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OF

The **PRIVY COUNCIL**, the High Courts of **ALLAHABAD, BOMBAY, CALCUTTA, LAHORE, MADRAS, PATNA** and **RANGOON**, the Chief Court of **OUDH**, and the Courts of the Judicial Commissioners of **CENTRAL PROVINCES** and **SIND**

Many of which are not reported **elsewhere.**

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277	Emperor v. Johri	...	(1931) A. L J. 177; A I R 1931 All. 269; (1932) Cr Cas 429; 33 Cr. L. J 256, Ind. Rul (1932) All 165
280	Bindeshari v. Banshi Lal	..	Ind. Rul. (1932) All 168; A. I. R. 1932 All. 344
281	Allah Baksh v. Emperor	...	(1931) A. L. J. 644; L. R. 12 A. 91 Cr; A. I. R. 1931 All. 555; 53 A 797; (1931) Cr. Cas. 891 (1); 33 Cr. L J. 259 (1); Ind. Rul. (1932) All 169 (1).
281	Bhup Singh v. Sheo Shanker	...	(1931) A. L. J. 887; 15 R. D. 688; A I R 1931 All. 743 (1); Ind Rul. (1932) All. 169 (2).
282	Guru Charan Prasad v. Vishnu Pararkar	...	(1931) A. L. J. 647; A I R 1931 All. 420; 53 A. 712; 33 Cr. L. J. 259 (2); Ind. Rul (1932) All 170.
283	Dwarka Das-Babu Ram v. Vaish Flour Mill	...	(1931) A. L. J. 622, A. I. R. 1931 All. 594; Ind. Rul. (1932) All. 171.
284	Pitam Lal v. Kalla Ram	...	(1931) A L J. 711; A. I. R. 1931 All. 489; 53 A. 687; Ind Rul (1932) All. 172 F. B.
287	Shankar Lal, *In the matter of*	..	(1931) A. L J. 678; A. I R. 1931 All. 580; 33 Cr. L J 260; Ind. Rul. (1932) All 175 S. B.
289	J Agarwala v. Emperor	..	33 Cr. L J 274 (2); Ind. Rul. (1932) Pat. 65; 13 P. L T 252, A I. R. 1932 Pat. 188; (1932) Cr. Cas. 414
290	Bhekdhari Singh v. Sri Ramchanderji	...	A. I. R 1931 Pat. 275, 10 Pat. 388; Ind. Rul. (1932) Pat 66, 13 P. L T. 331.
296	Ram Das v. Prem Das	..	A. I R. 1932 Pat. 95; 10 Pat 817; Ind. Rul. (1932) Pat. 72; 13 P. L. T. 594.
297	Bankey Bihari Lal v. Ram Anugrah	...	A I R 1931 Pat. 215; 10 Pat 337, 12 P. L. T. 717, Ind Rul. (1932) Pat 13
299	Biseswar Chaudhuri v. Kanhia Singh	...	11 Pat. 9; Ind Rul (1932) Pat. 75; A. I. R. 1932 Pat. 129. 13 P. L T. 298.
302	Basant Lal Ramjidas v Commissioner of Income Tax, Bihar & Orissa	..	A I R. 1932 Pat. 103; 11 Pat. 40; Ind. Rul. (1932) Pat 78; 13 P. L. T. 437.
305	Abdul Majid Sahib v. Arunachala Mudaliar	...	34 L W 715; 61 M. L. J. 857; A. I. R 1932 Mad. 84; Ind. Rul (1932) Mad. 273.
306	Venkatachalapathi Rao v. Venkatappayya	..	34 L W 809; (1931) M W. N. 1235; A I. R. 1932 Mad 86; 62 M. L. J. 302; Ind. Rul. (1932) Mad 274; 55 M 495.
311	Sathappa Chettiar v. Ramachandra Naidu	..	34 L W. 727; (1931) M. W. N. 1058; 61 M. L J. 848, A. I. R 1932 Mad. 26; 33 Cr L. J, 270, 55 M 262; Ind. Rul. (1932) Mad. 279, (1932) Cr Cas 6.
313	Kalastri Mudali v. Emperor	...	61 M L J. 686; (1931) M. W. N. 1048; 34 L. W. 629, A I R. 1932 Mad. 130, 33 Cr L. J. 272, (1932) Cr Cas 109 (2), Ind. Rul. (1932) Mad 281.
314	Potharaju v. Emperor	..	A. I R 1932 Mad 25 (1), (1931) M W. N. 1137; 35 L W. 141; (1932) Cr Cas. 5 (1); 33 Cr. L J. 273; Ind Rul, (1932) Mad 282 (1).
314	Emperor v. Varadarajulu	..	A. I R. 1932 Mad. 25 (2); (1931) M. W. N. 1050 35 L. W 140; (1932) Cr. Cas 5 (2), 33 Cr L J. 274 (1); Ind Rul (1932) Mad 282 (2).
315	Andiappan Ambalam v. Subbayya Ambalam	...	34 L W. 919. A. I. R. 1932 Mad 163; Ind Rul. (1932) Mad. 283.
316	Marudachala v. Chinna Muthu	..	A I R. 1932 Mad 155 (1); (1931) M. W. N. 1148. Ind. Rul (1932) Mad. 284.
317	Suppan Chetty v Yegnanarayana Ayyar	...	34 L W. 921; A. I. R. 1932 Mad. 141; Ind. Rul. (1932) Mad 285.
318	Karuppan Chettiar v. Subramaniam Chettiar	..	34 L W. 912; A I. R. 1932 Mad. 188; Ind. Rul. (1932) Mad. 286.

319	Somasundara Mudaliar, *In re* ...	34 L W. 903; (1931) M. W. N. 1118; A. I. R. 1932 Mad. 171; 62 M. L. J. 263; Ind. Rul. (1932) Mad. 287.
321	Jai Singh v. Emperor ...	8 O. W. N. 1240; A. I. R. 1932 Oudh 11; (1932) Cr. Cas 43; 33 Cr. L. J. 237; Ind. Rul. (1932) Oudh 113.
331	Asghar Ali-Mohammad Ali v. Commissioner of Income Tax ...	8 O. W. N 1366; A. I. R. 1932 Oudh 10; Ind. Rul (1932) Oudh 123.
332	Hashmat Ali v. Gobardhan Dass ...	8 O. W. N. 1368; Ind. Rul. (1932) Oudh 124.
333	Amar Nath Singh v. Har Prasad Singh ...	8 O. W. N. 1359; 15 R. D 785; A I. R 1932 Oudh 79; L. R. 13 A. (O.) 20; Ind. Rul. (1932) Oudh 125.
335	Sukhraj Kuer v. Harnam Singh ...	8 O. W. N. 1353; A. I. R. 1932 Oudh 76; Ind. Rul (1932) Oudh 127; 16 R. D 130.
336	Hukum Chand v. Radha Kissen-Moti Lal ..	9 O. W. N. 1; Ind Rul. (1932) Oudh 128; A. I. R 1932 Oudh 249 (1).
337	Alwar Aiyangar v. v. Subramania Dikshathar ...	34 L. W. 906; 61 M L. J 863; A. I R 1932 Mad. 169; (1932) M. W. N. 280; Ind. Rul. (1932) Mad 289 (1)
337	Chathu Nambiar v. Kunhiraman Nambiar ...	34 L. W. 804; A. I. R. 1932 Mad. 154; Ind Rul. (1932) Mad 289 (2).
338	Sivasami Odayar v. Subramania Aiyar ...	34 L. W. 908; (1931) M. W. N. 1251; A. I. R 1932 Mad. 95; 62 M. L. J. 68; Ind. Rul (1932) Mad. 290; 55 M. 316.
340	Appasami Pillai v. Ramu Tevar ...	34 L. W. 776; 61 M. L. J. 887; A I. R. 1932 Mad. 267; Ind. Rul. (1932) Mad. 292.
343	Venkatramayya v. Nagamma ...	35 L. W 233; (1931) M. W. N. 1242; A I. R. 1932 Mad. 272; Ind. Rul. (1932) Mad. 295.
346	Municipal Council, Conjeevaram v. Kachi Munusami Mudaliar ...	34 L. W. 911; (1931) M. W. N 1207; A. I. R. 1932 Mad. 1 (1); 62 M. L. J. 175; Ind. Rul. (1932) Mad 298 (1) **F. B.**
346	Govindarajulu v. Imperial Bank of India ...	35 L. W. 168; A. I. R. 1932 Mad. 180; Ind. Rul. (1932) Mad. 298 (2).
348	Pandmanabhani v. v. Appalanarasayya ...	35 L W. 176; (1931) M. W. N. 1305; 62 M. L. J. 230; A. I R. 1932 Mad. 254; Ind Rul. (1932) Mad. 300; 33 Cr. L. J. 307; (1932) Cr. Cas. 184; 55 M. 346.
350	Mundakath Mathu v. Vishnu Nambudripad ...	35 L. W. 171; A. I R. 1932 Mad. 303; Ind. Rul. (1932) Mad. 302.
353	Sheo Tahal Ram v. Binaek Shukal ...	(1931) A. L. J 653, A. I. R 1931 All. 689; 53 A. 747; Ind. Rul (1932) All. 177.
357	Bhagwati Pande v. Badri Pande ...	A. I. R. 1931 All. 574; (1931) A L. J. 953; Ind. Rul (1932) All. 181; 54 A. 171 **F. B.**
363	Muhammad Ishaq Khan v. Rup Narain Singh ..	A. I. R. 1931 All. 562; (1931) A. L. J. 977; Ind. Rul. (1932) All. 187; 54 A. 205 **F B.**
367	Padarath Tewari v. Dulhin Tapesha Kueri ...	(1932) A. L. J. 221; Ind. Rul. (1932) All. 191: A I. R. 1932 All. 524.
369	Ali Muhammad v. Zakar Ali ...	(1931) A L. J. 611; A. I. R. 1931 All. 665; 53 A 771; Ind. Rul. (1932) All 193.
372	Naunita Kunwar v. Mullo ...	(1931) A L. J. 440; A. I. R. 1931 All. 653; Ind. Rul (1932) All. 196.
373	Emperor v. Bahadur Singh ..	L. R. 12 A. 160 Cr; A. I. R. 1932 All. 58 (1); (1932) A L. J 112; (1932) Cr. Cas. 110; 33 Cr. L J. 281; Ind. Rul. (1932) All. 197; 54 A. 335.
374	Ram Phul v. Emperor ..	A. I. R. 1931 All. 711; (1932) A. L. J. 176; (1931) Cr. Cas 1047; 33 Cr. L. J. 282; Ind. Rul. (1932) All. 198; 54 A. 230.
375	Madho Singh v. Keshab Deo ..	A. I R. 1931 All. 656; (1931) A. L. J 1152; L R. 13 A. 3 Rev; 16 R. D. 87; Ind. Rul. (1932) All. 199.
376	Sawanta v. Emperor ...	L. R. 12 A 164 Cr.; A. I R. 1932 All. 71; (1932) Cr. Cas. 91; 33 Cr. L. J. 283; Ind. Rul. (1932) All. 200.
378	Ketki Kunwar v. Sheo Narain ..	(1931) A. L. J. 829; A. I. R. 1931 All. 706; 53 A. 799; (1931) Cr. Cas. 1012; 33 Cr. L. J. 285; Ind. Rul. (1932) All. 202.

380	Daya Shankar v. Bombay, Baroda and Central India Railway Company ...	(1931) A. L. J. 847; A. I. R. 1931 All. 740; Ind. Rul (1932) All. 201; 53 A. 943.
381	Pateshwari Prasad Pal v. Jai Haran ...	(1931) A. L. J. 832; A. I. R. 1931 All. 748; Ind. Rul. (1932) All. 205.
384	Ram Das v. Habib Ullah ...	(1931) A. L. J. 1031; Ind. Rul. (1932) All. 203; 53 A. 916.
385	Muhammad Sadiq Ali Khan v. Fakr Jahan Begam ...	8 O. W. N. 1378; A. I. R. 1932 P. C. 13; 36 C. W. N. 137; 62 M. L. J. 320; Ind. Rul. (1932) P. C. 81; 59 I. A 1; 6 Luck. 556; (1932) A. L. J. 663 P. C.
393	U Po Lein v. Ma Hnin Hlaing ...	A. I. R 1931 P. C. 317; 54 C. L J. 425; 61 M. L J. 898; Ind. Rul. (1932) P. C. 89 P. C.
396	Giuseppe Bianco v. Giovanni Vincezo ...	A. I R. 1932 P. C. 63; Ind. Rul. (1932) P. C. 92 P. C
398	Jogesh Chandra Roy v. Emdad Meah ...	A I. R. 1932 P. C 28, 9 O. W. N 119; 35 C. W. N. 221; 16 R D. 95; 55 C L. J. 72; (1932) M W N. 275; 34 Bom L. R. 481; 62 M. L J. 336; Ind. Rul. 1932) P. C 94; 59 I. A. 29; 59 C. 1012; L. R. 13 A. (C.) 271 P C.
402	Hans Nath v. Ragho Prasad Singh ...	A. I. R. 1932 P. C. 57; 9 O. W. N. 127; (1932) A. L. J. 190; Ind. Rul (1932) P. C. 98; 35 L. W. 343; 62 M L. J 544; 55 C. L. J. 276; 59 I. A. 138; 54 A. 189 P. C.
405	Promatha Nath v. Gostha Behari ...	A. I. R. 1932 P. C. 43; 36 C. W. N. 231; 55 C. L. J. 46; 62 M. L J. 243; Ind Rul. (1932) P. C 101; 59 I. A. 47; 35 L. W. 825; 59 C. 1025 P. C.
407	Alfred Ernest v. Carr Lazarus ...	A. I R. 1931 P. C. 224; 8 O. W. N. 899; 35 C. W. N. 986; 61 M. L. J. 121; (1931) A. L. J. 793; 54 C. L. J. 269; Ind. Rul. (1932) P. C. 103; 59 C. 320; 58 I. A. 306 P. C.
410	Krishna Chandra v. Pabna Dhana Bhandar Co. Ltd. ...	A. I. R 1932 P. C. 61; 36 C. W. N. 277; 55 C. L. J. 62; Ind. Rul (1932) P. C. 106; 62 M. L. J. 421; 59 I. A. 68; 35 L. W. 842; 59 C. 1034 P. C.
412	Krishna Chandra v. Challa Ramanna ...	A. I. R. 1932 P. C. 50; 35 L. W. 222; 62 M. L. J. 221; 36 C. W. N. 365; (1932) M. W. N. 284; 34 Bom. L. R. 508; Ind. Rul. (1932) P. C. 108; 55 C. L. J. 411 P. C.
413	Secretary of State for India v. Sannidhiraju ...	A. I. R. 1932 P. C. 46; 35 L. W. 238; 62 M. L. J. 213; 36 C. W. N. 359; 34 Bom. L. R. 500; Ind. Rul. (1932) P. C. 109; (1932) A. L. J. 348; (1932) M. W. N. 480; 55 M. 268; 59 I. A 56; 55 C. L. J. 461 P. C.
417	Shah Muhammad Kazim v. Abi Sahir ...	12 P. L. T. 817; A. I R. 1932 Pat. 33; 11 Pat. 288; Ind. Rul (1932) Pat 81.
412	Parmeshwar Sahu v. Nand Kishore Lal ...	11 Pat. 1; A. I. R. 1932 Pat. 123; Ind. Rul. (1932) Pat, 106.
415	Ruplal v. Dhansar Coal Co. ...	13 P. L. T. 169; Ind. Rul. (1932) Pat. 109.
417	Mosafir Singh v. Emperor ...	13 P. L T. 83; Ind Rul (1932) Pat. 111; 33 Cr. L. J. 314; (1932) Cr. Cas. 311; A. I. R. 1932 Pat 170 (1).
447	Dalip Narayan Singh v. Raghunandan Prasad ...	13 P. L. T. 160; Ind. Rul. (1932) Pat. 111 (2); A. I R. 1932 Pat. 184.
449	Prag Narain v. Collector of Agra ...	Ind. Rul. (1932) P. C 113; 9 O. W. N. 423; A. I. R. 1932 P. C. 102; 35 C. W. N. 579; 62 M. L J 682; 55 C. L. J. 318; 34 Bom. L. R. 885; 35 L. W. 812; (1932) A. L J. 741; (1932) M. W. N. 758; 54 A. 286 P. C.
451	Raymond Lincoln v. Mrs. Alice Poupinel De Valence ...	Ind. Rul. (1932) P. C. 115; A. I. R. 1932 P. C 95; 63 M. L. J. 275; 36 L. W. 434 P. C.
454	Ghulam Mohammad v. Ghulam Husain ...	(1932) A. L. J. 245; 34 Bom. L. R. 510; 35 C. W. N. 310; 62 M. L. J. 371; A. I. R. 1932 P. C. 81; 35 L W. 464; Ind Rul. (1932) P. C 118; 9 O W. N. 399; 59 I. A. 74; 55 C L. J. 479; 51 A. 93 P. C.

461	Prem Narain v. Ram Charan ...	9 O. W. N 53; A. I. R. 1932 P. C. 51; 36 C. W. N. 257; 35 L. W. 224; 55 C. L. J. 54; (1932) A. L. J. 182; 62 M. L. J. 249; 34 Bom. L. R. 491; Ind. Rul (1932) P. C. 125; 59 I. A. 121; (1932) M W. N. 685; 53 A. 990 P. C.
465	U. K. Mitra v. Corporation of Calcutta ...	A I R 1932 Cal. 63; 58 C. 129?; 35 C. W. N. 865; (1932) Cr. Cas 11; 33 Cr. L. J. 303; Ind. Rul (1932) Cal. 193.
466	Rabindra Nath v. Jnanendra Mohan ...	A. I R 1932 Cal 9; 58 C. 1018; 35 C. W. N. 537; Ind. Rul. (1932) Cal. 194.
468	Pashupati Nath v. Bank of Behar ...	A. I R. 1932 Cal. 141; 35 C. W. N. 907; Ind. Rul. (1932) Cal. 196.
470	Dabiruddin v. Krishto Chandra ...	A. I. R. 1932 Cal. 139; 35 C. W. N. 656; 54 C. L. J. 231; Ind. Rul. (1932) Cal. 198.
472	Abdul Hamid v Bijoy Chand ...	A. I. R. 1932 Cal. 108; 54 C. L. J. 302; 36 C. W. N. 238; Ind. Rul. (1932) Cal. 200.
474	Behari Majhi v Hari Majhi ...	A. I. R. 1932 Cal 61; 35 C. W. N. 976; 54 C. L. J. 144; (1932) Cr. Cas. 9; Ind Rul. (1932) Cal 202; 33 Cr. L. J 305 (1).
475	Hari Charan De v. Sherali Talukdar ...	A I. R. 1932 Cal. 60; 35 C. W. N. 1003; Ind. Rul (1 32) Cal. 203; 33 Cr. L. J. 305 (2).
476	Kalikumar Pal v. Rajkumar Pal ...	A. I R. 1932 Cal. 148; 58 C. 1379: Ind. Rul. (1932) Cal. 204.
478	Nurjahan Khatun v. Asia Khatun ...	A I R. 1932 Cal. 216; 35 C. W. N. 1056; Ind. Rul (1932) Cal. 206
479	Ashutosh Gangopadhya v. Sarojini Saha ...	A I. R 1932 Cal 205; 35 C. W. N. 1136; Ind. Rul. (1932) Cal. 207.
481	Harakchand v Sumatilal ...	33 Bom. L R. 1200; A. I. R. 1932 Bom. 25; Ind. Rul (1932) Bom 177.
486	Lakshminarayan v. Laduram ...	33 Bom. L. R 1557; A. I R. 1932 Bom. 96; Ind Rul. (1932) Bom 182.
488	Commissioner of Income Tax, Bombay v. Trustees of Sir Currimbhoy Ebrahim ...	33 Bom. L. R. 1549; A. I. R. 1932 Bom. 106; Ind. Rul. (1932) Bom. 184.
491	Motilal Kanji & Co v. Natvarlal ...	33 Bom L. R. 1495; A. I. R. 1932 Bom. 78; 56 B. 16; Ind Rul (1932) Bom 187.
493	Jagannath v. Emperor ...	33 Bom L. R. 1518; A I. R 1932 Bom. 57; (1932) Cr Cas 81; Ind Rul. (1932) Bom. 189; 33 Cr. L. J. 317.
497	Bhagvan Gokulji v. Balku Babaji ...	33 Bom. L. R. 1291; A. I R. 19 2 Bom. 1; Ind. Rul (1932) Bom. 193.
500	Sangangauda v. Hanmantgauda ...	33 Bom. L. R. 1225; 55 B. 699; A. I R. 1932 Bom. 8; Ind. Rul. (1932) Bom. 196
501	Ramji v. Ratan Lal ...	33 Bom. L. R. 1466; A. I. R 1932 Bom. 99; Ind Rul. (1932) Bom. 200.
503	Allibhai v. Dada ...	33 Bom. L. R. 1295; A I. R 1931 Bom. 578; Ind. Rul (1932) Bom 205.
513	Emperor v. Abdullakhan ...	25 S L. R 395; A. I. R 1932 Sind 28; (1932) Cr. Cas 114; 33 Cr. L. J 298; Ind. Rul. (1932) Sind 33
517	Radhakishen v. Secretary of State ...	Ind. Rul (1932) Sind 37; A. I R. 1932 Sind 181.
522	Chainrai v. Dolaram ...	25 S L R. 371; A I. R. 1932 Sind 3; Ind. Rul. (1932) Sind 42.
523	Chuto v. Emperor ...	25 S. L. R. 341; A I. R. 1932 Sind 16; (1932) Cr Cas 41; 33 Cr. L. J. 302; Ind. Rul. (1932) Sind 43
525	Kotumal MoLandas v. Dur Mahomed ...	A. I R. 1931 Sind 78; Ind. Rul. (1932) Sind 45.
529	Pramatha Chandra v. Bhagwandas ...	A. I R 1932 Cal. 236; 59 C. 40; 35 C. W. N. 705; 54 C. L. J. 546; Ind Rul (1932) Cal 209.
533	Hari Das v. National Insurance Co. ...	A. I. R. 1932 Cal. 213; 35 C. W. N. 1096; Ind. Rul. (1932) Cal. 213; 59 C 159.
535	Ghasiram v. Haribux ...	A I R. 1932 Cal. 231; 59 C. 31; 35 C. W. N. 674; 54 C. L. J. 558; Ind Rul. (1932) Cal. 215.
538	Haran Chandra v. Ram Kumar ...	A. I. R. 1932 Cal. 170; 35 C. W. N. 940; 54 C. L. J. 147; Ind. Rul. (1932) Cal 218.
539	Ramjash v. Orr, Dignam & Co. ...	A. I. R. 1932 Cal. 233; 58 C. 1439; 35 C W N 993; Ind. Rul. (1932) Cal. 219.

542	Jesraj v. Natore Municipality ...	A. I. R. 1932 Cal. 177; 58 C. 1356; Ind. Rul. (1932) Cal. 222.
543	Chandramani v. Bipin Behari ...	A I R. 1932 Cal. 206; 35 C. W. N. 1028; Ind. Rul (1932) Cal. 223.
544	Khosal Chandra Das v. Upendra Nath ...	A. I. R. 1932 Cal. 220; 35 C. W. N. 1058; Ind. Rul. (1932) Cal. 224.
545	Fazal-i-Hussain v. Tafazil Hussain ...	33 P. L. R. 105; Ind. Rul. (1932) Lah 225; A. I. R. 1932 Lah. 222; 13 Lah. 410.
555	Bhajna v. Bheoli ...	12 Lah. 752; A. I. R. 1932 Lah. 177; Ind Rul. (1932) Lah. 235; 33 P. L. R 355.
556	Jawaya v. Mulraj ...	33 P. L. R. 172; Ind. Rul. (1932) Lah. 236; A. I. R. 1932 Lah. 252; 13 Lah 542.
557	Narinjan v. Muhammad Yunus ...	33 P. L. R. 188; Ind. Rul. (1932) Lah. 237; A. I. R. 1932 Lah 265.
559	Gaindo v. Radha Mohan ..	33 P. L. R. 54; Ind. Rul. (1932) Lah. 239; A. I. R. 1932 Lah. 219.
561	Balkishan Das v. Bachan Pandey ..	(1931) A. L. J. 1092; A. I. R. 1932 All. 96; Ind. Rul. (1932) All 209; 54 A. 68.
562	Ram Kishan v. Radhey Lal ..	(1931) A. L. J. 1102; A. I. R. 1932 All. 130; Ind. Rul. (1932) All. 210.
565	Secretary of State for India v. Firm Girdhari Lal-Shambhunath ...	(1932) A. L. J. 150; A. I. R. 1932 All. 220; Ind. Rul (1932) All. 213; 54 A. 226.
567	Bal Kishan v. Bundia ...	(1931) A. L. J. 1073; Ind. Rul. (1932) All. 215; A. I. R. 1932 All. 246.
568	Risal Singh v. Faqira Singh ...	(1931) A. L. J. 842; Ind. Rul. (1932) All. 216; 53 A. 1006; A. I. R. 1932 All. 452.
569	Firm Rikhai Lal-Bindeshri Prasad v. Banarsi Singh ...	(1931) A. L. J. 961; A. I. R. 1932 All. 139; Ind. Rul (1932) All 217.
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572	Lachmi Narain v. Emperor ..	A. I. R. 1931 All 621; (1931) Cr. Cas. 973; (1932) A. L. J. 5; L. R. 13 A. 17 Cr ; Ind. Rul. (1932) All. 220; 33 Cr. L. J. 310; 54 A 212.
575	Kashi Nath Bagla, *In the matter of* ...	(1931) A. L. J 878; A. I. R. 1932 All. 1; Ind. Rul. (1932) All 223.
576	Panchaiti Akhara Bara Udasi Nanak Sahi v. Nasir-ud-din	(1931) A. L. J. 691; 15 R. D. 563; L. R. 12 A. 276 Rev.; A. I. R. 1931 All. 752(1); Ind Rul. (1932) All. 224.
577	Purnima Debya v. Nand Lal ...	11 Pat 50; 12 P. L. T 582; A. I. R. 1932 Pat. 105; Ind Rul. (1932) Pat. 113.
592	Raghunath v. Emperor ..	13 P. L. T 162; Ind. Rul. (1932) Pat. 128; 33 Cr. L J. 313; (1932) Cr. Cas. 407; A. I. R. 1932 Pat 224.
593	Mohitosh Dutta v. Satish Chandra ...	A. I. R. 1932 Cal. 203; 35 C. W. N. 971; Ind. Rul. (1932) Cal. 225.
594	Matilal v. Kamakshya ...	A. I R 1932 Cal. 209; 59 C. 301; 35 C. W. N. 1072; 54 C. L. J. 234; Ind. Rul. (1932) Cal. 226.
598	Sashadhar v. Charles Tegart ...	A. I. R. 1932 Cal. 229; 35 C. W. N. 1082; Ind. Rul. (1932) Cal. 230; 33 Cr. L. J. 322; (1932) Cr. Cas 177.
600	Nand Lal, *In re* ...	A. I R. 1932 Cal 227; 35 C W. N. 942; 59 C. 315 Ind Rul (1932) Cal. 232.
601	Ram Charan v. Madan Mohan ...	A. I R 1932 Cal 195; 35 C. W. N. 1143; Ind. Rul (1932) Cal. 233
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The Hon'ble Sir S. M. Sulaiman, Kt., LL. D.,
Barrister-at-Law,

Chief Justice,

High Court of Judicature at Allahabad.

INDIAN CASES

1932.

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OURSELVES

The best is yet to be

The last of life for which the first was made"—Browning.

A quarter of a century is about to expire since the *Indian Cases* was started and we crave the permission of our readers to pause for a moment and reflect on the progress that we have made so far and what we have still to achieve.

Though the administration of justice in India is under the control of a number of High Courts independent of each other, the law that is administered is—except with regard to a few local statutes and special customs—the same, and the usefulness of an All India journal to the legal profession and the unifying influence such a journal is bound to have on the development of the laws of India as a whole cannot be over-estimated. Attempts were made from early times to establish such a journal but the magnitude of the enterprise was so great that most of them failed. The honour of being the founder of the first successful journal of this kind belongs to Sir (then Mr.) Shahabuddin Chaudhri, the founder of the *Indian Cases*. From the year 1909 when the *Indian Cases* was started, for a period of about fifteen years Sir Shahabuddin Chaudhri edited the journal himself. The acute legal intellect, the untiring industry and the keen business instinct of Sir Shahabuddin had a marked effect. The *Indian Cases* steadily progressed till it acquired an enviable reputation for financial stability and accuracy of reporting.

The success of the *Indian Cases* attracted the attention of other publishers and these halcyon days soon gave way to an era of competition with rivals. Our subscribers are sure to be proud of the dignified attitude which we have maintained during this period of struggle in spite of provocations of various kinds.

The strong foundation upon which the *Indian Cases* is built has finally proved itself too strong to be shaken and we are now entering on the third stage of our career undistracted by business competition and with opportunities to expand our activities and to concentrate our attention in improving the quality of *Indian Cases* still further. Indian case law has become so voluminous that lawyers cannot reap the full advantages of even the best reports without additional facilities for reference and study. To meet this situation the *Fortnightly Digest* was started last year. With its quarterly and annual consolidated issues the *Fortnightly Digest* will greatly facilitate the work of reference. The study of the reports is a more difficult task. But much of this difficulty will disappear if it is once realized that, as Mr. Justice McCardie has observed in the address on Case Law which he delivered some time back, the proper method of studying case law is 'to get at the heart of case law, to grasp with clearness the main outlines of its history and to lay hold of its main principles'. To afford facilities to the legal profession in this direction we are now introducing a journal section in which the development of the law in its judicial, legislative, administrative, and literary aspects will be critically reviewed.

We take this opportunity of thanking our subscribers for their valuable support and of wishing them prosperity and long life.

The Hon'ble Sir S. M. Sulaiman, Kt., LL. D., Barrister-at-Law, Chief Justice, High Court of Judicature, Allahabad.

The appointment of Sir S. M. Sulaiman as the Chief Justice of the Allahabad High Court will be received with great satisfaction throughout India. Sir Sulaiman joined the Allahabad High Court Bar in 1912 and rose to such eminence at the bar within a period of 8 years that in 1920, at the age of 34, he was appointed to officiate as a Judge of the High Court. He acted again as a Judge in 1921 and 1922 and was made a permanent Judge in 1923. As a Judge of the High Court his learning and independence have evoked the admiration of the Bench and the Bar alike. Sir Sulaiman's academic career was as brilliant as his subsequent career at the Bar and the Bench He passed the Ma'riculation Examination in the first division, standing high in the order of merit. In the Intermediate he stood second, and in the B. A. he topped the list and won the State Scholarship. He took the Mathematical Tripos and the Law Tripos at the Cambridge University in 1909 and became an LL. D. of the Dublin University in 1911. We welcome the appointment of Sir Sulaiman and look forward to a long era of efficient and independent administration of justice in the United Provinces under the guidance of the new Chief Justice.

Though the High Courts of India were established so long ago as 1865 and there have been many European Chief Justices, this is the second instance in which an Indian has been appointed as a permanent Chief Justice. We are having promises every day of equal partnership and self-government for India. Let us hope that the British Government will not hereafter allow racial considerations to outweigh the claims of seniority and merit in the matter of such appointments.

Notes on Current Topics.

Supreme Court for India

There was an interesting debate in the Legislative Assembly on the motion of Mr. B. R. Puri of Lahore urging early steps to establish a Supreme Court for India. So long as the same law is administered throughout India, a Supreme Court is, in our opinion, a necessity. Even Imperial Statutes are interpreted differently by the several High Courts and the abnormal growth of Indian case-law and the conflict that prevails now in India on several points of law and practice are due to a great extent to the want of a Central Supreme Court. The existence of such a Court is bound to have a very salutary influence on the development of the law in India as a whole. We entirely agree with the remarks made by Mr. B. R. Puri and Sir Hari Singh Gour on the necessity of a further right of appeal in criminal cases. Under the Indian

Evidence Act several kinds of evidence such as confession of a co-accused which are rejected as inadmissible in the systems of law followed by all civilised nations including the British are admissible, and many an accused person is convicted on the flimsy evidence of an approver or a co-accused. It is difficult to appreciate the spirit or the meaning underlying the Law Member's objection that the resolution, if given effect to, would abolish the Privy Council and create a mock Privy Council in India. The functions of the Supreme Court would be much wider and quite different from those of the Judicial Committee, and we are glad to find that the resolution has been passed by the Legislative Assembly by a large majority in spite of the Law Member's opposition.

The Punjab Governor Shooting Case.

Judgment has recently been pronounced by the Lahore High Court in *Ranbir Singh* v. *The Crown* (136 I. C. 19) in which three young men who had been sentenced to death by the Sessions Judge of Lahore for conspiring to murder the Governor of the Punjab, have been acquitted by the High Court. Apart from its political significance, with which we are not concerned, the case is of much interest to the legal profession. The first thing that strikes us is the importance of the right of appeal in murder cases. The case further reveals the highly irregular manner in which confessions are recorded in India. Though the Magistrate who recorded the confession of the accused in this important case was a retired District and Sessions Judge, and the accused was a school boy, the confession was recorded by the magistrate at a police station during a winter night, without informing the accused that he was a Magistrate and without putting any questions to him to ascertain whether the confession was made voluntarily. Their Lordships have rightly condemned this method of recording confessions. On the question whether a Magistrate recording a confession should record the questions put by him in order to ascertain whether the confession was voluntary and the answers given by the accused, their Lordships say as follows: "Counsel would have us go further and accept the view expressed in I. L. R, 52 Cal. 67 to the effect that the questions put and answers elicited in making the preliminary enquiry must be recorded. This we have already declined to do in 133 I. C. 55 and we adhere to the view there expressed and repeat that, provided the Magistrate satisfies himself by putting questions and hearing answers that the prisoner before him is making a voluntary confession, it is unnecessary for him to record the questions and answers, and it is sufficient if he complies with the letter of the law." The view of the Judges of the Oudh Chief Court in *Prag* v. *Emperor* (I. L. R, 6 Luck. 335; 128 I. C. 215) affords a striking contrast. The learned Judges (Raza and Nanavatty, JJ.) say: "It is with regret, with stern regret, that we note that Babu Bhagwati Prasad Sinha, the Deputy Magistrate, who recorded these confessions, has completely disregarded the standing order of Government as to the method in which confessions ought to be recorded. Paragraphs 852, 853 and 853-A of the Manual of Government Orders, Vol. I, lay down definite rules in this matter for the guidance of all Magistrates throughout British India.....As pointed out by Government in Para. 853 A of the Manual of Government Orders quoted above, it is the Magistrate's duty to satisfy himself in every reasonable way that the confession is made voluntarily; and *it is further the imperative duty of the Magistrate to record those questions and answers* by means of which he has satisfied himself that the confession is, in fact, voluntary. It is only by recording those questions and answers prior to taking down the story of the accused that the Magistrate recording the confession furnishes *data* which enable the Court of Session and the High Court or the Chief Court to arrive at the same conclusion as that to which the recording Magistrate has come as regards the voluntary nature of the confession. Without supplying these *data* or materials it is impossible for the trial Court (*i. e.*, the Court of Session) or for this Court to form any estimate as to the voluntary nature of these confessions. The Court of Session or this Court cannot merely accept the *ipse dixit* of the Deputy Magistrate recording the confession as to its being voluntary. *The genuineness of the confession and the fact of its being voluntarily made are matters which are within the exclusive province of the Court of Session and of this Court* and neither the Court of Session nor this Court can blindly accept the ready-made opinion of the recording Magistrate on these points without having before it materials from which it could arrive at an independen

opinion on these crucial questions on which the fate of the accused hangs." (*Italics are ours*). These observations have been quoted *verbatim* and entirely approved in a recent decision of the Allahabad High Court by Mears, C. J., and Sen, J., in *Emperor* v. *Sambhu* decided on November 2, 1931 and reported in 135 I. C. 838 The better view is undoubtedly that laid down by the Calcutta High Court which has been followed and re-iterated with great emphasis by the Oudh Chief Court and the Allahabad High Court.

The Privy Council on protracted examination of witnesses.

In India, especially in the mofussil, examination of witnesses is more protracted than in England. When witnesses are examined on commission, owing to the absence of an authority having a power to rule out irrelevent questions, the length of the examination often assumes intolerable proportions. In *Raj Kumar Sen Chowdhury* v. *Ram Sundar Shaha* (136 I. C. 102) two instances of this abuse came to the notice of the Judicial Committee. In one of the cases the examination of a witness took up 226 pages of the record and contained 1250 questions. In the other, the cross-examination of a *pardanashin* lady lasted for a hundred days. Their Lordships condemn this practice in these strong terms: "In their Lordships' opinion it is imperative that an abuse of this kind which enormously increases the costs of litigation without any corresponding benefit to the parties, should be checked, and it would appear to be clearly within the powers of the High Courts to direct an enquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals."

Executor's title before taking out probate.

There was a divergence of opinion between the High Courts of Madras and Bombay on the one hand and the High Court of Calcutta on the other, on the question whether under the Probate and Administration Act, 1881, the estate of the deceased vests in his executor before probate is taken out. The conflict has now been set at rest by the Judicial Committee in *K. Venkatasubbamma* v. *K. Ramayya* (136 I. C. 111) decided on the 12th of January. Their Lordships have held in this case that the opinion of the Madras and the Bombay High Courts, namely, that the estate vests from the date of the testator's death even though probate has not been obtained is 'undoubtedly the right one'. Under the English law the title of an executor is derived from the will itself and not from the probate though it is the probate alone which authenticates his right and in their Lordships' view the Indian Legislature has not departed from this principle.

Contribution between joint tort-feasors.

Some aspects of the law relating to contribution between joint tort-feasors have recently been mooted in the High Courts of India. Lord Herschell refused to extend the doctrine laid down in *Merryweather* v. *Nixan* [(1799), 8 T. R. 186] to Scotland on the ground that it was not 'founded on any principle of justice or equity or even of public policy' and since the date of this decision the harshness of the doctrine has been tempered in England by limiting it to wilful and conscious wrong doing. In *Yegnanarayana* v. *Jagannath Rao* (135 I. C. 711) Madhavan Nair, J., discusses the question whether the rule in *Merryweather* v. *Nixan* as modified by the subsequent decisions and now followed in England should be followed in India, and answers the question in the affirmative. As his Lordship says, "Surely, the plea that there is no justice or reason behind the rule cannot be urged against the modified form of the rule in *Merryweather* v. *Nixan*." This view is supported by the decision of the Patna High Court in *Mahabir Prasad* v. *Darbhangi Thakur* (51 I. C. 697; 4 P. L. J. 486; 1919 Pat. 289) and it may now be taken as settled law in England as well as in India that if an act is manifestly unlawful or the doer of it knows it to be unlawful, he cannot maintain an action for contribution or indemnity against the liability which results therefrom. The second point that has been discussed is whether an express promise to indemnify for the commission of such act is enforceable. In England it has been held that such a promise is void and this view has been followed by Madhavan Nair, J. This is more or less a corollary of the first proposition. Another important aspect of the rule, namely, whether the fact that a judgment had been obtained against the wrong-doers makes any difference, has been discussed very recently in *Parbhoo Dyal* v. *Dwaraka Prasad* (135 I. C. 837). Mukerjee and Bennet, JJ., of the Allahabad High Court have expressly decided the question in

the negative. Their Lordships say: "Speaking for ourselves, we do not see any distinction that can properly be drawn in principle between a case where a joint liability has been liquidated without a suit and where a joint liability has been established by a suit, and the judgment has been liquidated by one of the parties." But there is direct authority to the contrary in the *dictum* of Lord Watson in *Palmer* v. *Wick* (1894 A. C. 318) and in the decision of Mahmood, J., in *Ram Prasad* v. *Arja Nand* (1890 A. W. N. 161) and the law on this point must be regarded as still unsettled.

Appeal from decree based on award where validity of reference is challenged.

The recent decision of the Lahore High Court in *Rala Ram-Walaiti Ram* v. *Bansilal Jagan Nath* (136 I. C. 11) throws much light on the vexed question whether an appeal lies from a decree based on an award where the validity of the reference itself is impugned. In *Durga Charan Deb Nath* v. *Gangadhar Deb Nath* (130 I. C. 137) the Calcutta High Court held that an appeal lies where there is no valid reference and in a subsequent decision, *Golnur* v. *Abdusumad* (130 I. C. 209), there was a difference of opinion between the Judges. In the Allahabad High Court the earlier view was that no appeal lies in such a case but the decision in *Tej Singh* v. *Gasi Ram* (102 I. C. 236) has thrown some doubt on the point. In the judgment of Shadi Lal, C. J., in *Rala Ram Walaiti Ram* v. *Bansilal-Jagan Nath* the case law on the subject and the history of the Legislature are discussed in detail and his Lordship concludes as follows:—"The above survey of the case law leaves no doubt that the preponderence of judicial authority is clearly in favour of the view that no appeal lies from a decree made in accordance with an award, and that it is immaterial whether the validity of the award is challenged on the ground of the illegality of the procedure of the arbitrator or on account of the invalidity of the reference which constitutes the foundation of his authority. This view receives support from the history of the legislation on the subject and from the rule attaching finality to a decision based on an award made under the supervision of the Court." We hope that the Calcutta High Court will reconsider its decision in *Durga Charan-Deb Nath* v. *Gangadhar-Deb Nath* (130 I. C. 137) and refer the matter to a Full Bench when the question next arises for decision.

Appeal from order granting review.

In *Das Keshav* v. *Kasabasappa* (94 I. C. 591; 27 Bom. L. R. 1446; A. I. R. 1926 Bom. 121), it was held by the Bombay High Court that the general right of appeal given in O. XLIII, r. 1 (*w*), Civil Procedure Code, against an order granting an application for review was not controlled by O. XLVII, r. 7 which lays down the grounds on which such orders could be objected to. This decision was dissented from by the Madras, Calcutta, Allahabad, Rangoon and Lahore High Courts. The Chief Court of Oudh has also very recently disagreed with the view of the Bombay High Court and followed the view of the other High Courts, in *Bankey Behari Lal* v. *Abdul Rahman* (135 I. C. 695; 8 O. W. N. 1267). In his exhaustive and lucid judgment in *Sikandar Khan* v. *Buland Khan* (I. L. R. 8 Lah. 617; 107 I. C. 596), Tek Chand, J., has exposed the fallacy underlying the decision in *Das Keshav* v. *Karabasappa* and this decision of Tek Chand, J., which has been approved in all the subsequent cases has practically put an end to the conflict which was raging on this subject.

Points in everyday practice.

(1) An adjustment out of Court after the passing of a preliminary decree in a mortgage suit cannot be recognised by the Court in proceedings to pass the final decree. (35 C. L. R. 138.)

(2) In the exercise of insolvency jurisdiction the moffusil courts have the right to review and to entertain applications for setting aside *ex parte* orders. 49 M 935 dissented from. *Ayyasami Chetty* v. *Official Receiver* (135 I. C. 750).

(3) Where no notice is given to the decree-holder of the fact of a deposit under the decree, and the decree does not contain any special direction as to the mode of payment the decree-holder is entitled to interest up to the date when he has notice and to the costs of execution *bona fide* taken out: *Rangpur Bank Ltd.* v. *Hesabuddin* (135 I. C. 799).

Notable Dicta in Recent Cases.

'If any of His Majesty's subjects are clever enough to avoid taxation by legal means they are at liberty to do so; there is nothing wrong in so conducting one's affairs within the law as not to attract taxation.—*Beaumont, C. J.*, in *In re Bai Sakinboo* [34 Bom. L. R. 100.]

"As it lies on the prosecution to prove the case against the accused, if this has not been done, it is not legitimate to draw any inference against the accused based on a criticism of the defence—*Munroe, J.*, in *R.* v. *Barwick* (136 I. C. 5.)

"There seems to be a fatal attraction about conspiracy and gang cases and it is perhaps not always realised how difficult it is to prove them. Speaking generally, the police would usually be well advised to proceed with the substantive cases and to leave the gang cases alone."—*Harrison, J.*, in *Surjan* v. *Crown* [136 I. C. 77]

Extracts from Contemporaries.

Shooting at a Judge.

It is not only in India that a Judge may be shot at. Missiles of various kinds have on various occasions, happily rare, been thrown or fired at occupants of the Bench in England.

Jessel, M. R., experienced, if he did not indeed enjoy, the distinction of being fired at by a clergyman, the Rev. H. J. Dodwell, whose mind had been unhinged by his troubles. The story was duly told to the Magistrate at Bow Street. Mr. Dodwell believed that he was entitled to certain property. His claim was stated in a petition of right, heard and dismissed by Malins, V. C. Jessel, M. R., upheld the Vice-Chancellor's decision. Thereafter for many days Mr. Dodwell haunted the Rolls Court for the purpose of making applications which could not be entertained. He came at last one day with a pistol concealed on his person. As the M. R. was ascending the steps of the Court, Mr. Dodwell fired at him point blank and missed. Sir George showed no sign of perturbation, refused Mr. Dodwell's card, which that gentleman politely offered, and calmly took his seat.

The Usher, Mr. Hayes, was the sole witness of the attempt on Jessel's life, and gave his evidence before the Chief Magistrate. Mr. Dodwell's only correction of the evidence offered against him was that he had not stated to the constable that Sir George Jessel had "did" him. He could not have said that, he declared, proudly observing that he was a man of education —*The Law Journal.*

Decline of the Bench.

The reason is simple and natural; the best men cannot and will not accept a post which brings so poor a reward as compared with what they can earn by remaining at the Bar. The Bench will then attract only the dubious and the second-rate, and prestige must suffer. The best Judges that England has produced belong to that period when a reasonably adequate salary, and fixity of tenure, had been established. And why, I ask for the third time, have they cut the judicial salaries so drastically in the days of reduction when in the days of increase and inflation they never augmented them by a penny?

Because of their prestige, their dignity, their patriotism and/or their pride the Judges will not agitate their grievances or strike or make use of the simple weapons of passive resistance and ca'canny. They have indeed, it is said, indicated their views to Lord Sankey, who will do what he can to bring the matter to the Governmental ear. But it is a sad business that the Judges should, however indirectly, have to ask the Executive for a restoration of their emoluments. It places the judiciary in an invidious position of inferiority. These salaries were fixed by solemn and direct enactment of Parliament and ought never to have been altered save by the same means.—*The Law Journal.*

Necessity of training in Advocacy.

Mr. Justice Rigby Swift, speaking at the annual dinner of the Birmingham Law Students' Society, said he had long held the opinion that it was not enough to teach boys the law. If they were to be made advocates, they ought to be instructed in the mysteries of the greatest of all the arts. Nobody became a great surgeon without being taught how to conduct an operation; and no one became a musician without hours of practising. "But day after day", said the Judge, "the law students of this country are sent into court as full-blown barristers or solicitors, to conduct cases as advocates in an art in which they have never had the slightest training." - *The Law Journal.*

Recent Legislative Measures.

Hindu Widows' Right of Inheritance Bill.

Mr. Sarda moved for reference of the Hindu Widows' Inheritance Bill to a Select Committee. The Law Member (Sir B. L. Mitter) pointed out the various defects in the Bill and doubted if draftsmen in the Select Committee could do much with the Bill as it stood. He said it was not clear whether the Bill dealt with sonless widows or widows with sons, that it ignored testamentary rights and that he could not in fact discover any principle in the Bill. The House divided and rejected Mr. Sarda's motion. The status of widows under the Hindu Law requires considerable modification and the rejection of the Bill as a whole is to be deplored. We hope that a Bill in an improved form will be introduced in the assembly to ameliorate the condition of Hindu widows.

The Indian Companies Amendment Bill (No. I of 1932)

Thes Indian Companies (Amendment) Act (Act XIX of 1930) provided that a firm whereof 'thelpartners all hold auditor's certificate' may be appointed by its firm name to be auditor of a company. It was brought to the notice of the Government that the wording of the amendment excluded firms which had foreign partners who did not possess Indian auditor's certificate and the Act was kept in abeyance This Bill has been introduced to remove this defect.

The Employers and Workmen (Disputes) Repealing Bill (No II of 1932).

The Royal Commission on Labour which had invited opinions regarding the utility of the Employers and Workmen (Disputes) Act, 1860, reported that the Act had every where ceased to be used and recommended the entire repeal of this obsolete Act. This Bill is intended to give effect to that recommendation.

The Indian Partnership Bill.

The Report of the Select Committee on the Indian Partnership Bill has been published. The Committee propose that the Act should come into force on the 1st October 1932, and s. 68 a year later. The main alterations which the Select Committee have made in the Bill are the following The provision that the books of a firm shall be kept at its place of business has been removed and the clause is now confined to declaring the right of each partner to have access to all the books of the firm; as regards liability for fraud, cl. 14 (*f*) has been so amended as to make the liability to indemnify for fraud absolute and not subject to contract; the right of a minor to have access to the books of the firm has been confined to account books; the rights and liabilities of a minor partner when he attains majority are worked out in greater detail; provision has been made that a minor partner should be required to give public notice on attaining majority whether he elects to become or not to become a partner and that he shall be deemed to continue a minor until he gives notice or until the expiry of six months. There are some amendments of the clauses relating to registration of firms. An important change has been made in cl. 71 (*a*) by requiring that all public notices shall be published in the Gazette and in a local vernacular newspaper.

[The other bills that have been introduced will be considered in our subsequent issues—*Ed.*]

Notes of Recent English Cases.

Banking—Alteration of Cheque—Materiality—Pay X or Order—Fraudulent addition of 'per Y' after X—Endorsement by Y—Payment by Bank—Liability.—The plaintiffs drew a cheque on the defendant Bank in favour of J. P. & Company and handed it over to O. P. a partner of the plaintiffs' Solicitors' firm with instructions to deliver it to J. P. & Company. There was some space in the cheque between the payee's name and the words "or order". O fraudulently added the words 'per O. & P.' after the payee's name, endorsed the cheque 'O. & P.' and paid to a bank to the account of a company of which he was the director. The cheque was credited to the latter bank by the defendant bank and debited to the plaintiffs' account. In an action by the plaintiffs: *Held*, that the plaintiffs in leaving a space after the payee's name did not commit any breach of duty of a customer to his banker and as the defendant bank had paid on an irregular endorsement, the bank was liable to the plaintiffs. *Held*, further, that the plaintiffs were not liable as principals for the fraud of O, as O was not acting within the scope of his authority but fraudulently. [(Wright, J.) *Slingsby* v. *District Bank Limited* (*Manchester*) (1931) 100 L. J. Ch. 665.]

[This decision has been recently affirmed by the Court of Appeal in *Slingsby* v. *District Bank, Limited.* Scrutton, L. J., Greer, L. J., Romer, L. J.,]

Company—Director—Vacation of office—Verbal notice—Master and servant—Termination of service. Where the Articles of Association of a company provided that the office of a director shall *ipso facto* be vacated if by notice in writing to the company he resigns his office, and a verbal notice of resignation given by the director was accepted by a resolution of the company: *Held*, that there was a valid notice which vacated the office of the director. Where a written contract for service has been made for service which requires a notice on either side before it can be terminated, it can be terminated by word of mouth by mutual agreement between the parties: (Bennet, J.,) *Latchford Premier Cinema Ltd*, v. *Ennion and Paterson:* (1931) 100 L. J. Ch. 397.

Company—Proxy—Voting in person without revoking proxy—Validity of vote. Where the Articles of Association of a company provided that a vote given in accordance with the terms of an instrument of proxy will be valid notwithstanding the previous death of the principal or revocation of the proxy unless notice of revocation had been received at the office of the company before the meeting: *Held*, that every proxy was subject to an implied condition that it should only be used if the principal was unable or found it inconvenient to attend the meeting and a proxy-giver was entitled to vote personally at the meeting even though he had not given notice of revocation: [Lord Hanworth, M.R., Lawrence, L. J., Romer, L. J.] *Cousins* v. *Int. Brick Co.* (1931) 100 L. J. Ch. 404.]

Income Tax—Exemption—Bodies established for charitable purposes.—The Institution of Civil Engineers is a body established for charitable purpose only within the meaning of s. 37, of the Income-tax Act 1918, and is therefore exempt from the payment of Income-tax. *Institution of Civil Engineers* v. *Rev. Commissioners*, (1931) 100 L. J. K. B. 705.

THE LEGAL ASPECT OF LITERATURE.

(CONTRIBUTED.)

The lawyer's profession calls for a perfect understanding of human character and a skilful use of such knowledge. He can find in literature, drama, poetry or fiction, as in an encyclopedia, that learning which he cannot hope to gather from his own limited experience of men and things that chance may enable him to observe at close range.

This learning has been sought, possessed and valued by all great Advocates. Referring to the value of literature to lawyers, Mr. Frank J. Loesch, Esq., President of the Chicago Bar Association in an address to the students of the University Law School said :—"Read the literature of human nature.....To my mind Balzac is the greatest Judge of human nature, after Shakespeare. I think I learned more of human nature (outside of my own experience) from Balzac than I have from any other author except Shakespeare. I recall especially *Eugenie Grandet*, the history of a miser. I have read that book two or three times, and this is how it profited me afterwards. I was retained in a very serious case of fraud. I studied the party on the other side. I made up my mind, that, if ever there was a miser out of the pages in literature, that was the man and that Grandet was his literary father-in-law. I studied *Eugenie Grandet* again, and then I attacked that opponent. It was an eight years' task. But the image of Grandet helped me to hound that man, so that at the end of eight years there was not anything left but his hide. The greatest admirer of my work in that case was that man's own lawyer, but he will not give me credit for having any legal acumen. He maintained that I knew all the facts beforehand. Yet, the truth of the matter was that I did not. I drew the bill before I had the facts. I merely judged the man's character from what I had read of Eugenie Grandet. That experience was to me a life-lesson.

"Let me allude also to another case, one that nearly broke me down with the mental and physical strain. I had bought every printed trial I could find on that particular subject. I had a year to prepare for the actual trial of the case. There were very eminent lawyers on the other side. I will not mention names for the parties are living. But I did not receive from all these books as much light as I did from a certain classical novel, one that characterized exactly the plaintiff's object and put that party in the lime-light. With that aid I was able to follow all the ins and outs of his manœuvres, and finally to win the case. It was a work of fiction that guided me to a right solution of that person's character, and a knowledge of his character that was essential to victory.

"Still another lesson I now recall which I learned from reading a lesson I shall

never forget. It related to a gentleman by the name of Gil Blas. Gil had various and sundry adventures, and among others he was made secretary to the Archbishop of Toledo. The Archbishop said to him one day: "Gil, I look upon you as a very likely young man, I like your intelligence and acumen. Now I am getting old. I have to preach once a month. Make it your duty to let me know when you see any failing signs in my mental powers. I will trust you as a friend to tell me about it." So Gil noted the character of the sermon the next month. Then he heard the ensuing sermon; and he thought the Archbishop showed signs of age and senility. At the third sermon he was more satisfied of this, and the fourth was shockingly significant. He complimented the Archbishop on the first sermon, and spoke fairly of the second but of the others he did not. The Archbishop asked, 'Now, Gil, what is the truth?' Gil said: 'Your Eminence, your mental powers are failing rapidly'. 'Gil', responded the Archbishop, 'I find that I am mistaken in your acumen. The treasurer will pay you,—and you will leave the house'. I have never forgotten the moral of that story. Such incidents in literature add to your knowledge" (1).

And so the best literature—drama or poetry, philosophy or fiction must always be an arsenal for the lawyer.

"A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these he may venture to call himself an architect." These were the words of Sir Walter Scott, put into the mouth of Mr. Pleydell—the most attractive of all the lawyers in the Waverley Novels.

"In order to be equipped for success in the profession to day a man must not only be a fairly good lawyer, but he must be a 'man of affairs' and he must also be a man of wide reading. Mere law reading, nothing but law reading, for a young man is bad. His mind gets into a groove and he becomes what is called a '*mere lawyer*'. In the House of Commons or in Halls of the Legislature which, after all, often reflects the National feeling, a mere lawyer has no chance of getting forward; he is scarcely listened to. It would therefore be necessary for lawyers to endeavour to become cultured men, and, to do that, they must read the best authors. There is a lamentable want among the young men and women of to-day in that they never read the best novels and dramas or the ancient classics. We can imagine no better way for a man to educate himself as a practical and successful lawyer than by reading the Waverly Novels and the works of Dickens. He would find there beautiful descriptions of scenery, things that would enlarge his mind, and he would amass a store of reflection and recollection, and when the time for action comes those novels would recur to him again and again, and become a fine storehouse of instruction and inspiration. Some of the best English lawyers have been great students of Shakespeare."

Sir Edward Coke has left us his opinion, that some knowledge of literature and of every science and art, is not only useful, but even necessary to a lawyer:—"If it be asked, of what arts and sciences a knowledge is necessary for a full knowledge and understanding of our laws, I answer that since not only laws, but also all arts and sciences are subjects of jurisprudence, I not only do not exclude any art or science, but I consider a knowledge of every one of them not only useful, but even essential to a lawyer."

It is said that the "sparks of all the sciences in the world are taken up in the ashes of the law." The administration of justice has received its full share of the benefits conferred upon mankind by the development of science. One of the earliest missions of the electric telegraph was to consign a murderer, in hot fight from his prostrate victim, to a deserved scaffold. Scarcely had Tawell quitted the fearful presence to be borne from it, as he imagined, to a place of safety, with speed unknown to former years, than his fight was overtaken by a few words passed along the unsuspected wire, and the Ministers of Justice were awaiting his arrival. Another remarkable instance was afforded recently by the discomfiture of a daring impostor, laying claim to large estates, by means of elaborate fraud and perjury. He had tendered himself as a witness in his own cause, tried at the Gloucester summer assizes, in the year 1853, and was writhing under a powerful cross-examination inflicted by Sir Frederick Thesiger, since Lord Chancellor, when the electric telegraph unexpectedly enabled him to put a question which, so to speak, suddenly blew up the whole fabric of

(1) Cited in the Illinois Law Review (1907) Vol. I p.455—Address by Mr. Frank. J. Loesch on "The acquisition and retention of a clientage."

forgery and falsehood. The cross-examination had been pointed to a brooch and seal on which a name and alleged family arms were engraved, furnishing, if genuine, strong proof that the claimant was what he represented himself to be. The examination in chief having commenced on the preceding day, was fully reported in the newspapers on the ensuing morning, and came under the notice of a seal engraver in Oxford street. He instantly communicated by telegraph to the defendant's Attorneys, the fact that he had himself not long before, engraved the brooch and seal for the claimant, whose case was, that they had been given to him by a friend of his pretended mother, as part of their trinkets fifty years before the trial. The verdict was at once, amidst a scene of much excitement, entered for the defendants; and the plaintiff, consigned immediately to the hands of justice, was afterwards tried, convicted of forgery, and transported for life." (2).

No better advice was ever given to an ambitious lawyer than that given by Chitty, who advised him to "Study mankind so as to be able to detect under every semblance, the exact character of every individual with whom he is to have transactions in business...and devote your leisure hours to the study of literature and science, psychology, pathology, surgery, chemistry, medical jurisprudence and police."

Thomas Emmet was admitted to the Bar in the Supreme Court of the State of New York in 1805. The following incident in his professional career furnishes food for thought as to how far a lawyer can use his knowledge picked up from the study of fiction to advance his client's interests in the case.

"A journeyman saddler in New York who, by his industry and economy, had accumulated a few hundred dollars in money, resolved to establish himself in business in an adjacent village. After securing a situation for a shop, he returned to the City with about 200 dollars to purchase his stock. He put up at one of the public houses, and confiding in the integrity of the landlord, gave the money into his hands for safe-keeping till he should call for it. He then traversed the City in search of a favourable chance to purchase his stock, and after finding one that suited him, he returned to his quarters and called for his money.

(2) Warren's Law Studies 13-14.

"Your money," said the landlord, "you put no money into my hands."

"He had no evidence of the fact, and finding all his efforts to induce his host to give up the money were fruitless, the desponding and indignant saddler repaired to Mr. Emmet for counsel.

"After hearing a statement of the facts, and taking such measures as satisfied him that the saddler was a man of the strictest integrity, he rebuked him for putting his money into such hands without evidence; 'But' said he, 'if you will do as I tell you, I will obtain your money for you.'

"The saddler very readily promised a strict obedience to his directions.

"Well'," said Emmet, "go back to the landlord and tell him when no one is present that you owe him an apology—that you have found your money and were mistaken in supposing that you put it into his hands; you will then return to me.'

"The saddler did so, and the landlord expressed great satisfaction at the discovery of the mistake. Mr. Emmet then gave the saddler 200 dollars and told him to go and deposit it in the hands of the landlord, but before you enter the house, procure some gentelman of respectability to go in and call for a glass of beer, and request him then to take his seat and carelessly pass away the time in reading the news etc, till you arrive. You will then enter the room and *in his presence* tell the landlord you now wish him to take the 200 dollars for safe keeping till you call for it."

"This done, the saddler again returned to Mr. Emmet who directed him 'to continue his lodging at the house for two days, and be regular at his meals; and then, while no other person is present tell the landlord you will take back your money.' This the saddler did, and the unsuspecting landlord without hesitating immediately refunded the money, which the saddler restored to Mr. Emmet, who directed him to take a good witness with him, and go and demand the 200 dollars 'which you delivered in his hands for safe keeping in the presence of the gentleman who called for the beer.'

"The saddler accordingly proceeded to the house, in company with another person and demanded his money.

"Your money," said the astonished landlord, "I have just handed it to you."

"No, Sir," replied the saddler, "I have not received my money and if you refuse

to deliver it to me, I shall take measures to obtain it."

"The landlord dared him 'to do his best'; and Mr. Emmet immediately instituted a suit against him in favour of the saddler. The landlord, finding himself outwitted, paid over the money, with 20 dollars as costs". (3).

It is said of Mr. William Beach, "one of the noblest Advocates that ever practised in the American Bar" that his father, a well-to-do tradesman in Saratoga, New York, gave William a good education in the academy, and his admission to the Bar was considerably later; for the old gentleman had peculiar notions of how Beach should pursue his studies.

After spending something over a thousand dollars on the young man's education he questioned him of his future plans and prospects, of what he wanted to do for a living. The young graduate had not the faintest notion of law at that age, and replied that he did not know. "I want you to be a lawyer," said the father decidedly. The young man hung his head, and replied. "How can I get a library"?

He was an early lover of books and fishing, and kept up both for a life-time. "I'll hire you," said the father, "If you'll work faithfully and obey orders for the first year or so, and you will have a stated salary and enough to buy books when the time comes."

"I will do it," said William; and accordingly he was furnished with a Bible, a copy of Shakespeare and Bunyan's "Pilgrim's Progress", and sent to live with a farmer uncle in the mountains some twenty miles away. It was some days and weeks before he became interested in the Bible (each book was to be read three times thoroughly and notes made of it); but the young man became interested, fascinated, and charmed by each volume. He mastered them, and received with this victory a splendid vocabulary.

He was still diffident, and when he commenced practice he was timid and ungraceful. Still he had ideas in his language, quaint illustrations, strong sentences, little words, and clearness in putting things. The boys would say, "Let's go down and hear Gus Beach plead a case"; and they would first go out of curiosity; but they would turn away, charmed by the little things he had said, and later they would change the saying to, "Let's go and hear young Beach speak." And so, by degrees he grew to be a fine reasoner, an attractive speaker, and late in life had a charm about all his speeches that was almost irresistible. (4).

Gray says very truly in a letter to his friend West, who could not force his inclination to like the study of the law and to dissuade him from being disgusted with its dry and unentertaining elements, "It is strange, if, among all that huge mass of words there be not something intermixed with thought. Laws have been the result of long deliberation, and that not of dull men, but the contrary; and have so close a connection with history, nay, with philosophy itself, that they must partake a little of what they are related to so nearly."

There is yet another use of literary works for lawyers and laymen alike. They teach a great deal of law in simple and interesting stories. Legal text books do not, as such, always afford pleasant reading to others than lawyers. But even a layman may learn a great deal of law in a very agreeable way by reading novels. Thus, in *"Ten Thousand a Year*, you find the old action of ejectment with all its fictions and prolixities, fully described; the plot of Felix Holt turns upon a *base fee*, and George Elliot obtained professional advice upon her book before it was published. In *Cesar Birottear*, Balzac explains in detail the French Law of Bankruptcy; while in other books forged wills and murder trials of the most thrilling sort abound. Sometimes these legal novelists may not be very accurate in their law, but on broad outlines they rarely err. Shakespeare's plays are crammed with legal allusions; and Sir Walter Scott who was a lawyer by profession and a well-read lawyer too, made good use of his legal learning. Nothing of the kind is more amusing than his account the great case of *Peebles* v. *Planestanes* in 'Redgauntlet' while 'Anne of Geierstein' is worth reading for the sake of the *Vehmgerickt.*" (5). The works of Dickens abound in law and lawyers. We shall deal in the course of this article with the way in which Dickens treated law and lawyers in some of his famous novels.

In reading Dickens's description of law and lawyers we must bear in mind that, first and last, his aim was to ridicule satirize and caricature all that he disliked

(3) Donovan's Modern Jury Trials.

(4) Donovan's Tact in Trials.

(5) Address by John Marshall to the students of the Law School of Pennsylvania in April 1905, on the "Law and Lawyers of Charles Dickens."

and despised, and he saw much in the law and lawyers of England in his days dislike and despise.

Novelists and dramatists have always a strong tendency to exaggerate lights and shadows and the resulting pictures are marked by caricature and *burlesque*. Caricature, the humorous exaggeration of characteristics, is always popular, for every one likes to see every one else ridiculed, and *burlesque* renders any subject ludicrous by an incongruous manner of treating it. So when a talent like that of Charles Dickens for caricature and *burlesque* is turned loose upon the unpopular profession of the law, the result is highly edifying to the laity." Dickens was not a very learned lawyer, and one may very much doubt, if he ever seriously read any law at all. Dickens's knowledge was not derived from the printed page of legal text books, but from what he saw and heard.

Dickens's practical experience of the law was decidedly unpleasant. "In 1844 Vice-Chancellor Knight-Bruce granted him an injunction against some literary pirates who published limitations of his 'Christmas Carol' and 'Martin Chuzzlewit' Although successful, he had to pay the costs, an incident which he might have considered very funny had it happened to another. When another case of piracy occurred, he wrote to his Counsel, Talfourd: "It is better to suffer a great wrong than to have recourse to the much greater wrong of the law. I shall not easily forget the expense and anxiety and horrible injustice of the Carol case, wherein, in asserting the plainest right on earth, I was really treated as if I were the robber instead of the robbed."

It was doubtless his own sentiments which he expressed in the 'Battle of Life', which he wrote soon after.

"Nothing serious in life", said Mr. Snitchey, of the law-firm of Snitchey & Craggs, as he peeped into his blue bag. "What do you call law?"

"A joke," replied the doctor.

'Did you ever go to law?", asked Mr. Snitchey, looking out of the blue bag.

"Never," returned the doctor.

"If you ever do", said Mr. Snitchey, "perhaps you'll alter that opinion."

Snitchey the solicitor naturally took a professional view of the law. "Take this smiling country as it stands. Think of the laws appertaining to real property; to the bequest and devise of real property; to the mortgage and redemption of real property; to leasehold, freehold and copy-hold estate; think," said Mr. Snitchey, with such great emotion that he actually smacked his lips, "of the complicated laws relating to title and proof of title, with all the contradictory precedents and numerous Acts of Parliament connected with them; think of the infinite number of ingenious and interminable Chancery suits to which this pleasant prospect may give rise, and acknowledge that there is a green spot in the scheme about us."

"The one great principle of the English Law," says Dickens in 'Bleak House', "is to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light, it becomes a coherent scheme, and not the monstrous maze the laity are apt to think of it. Let them but once clearly perceive that its grand principle is to make business for itself, at their expense, and surely they will cease to grumble."

'For fees to any form they mould a cause;
The worst has merits and the best has flaws.
Five guineas make a criminal to-day.
And ten to-morrow wipe the stain away.'

Dickens like other great writers, has been responsible for several salutory reforms in the laws of his country. To take one out of several such instances, he more than another, was responsible for the change in the method of executing death sentence on condemned criminals.

"Executions were in his days public and, up to very recent times, were attended by, people of fashion. Boswell, Johnson's biographer, had a great taste for that sort of thing. On one occasion, he records, he saw six executed at Tyburn; on another, fifteen at Newgate. The solemn procession to Tyburn had been abrogated in 1783, much to Boswell's disgust, and Dr. Johnson observed: "The age is running mad. Men are to be hanged in a new way. The old method was most satisfactory to all parties, the public was gratified by a procession, the criminal was supported by it. Why is all this to be swept away?" The celebrated George Selwyn never missed a hanging without some legitimate excuse. When Hackman was executed for the murder of Miss Ray, the Earl of Carlisle wrote Selwyn an account of it, and added, "Everybody inquired after you". Selwyn made a trip to Paris to see Damien broken on the

wheel for attempting to assassinate Louis XV. He displayed so much interest that he was asked by a French nobleman if he were a hangman. "No, Sir", was his reply, "I have not that honour; I am only an amateur."

Charles Lamb worte to a friend in Paris: "Have you seen a man guillotined yet? Is it as good as hanging?"

But times and tastes have changed. In 1849 Dickens saw the two Mannings, husband and wife, executed on the wall of Horsemonger Lane Jail, and, like a true-born Englishman, sat down quickly and wrote a letter to the *Times*, advocating a change, which was finally effected, in or about 1868. (6)

One of the best law reforms with which the name of Dickens is associated is the avoidance of the great expense and inordinate delay, which were inseparable incidents of Chancery suits in the first half of the 19th century.

The law's delays have been the subject of several satirical attacks by Charles Dickens in many of his novels.

"A bill in equity, in those days, was not the innocent document which with us bears the name, but a much more formidable instrument. In the first place, it was very lengthy. After the caption and names of the parties came the stating part, in which the plaintiff stated the facts of his case; then a general charge of confederacy against the defendants and divers other persons then unknown. This was originally inserted in order to lay ground for amendment by adding other parties to the bill, but soon became a mere form. The next was the charging part of the bill, in which were set out anticipated defences, which were then denied or avoided in order to ground interrogatories. Then, after an averment that the plaintiff had no remedy at law, came the interrogatories propounded to the defendant, with prayers for relief and process. As the costs were in proportion to the length of the pleadings, it will be readily seen that the solicitors had every temptation to prolixity. Thus, a witness testified before the Chancery Commission of 1852: "If I draw a document of 120 folios, I get £6, and if I compress that into 30 folios I get only 30 shillings. In fact the worse the business is done the better it is paid for,"—a folio being about fifteen lines of six words each (7).

(6) Ibid.

(7) Testimony of Henry Lake, First Report, Chancery Commission, 1852, App. A. page. 180.

It frequently happened that the defendant's answer rendered it necessary or advisable to amend the bill, adding fresh interrogatories which called for a further answer. Sometimes the plaintiff would designedly refrain from making his bill full in the first instance and file what was called a fishing bill, and then on the answer coming in, would avail himself of its averments to frame his amendment. This was called "scraping the defendant's conscience . ." (8).

As the defendant very frequently filed a cross-bill against the plaintiff to scrape his conscience, and there were continual opportunities for exceptions, and references to a Master and appeals, it will easily be seen that by the time the parties' consciences had become thoroughly scraped, the proceedings had become unconscionably complicated.

Again, the rules of the Court required that every person having any interest, no matter how theoretical, remote or contingent, must be made a party, and this added enormously to the expense, and also to the vexation of suitors. Many a man whose interest was, as a practical matter, nothing, would be made a defendant, and, fearing to disregard the suit, would be obliged to employ Counsel. Forster, Dickens's biographer, mentions a case of a legacy of three hundred pounds. There was but one defendant in reality but seventeen according to the technical rule, and, after two years, it was discovered that an eighteenth should be added, and the suit begun *de novo*, after costs had been incurred of over eight hundred pounds. This case Dickens worked up in 'Bleak House' as the story of Gridley, "the man from Shropshire."

The testimony in a Chancery case was not oral, but taken in writing by commissioners or examiners. The party examining prepared his questions in writing, and the other side cross-examined if he chose, and questions were propounded to the witnesses by the examiner. This method was most unsatisfactory, tedious, and expensive. A witness before the Chancery Commission testified that in one case, where bill had been filed against the directors of a bank to hold them liable for its debts, the expense of obtaining the testimony of one witness was over eight hundred pounds. The witness observed that "the tremendous expense expedited a compromise (9)."

(8) Testimony of James Chalmers, Chancery Commission, 1826 pages 165—166.

(9) Testimony of S. B. Toller, 3rd Report, Chancery Commission, 1856 p. 38.

Then every party had to take office copies of every paper filed or at least pay for them, on penalty of incurring the displeasure of the officials.

Then the delay caused by appeals was something of which we can have little idea at this time. In 1811 a Scotch solicitor testified before the Committee on delays of suits in Chancery: "I know that there has been a great increase of appeals and I know that appeals are entered, many of them, only for the purpose of delay. There was a remarkable instance of it this session, to prevent a person paying one thousand pounds into Court; it was in the House of Lords seven years. I had orders to withdraw the appeal as soon as it should be called on, and when it came to the last moment I took it away upon paying the costs." (10)

In 1824 a witness before the Chancery Commission spoke of the "Heart-sickening delays" in appeals, and mentioned one important case, appealed from the Master of the Rolls to the Chancellor, which remained unheard for nearly six years (11).

Well might poor, crazy Miss Flite say so often: "I expect a judgment. Shortly. *On the day of judgment.*"

Litigated or contentious suits, we all expect to be somewhat protracted. But when all the parties to the suit simply want their rights determined by the Court, it seems cruel to prohibit them. Yet this was what the Court of Chancery did by making no distinction between contentious and merely administrative business. The disputes which arise over the interpretation of a Will, the settlement of accounts, and, in short, the thousand and one things which the modern Courts, attend to every month, would, in England, under the old practice, be the subjects of bills in equity, with all their delay, expense, and vexation of spirit; as, for example where a trustee filed a bill merely to obtain the direction of the Court in the execution of the trust, or to have the terms of an obscure Will construed by the Court, or where a creditor was required to make formal proof of his claim—all these proceedings assumed the cumbrous and expensive character of hostile suits (12).

In 1855 it was said before the Chancery Commission that it took the Registrar six months merely to settle the decree in the settlement of an intestate estate where some of the children had been advanced. It only required somebody to do it "who understood figures," but there was "nothing that any man of business might not settle in two or three hours." (13)

Then when the decision of the Chancery suit involved a preliminary determination of the legal rights of the parties the Chancellor generally considered himself bound to direct an issue to a Court of law, or take the opinion of the law Judges. He was concluded to be sure by neither, but took this course to assist his conscience, and it need hardly be said that it was a proceeding which did not speed the cause nor lessen its expense.

In one case, where the contest involved the determination of who were the next of kin, the Master of the Rolls heard the case for three days, and then directed an issue. The case was tried for two days, and then the Master of the Rolls, dissatisfied with the verdict, directed a new trial. The Master of the Rolls was again dissatisfied, but no further trial was awarded, for the very simple reason that the fund of five thousand pounds was just sufficient to pay the costs (14).

How Bentham lashed the whole system. "Equity!", he claims, "Equity! It is a term of derison, a cruel mockery. Is it a remedy? It sweetens like sugar of lead; it lubricates and soothes like oil of vitriol." And in another place he says "The parties unheard of and unthought of, pave their way through the offices like half-starved flies crawling through a row of spiders."

The evils of the Court of Chancery were not confined to the mother country. It spread to some of the Colonies that borrowed its law and legal procedure from England. In some Colonies the supplanted procedure was even worse than the parent stock. According to Parke's "History of the Court of Chancery", the Court of Chancery in the island of Montserrat, West Indies, had several times been represented as a public nuisance; and, he says, "the tornado which periodically interrupts the sittings of the West India Courts of Chancery is the only temporary relief of the islanders from the visitation of equity."

Here is an inimitable description by Charles Dickens of the progress of a Chancery suit in the early part of the 19th century.

(10) Testimony of James Chalmers, Chancery Commission, June 18, 1811 page 24.

(11) Testimony of John Forster, Chancery Commission, 1826, App. A. p. 302.

(12) Chancery Commission, First Rep. 1852, page 10.

(13) Testimony of R. B. Follett, Chancery Commission, 3rd Rep. page 92.

(14) Testimony of Joseph Leech, Chancery Commission, 1852, App. A page 7.

"*Jarndyce* and *Jarndyce* drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in *Jarndyce* and *Jarndyce* without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking horse when *Jarndyce* and *Jarndyce* should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of Court have faded into mothers and grandmothers; a long procession of Chancellors have come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three *Jarndyces* left upon the earth perhaps, since old Tom *Jarndyce* in despair blew his brains out at a coffee-house in Chancery Lane; but *Jarndyce* and *Jarndyce* still drags its dreary length before the Court, perennially hopeless.

"*Jarndyce* and *Jarndyce* has passed into a joke. That is the only good that has ever come of it. It has been death to many, but it is a joke in the profession. Every Master in Chancery has had a reference out of it. Every Chancellor was "in it" for somebody or other, when he was Counsel at the bar. Good things have been said about it by blue-nosed, bulbous-shoed old benchers, in select pot-wine committee after dinner in hall. Articled clerks have been in the habit of flashing their legal wit upon it. The last Lord Chancellor handled it neatly, when, correcting Mr. Blowers the eminent silk gown who said that such a thing might happen when the sky rained potatoes, he observed, "or when we get through *Jarndyce* and *Jarndyce*, Mr. Blowers;"—a pleasantry that particularly tickled the maces, bags, and purses. * * *"

Here is a bit of how the proceedings were conducted in the *Jarndyce* case.

Thus in the midst of the mud and at the heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

"Mr. Tangle," says the Lord High Chancellor, latterly something restless under the eloquence of that learned gentleman.

"My Lord," says Mr. Tangle. Mr. Tangle knows more of *Jarndyce* and *Jarndyce* than anybody. He is famous for it—supposed never to have read anything else since he left school.

"Have you nearly concluded your argument?"

"My Lord, no—variety of points—feel it my duty to submit-ludship", is the reply that slides out of Mr. Tangle.

"Several members of the bar are still to be heard, I believe?", says the Chancellor with a slight smile.

Eighteen of Mr. Tangle's learned friends, each armed with a little summary of eighteen hundred sheets, bob up like eighteen hammers in a pianoforte, make eighteen bows, and drop into their eighteen places of obscurity.

"We will proceed with the hearing on Wednesday fortnight," says the Chancellor. For the question at issue is only a question of costs, a mere bud on the forest tree of the parent suit, and really will come to a settlement one of these days.

"The pages of 'Bleak House' do not disclose the details of the great case of *Jarndyce* v. *Jarndyce*, although, as the book was professedly written to show up the iniquities of the Court of Chancery, and is spun out to more than a thousand pages, surely a few might have been spared to give the reader a definite idea of what the case was about. It does appear, however, that the question was how the trusts under the *Jarndyce* Will were to be administered, and that, while the costs were steadily increasing, the value of the estate was steadily decreasing. "It was a street of perishing blind houses, without a pane of glass, without so much as a window frame, with the bare bland shutters tumbling from their hinges, and the iron rails peeling away in flakes of rust; the chimneys sinking in; the stone steps to every door (and every door might be Death's Door) turning stagnant green." Meanwhile, the legatees were reduced to poverty, and everybody had to have or pay for copies of cartloads of papers, and all hands went downthe middle and up again through such an infernal country dance of costs and fees and nonsense and corruption as was never dreamed of in the widest visions of Witch's Sabbath."

"The parties in a case are made to say, "And nothing ever ends. And we can't get out of the suit on any terms, for we

are made parties to it, and must be parties to it, whether we like it or not."

So Tom *Jarndyce* committed suicide from despair. "For," said he, "it is being roasted at a slow fire, it's being stung to death by single bees, it's going mad by grains."

All these evils of Chancery were well known, well recognized by the Government of the day and had been exposed over and over again in judgments of courts. But where the Blue Books and the Law Reports in which the evidence was contained, could find one reader, Dickens's 'Bleak House' would find a myriad. Even Parke's "History of the Court of Chancery," one of the most interesting law-books ever written, does not attract the casual reader. Nothing stirs the public conscience so well and so deep as a study of the system in the pages of 'Bleak House'.

Even before Dickens's 'Bleak House' came to be widely read a Parliamentary Commission was appointed with Sir Romilly, then Attorney-General as President, and as a result of its labours Acts were passed in 1853 which made most important alterations in the method of taking evidence, substituted printed bills for engrossed bills, simplified rules as to joinder of parties, gave the Chancellor full power to determine questions of law, substituted salaries for fees, and abolished many useless expenses and offices. (15).

In his preface to 'Bleak House', Dickens wrote : " As it is wholesome that the public should know what has been doing, and still is doing in this connection, I mention here that everything set forth in these pages concerning the Court of Chancery is substantially true, and within the truth."

The ravages of law on the fortunes of the litigant are not even to-day a thing of the past. Only a few weeks ago we saw in the daily papers, the learned Judges of the Calcutta High Court in disposing of a long pending suit remarked in much the same words as Charles Dickens that the purpose of the whole proceedings seemed to be nothing else than to incur costs in the litigation and to create business and provide profit for lawyers. Scott's picture of Peter Peebles can very well be applied even to-day to many a suitor who seeks his fortune in Courts of Law.

Peter Peebles was called poor Peter, because he was "a suitor *in forma pauperis* a worn-out litigant, half crazed by fifteen-years' experience in the Courts with a new Solicitor every year.....he wished he had a new coat as regularly—broken down with poverty and drink, the laughing stock of the Courts, and yet proud of his notoriety, as the best known litigant in Edinburgh. When asked for his occupation he said, "If I am laird of naethin else I am aye a *dominus litis*" —*i. e.* laird of a lawsuit.

We will close this little article with the following remarks made by an eminent Judge in an address delivered by him before an assembly of English lawyers: " Whether Advocates, Judges or text writers we are fast becoming case lawyers, and yet we instinctively feel that this is not the highest type. When we wish to recall great legal names they are rather Hardwicke, Mansfield, Marshall, Webster, Choate, Story, John and Campbell and not the lawyers that have won cheap victories and amassed great fortunes by mere citation of cases on point. The great Advocates, whose names are enshrined in the pages of history were not case lawyers,—but people that dwelt on principles, with ever-widening horizons. I think the antidote of our tendency to study law only as an art is to be found in remembering that it is also a science and in the study of its literature, its origin and its history" (16).

(15) Gest's Lawyer in Literature, Chap. I.

(16) Cited in 15 Green Bag 159.

Wit and Humour.

No Witnesses.—

Judge: "You are charged with stealing Colonel Julep's chickens. Have you any witnesses?"

Uncle Mose: "Ah has not. Ah don't steal chickens befo' witnesses."

—*Case & Comment.*

Expired.—

"Do you wish the Court to understand that you refuse to renew your dog license?" asked the Judge. "Yes, your Honor," but —" "We want no 'buts.' You will be fined. You know the license has expired." "Yes, but—so has the dog."

—*Case & Comment.*

INDIAN CASES

1932.

Vol. 136 JOURNAL Part 2

Notes on Current Topics.

The Consultative Committee and Supreme Court for India.

The question of establishing a Supreme Court for India was taken up for consideration by the Consultative Committee of the Round Table Conference on the 29th February. The Federal Structure Committee had recommended that the Constitution Act should prescribe the jurisdiction and the functions of the Supreme Court and that the Federal Legislature should be given the power to adopt those provisions of the Constitution Act if it should think fit to do so. The discussions in the Consultative Committee centered round the precise interpretation to be put on these recommendations. The Committee have agreed on the following points: First, that the intention of the Federal Structure Committee was that there should be a single Court which would sit in two divisions and not two separate institutions. Secondly, that the salaries of the Judges of the combined Federal and Supreme Court should be a little higher than those of the Judges of the High Court, and that the exact figure might be fixed by a clause in the Constitution Act. The Committee were further of opinion that the Supreme Court should be invested with jurisdiction to act as a Court of criminal appeal for the whole of British India, the right of appeal being however confined to capital sentences. We think that the opinion of the Consultative Committee that it is unnecessary to have two separate Courts and that the Supreme Court should be invested with power to act as a Court of criminal appeal will meet with general approval but its jurisdiction in criminal matters should not be so restricted.

The exact scope of the powers of the Supreme Court in civil matters does not seem to have been discussed. In our view the powers of the Supreme Court in the matter of appeals from the High Courts should be more comprehensive than those of the Judicial Committee and the Supreme Court should be invested with the power to settle all conflicts of opinion that arise between the several High Courts.

Civilians as High Court Judges.

The Legislative Assembly has adopted the resolution moved by Sir Hari Singh Gour that the Chief Justice of a High Court of India shall be a Barrister, Vakil, or Advocate and not a member of the Indian Civil Service. The resolution as it stands, whatever may be its merits from other points of view, is unfair. It would be a travesty of justice indeed if impartial justice based on claims of seniority and merit is not meted out to those who have been presiding over the highest Courts of Justice and without committing grave injustice how can the claims of the seniormost Judge be overruled because he belongs to a particular race or community or because he is a member of the Indian Civil Service and a junior Judge be promoted over his head because he happens to be a Barrister or Advocate? If any sort of exclusion of civilians is to be imposed it should be done at a much earlier stage.

While we are not in favour of Sir Hari Singh Gour's resolution, we are entirely in sympathy with the principle underlying it. Though it is not difficult to mention the names of some eminent civilian Judges, it cannot be denied that, as a rule, an early training in law and association with the traditions of the Bench and the Bar are bound to have an effect on the growth and development of the judicial mind which service on the executive side, however long, cannot produce. The proper time, however, to work out this principle is when it is proposed to transfer an executive officer to the judicial side.

The Privy Council on winding-up proceedings in India.

Though the actual decision of the Judicial Committee in *Ripon Press and Sugar Mills Company, Limited* v. *Gopal Chetty* (136 Ind. Cas. 114) is not of much importance, we would invite the careful attention of the High Courts of India to certain observations which their Lordships have made in this case on winding-up proceedings in India. With regard to delay in the disposal of winding up proceedings their Lordships observe as follows:

"The petitioners appealed to the High Court by notice dated the 17th November, 1922. For some unexplained reason the appeal was not disposed of until the 13th November, 1924, nearly two years later. There were no new materials placed before the Appellate Court to account for this loss of time which would not have been possible in England where winding-up appeals are placed in an interlocutory list in order to be beyond any such risk. Their Lordships hope that this case is, in this, as in so many other respects, exceptional, but this delay ought to have weighed with the learned Judges in reaching a decision. The difficulties created by a winding-up order in November, 1924, with effect from 1st May, 1922, which so soon became manifest in the liquidation might have given them pause. It does not appear that these difficulties were even present to their minds." (p. 119)

The next point on which their Lordships have laid great emphasis is the necessity of care and caution in making orders for winding up solvent companies on the application of persons having no substantial interest in them and against the wishes of the majority of the share-holders. The practice of passing summary orders on important matters on *ex parte* summons at the instance of the liquidator is also condemned. Referring to certain orders of this nature, their Lordships say:

"It is to be hoped that orders like that of the 14th November, 1928, will not in future be lightly made in the course of an Indian winding-up." (p. 121)

and again,

"their Lordships cannot refrain from expressing the hope that in liquidation proceedings in India matters of such importance will not normally be so summarily disposed of." (p. 124)

Their Lordships further point out that it is the duty of the Official Liquidator in winding-up cases not to identify himself with either of the parties but to maintain a position of complete impartiality. Their Lordships conclude with the following remarks:

"What they find themselves faced with at the end of the day is a winding-up order made two years after its presentation upon a petition which ought never to have been presented, for, even if not merely vindictive and malicious, the petition was merely without proved merits. They find also that the winding-up order has in the liquidation been succeeded by series of orders off hand in form and on the face of them at all events made without full consideration of all relevant circumstances. Lastly, their Lordships find a liquidation in being which if carried on as it has been begun, can, as they forecaste it, end in nothing for the contributories but a call of all the unpaid capital to provide for payment of the costs and expenses." (p. 124)

Though the order for winding-up was made in this case on entirely insufficient grounds, their Lordships held that it would be 'a calamity to all concerned' to set it aside as four years had elapsed since the date of the order. This case reveals the harmful consequences of delay in winding up proceedings and the necessity of framing rules for the quick and proper disposal of winding-up proceedings on the lines of the English Rules.

Marginal Notes.

It was laid down in *Claydon* v. *Green* [(1868) 37 L. J. C. P. 256], that marginal notes could not be used in the construction of Acts of Parliament and their Lordships of the Privy Council in the case of *Balraj Kanwar* v. *Jagat Pal Singh*, [26 All. 393] observed as follows: "It is well settled that marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake and it has been exploded long ago. There seems to be no reason for giving the marginal notes of an Indian Statute any greater authority than the marginal notes in an English Act of Parliament." Mr. Justice King of the Allahabad High Court has in a very able judgment in *Ram Saran Das* v. *Bhagwati Prasad*, (I. L. R. 51 All. 411; 113 Ind. Cas. 442) described how the practice in India differs from that of the House of the Commons in this respect and has held that in India marginal notes can properly be regarded as giving a *contemporanea expositio* of a meaning of the section when the language of the section is obscure and ambiguous. It would be interesting to note that the old rule laid down in *Claydon* v. *Green* is loosing currency and becoming a matter of imperfect obligation in England also. Reference was made very recently to a marginal note to a section of an Act of Parliament in *Vauxhall Estate Limited* v. *Liverpool Corporation*, (1931) 95 J. P. 224. The current view in England seems to be that it is permissible to look at a side-note, not as enacting anything, but a

throwing some light on the meaning of the section itself, though as one of our learned contemporaries has observed "old fashioned lawyers may shake their heads about such a lapse, as they might regard it, from the proper standards of interpretation."

The Law of Tender.

There is an interesting discussion in a recent decision of the Madras High Court, *Arunachalam Pillai* v. *Govindaswami Chettiar* (135 Ind. Cas 907), of the question whether in order to stop the running of interest a tender before suit must be followed by payment into Court. The general rule of the common law and the long standing practice in England was that there must be payment into Court. In India this principle was applied in *Haji Abdul Majid* v. *Haji Noor Muhammad* (I. L. R. 16 B. 141) and referred to with approval by the Calcutta High Court in *Boyle Chand Singh* v. *Moulard* (I L. R. 4 C. 572) and *Jagat Tarini* v. *Nabha Gopal* (I. L. R 34 C. 305). But in a later decision of the Calcutta High Court, *Gajendra Narain Maiti* v. *Sita Nath Das* (1926, 90 Ind. Cas. 637), doubts were thrown upon the applicability of the rule to India. The learned Judges held in this case that in the absence of any provision in the law of contract or in the law of procedure applicable to Indian Courts it cannot be laid down as a binding rule of law that if a tender is not followed by a deposit in Court it is ineffectual to stop running of interest. In a subsequent case decided in 1928, *Rakhal Chandra* v. *Baikunthanath* (117 Ind. Cas. 687, 32 C. W. N. .032) the Calcutta High Court has explained and adopted the principle though without referring to the earlier decision of 1926. Waller and Pandalai, JJ., after discussing the point with reference to principles and authorities and distinguishing cases under s. 84, Transfer of Property Act, have expressly held in the recent Madras case that 'the later Calcutta decision is more in accord with precedent and the reason of the thing'. The authority of the decision in *Gajendra Mohan Maiti's case* is considerably shaken by the later decisions of the same Court and we think we may now take it as settled law in India that in order to stop the running of interest in the case of ordinary money claims, tender must be followed by payment into Court. As their Lordships say :

"A debtor who is required to keep his tender good must when he is sued, certainly understand that the debt is being demanded through the Court and as he must be able and willing at any time after tender to pay it on demand he can demonstrate his ability and willingness after the matter has come to Court only by bringing the money into Court. Although in the abstract it is possible to argue that though the defendant has not deposited the money in Court and so placed his ability and willingness beyond question, he may be able to prove by other evidence that he was always ready and willing to pay the debt, to accept that argument would be to introduce much uncertainty into a test which is simple and conclusive and which has been accepted and acted on by the Courts in England and India for a very long time."

Interpretation of s. 211, Penal Code.

In a series of decisions beginning with *Empress of India* v. *Patam Rai* (I.L.R. 5 A. 215) and ending in *Burkuttulla* v. *Sadhokalwar*, (17 Ind. Cas. 791) the Allahabad High Court had consistently held that in order to constitute an 'institution of criminal proceedings' within the meaning of s 211, Penal Code, a criminal prosecution should have taken place. Though a Full Bench of the Calcutta High Court had in *Karim Bakhsh* v. *Queen-Empress* (I. L. R 17 Cal. 574) taken a different view, the Allahabad High Court refused to change its opinion. The view of the Calcutta High Court was followed by the Madras and the Patna High Courts in preference to that of the Allahabad High Court. In the recent case of *Emperor* v. *Johri*, (136 Ind. Cas. 277), however, King & Bennet, JJ., have completely altered the trend of the rulings of the Allahabad High Court. After discussing the matter in detail, Bennet, J., concludes as follows : "The Allahabad ruling in *Queen Empress* v. *Bisheshar*, (1894, I. L. R. 16 A 1:4) has, therefore, been considered and dissented from by three other High Courts and in one case dissented from by a Bench of five Judges. The weight of authority is, therefore, heavily against the ruling in *Queen-Empress* v. *Bisheshar*. The reasoning contained in the rulings of the other High Courts is clear and cogent. I, therefore, consider that we should follow the rule of the other High Courts and hold that making of a false charge to the Police of a cognizable offence is the institution of criminal proceedings within the meaning of s. 211, Indian Penal Code." The long conflict that prevailed on the point has thus been finally set at rest.

Summary powers of Court under the Guardians and Wards Act.

On the question whether under the Guardians and Wards Act the Court has power to compel the guardian to pay into

Court sums found due on investigation by the Court, there has been some conflict between the several High Courts. The Calcutta High Court, the Madras High Court and the Judicial Commissioner's Court of Sind hold the view that the Court has no such power. The Allahabad High Court has taken a contrary view. The point was recently discussed in the Lahore High Court by Shadi Lal, C. J., in *Arur Singh* v. *Gurbax Singh* (136 Ind. Cas. 2), and Addison, J., in *Fakir Muhamad* v. *Bhari* (136 Ind. Cas. 3). Their Lordships have followed the view of the Calcutta and Madras High Courts and dissented from that of the Allahabad High Court. In the latter case Addison, J., observes that 'the question does not appear to have come directly before this Court', but we find, on the other hand, that the question was well discussed and decided in the same way in two earlier cases of the Lahore High Court, namely, in *Hakim Rai* v. *Khandi Bai* (1930, 126 Ind. Cas. 785; A. I. R. 1930 Lah. 420) and in *Sadhu Singh* v. *Mehr Singh* (1931, 130 Ind. Cas. 779; A. I. R. 1931 Lah. 68; 31 P. L. R. 965). But the fact that Addison, J., has come to the same conclusion independently of the earlier decisions only enhances the value of the decision. The weight of authority against the correctness of the decision in *Sita Ram* v. *Govindi* (I. L. R. 46 All 458; 80 Ind. Cas. 592) is becoming stronger day by day and we hope the Allahabad High Court would reconsider its decision and refer the question to a Full Bench when it arises for decision again.

A 'novel' procedure.

We find in *The Municipal Board, Etah* v. *Asghari Jan*, (1932) A. L. J. R. 117, a glaring instance of the abuse of the power of the Court to issue a commission. The question in issue in this case was whether the plaintiff was a public prostitute. The Munsif found that she was, and dismissed the suit. On appeal the Additional District Judge passed an order to the following effect: "As the question largely hinges on the point whether the chief business of plaintiff is public prostitution or her chief business is singing and dancing as an art, so in order to decide this point, it is necessary that some one who is an expert in this art should be examined. The expert should see the girl's singing and dancing and then should give his evidence before this Court. The expert's fee will have to be paid by the plaintiff. Mr. A. A. Jilani, M.A., LL. B., Vakil, is present in Court. He says that he can work as an expert. I appoint him as an expert. He should have the performance of singing and dancing of the girl at some place and give evidence before this Court on February 25, 1929." The qualification of the expert was that he had been regularly hearing the singing of dancing girls since 12 years, that he was acquainted with a large number of public prostitutes and had many opportunities of mixing with them. The commissioner "invited the best educated singers of the city to hear the singing and to help him as assessors", got a performance of music made, "took help from the assessors, and weighed their opinion with his opinion in forming the opinion about the art of the plaintiff." He gave evidence that in his opinion the plaintiff was 'a tolerably fair singer and knew her art', that she was 'a trained girl in the art of music and not an ordinary public prostitute', that a girl who is habituated to promiscuous cohabitation like a public prostitute can in no way possess a melodious and sustained voice and that from this he was of opinion that the plaintiff was not a public prostitute. The Additional District Judge acted upon this evidence and came to the conclusion that the plaintiff was not a public prostitute. The judgment reads more like a passage from a novel of Dickens or a satire of Addison, than a report of the proceedings of a judicial tribunal. Their Lordships have characterised the procedure adopted by the Additional District Judge and the nature of the evidence adduced as 'novel and startling' and it is a great relief to think that such instances are happily too rare to spoil the fair name of the administration of justice in India.

Ill-considered proceedings against Legal Practitioners.

Proceedings against legal practitioners for professional misconduct are now-a-days becoming too common and the note of caution which the Allahabad High Court has given to the Subordinate Courts against initiating proceedings in haste has come at a most opportune time. The principles which should guide the Subordinate Courts in such matters are laid down in this case by the Court (Boys, Banerjee and Niamatullah, J. J.) in the following words: "We cannot however, leave the matter at that without putting on record our view that the Magistrate was unduly hasty in making that complaint. It is right and

proper that all judicial officers, high or low, should keep a vigilant eye on the conduct of legal practitioners, of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Legal Practitioners Act or make complaints under the Bar Councils Act according to the status of the legal practitioner concerned, but legal practitioners are one and all of whatever status, entitled also to the protection of the Court, and inquiries should not be instituted or complaints made without giving very grave consideration to the reasonable probability of the case against the legal practitioner being well-founded. As much injustice may be done to a legal practitioner by ill-conceived proceedings against him as may be done to the public interest and to the general body of legal practitioners by failure to keep a vigilant eye upon and take proper strong action against cases of misconduct. It is manifest that permanent and undeserved harm may be caused to the reputation of any legal practitioner against whom ill considered proceedings are taken. We say advisedly "ill-considered" proceedings. It is equally the bounden duty of every judicial officer to initiate proceedings where he has upon grave consideration, reason to believe there has been misconduct as it is to refrain from ill considered proceedings and *vice versa*."

Notable Dicta.

'Even a settled practice cannot oust the jurisdiction of the High Court'—Sulaiman A. C. J in *Balkrishna Sarma* v. *Emperor*, 1932 A.L J. 39 at p. 40.

"Courts of justice have not only to do justice but should also inspire confidence in the public mind as to their fairness."—Sulaiman, J. in *Pandarath Tewari* v. *Dulhin Topesha*, 136 I. C. 367.

"It is sometimes the simplest issues which cause the greatest conflicts of opinion "—*The Solicitors' Journal*

"Under the numerous rules of O XXI, an attachment does appear as a many-headed hydra. But when the monster is seen steadily and seen as a whole, it is quite amenable to reason and to intelligent parley."—Tyabji, J. in *Lakshman Mahadev Banker* v. *Ram Chandra*, 34 Bom. L R. 117.

Points in everyday practice.

Inherent powers.

Order IX, Civil Procedure Code, is not applicable to the dismissal of an application to set aside a sale under O. XXI, r. 91, Civil Procedure Code, but the Court has inherent jurisdiction to restore such an application if good cause is made out. *Dwarka Das-Babu Ram* v. *Vaish Flour Mill*, (136 Ind. Cas. 283.)

Interest.

Having regards to the terms of s. 34, Civil Procedure Code, the Court has power to award interest after suit, whether claimed specifically in the plaint or not. *Chathurbhuj Tulsiram* v. *Ambarsing Harji* (34 Bom L R. 1240; 136 Ind. Cas. 186.)

Alteration of charge.

Section 231, Criminal Procedure Code, is mandatory and if a charge is amended the accused must be given an opportunity to recall witnesses who may have been examined irrespective of whether the alteration is material or not *Nagendra Nath Sen Gupta* v. *Emperor*, 136 Ind. Cas. 136.

Insolvency.

The Insolvency Court is the only Court which can determine the questions raised under s. 53 of the Provincial Insolvency Act and to decide them and the parties cannot be referred to the Civil Court. *Hridaya Krishna Adya* v. *Osmanali Mandal*, 136 Ind. Cas. 143.

Ex parte decrees.

High Courts have power to grant an injunction restraining execution of an *ex parte* decree pending an appeal from an order refusing to set aside such decree. (Curgenven, J) *Govinda Rajulu Naidu* v. *Imperial Bank*, 35 L. W. 168.

Recent Legislative Measures.

Indian Finance Supplementary Amendment Bill No. 3 of 1932.

The object of this Bill is to enable the assessments of incomes exceedings Rs. 1,000 but not exceeding Rs. 1,999 to be carried out expeditiously and economically with the minimum of labour and inconvenience, by reintroducing the provisions of the Income Tax Act of 1918, s. 30, with one exception namely that the assessment notice is now

to be served personally. The Bill reserves the option to accept the summary assessment or to claim assessment on a return according to the usual procedure.

The Indian Air Force Bill, No. 4 of 1932.

This Bill is intended to provide for the discipline of the officers and men of the Indian Air Force which is expected to come into effect in 1933. The Government have adopted the course of introducing a self-contained Air Force Bill following the general outline of the Indian Army Act. The material of the Bill is drawn from the Indian Army Act and from the British Air Force Act.

The Sugar Industry Protection Bill No. 5 of 1932.

The object of this Bill is to provide for the fostering and development of sugar industry in British India by temporarily increasing the import duty leviable on sugar and to amend the schedule of the Indian Tariff Act, 1894, so as to carry out this object.

The Wire and Wire Nail Industry Protection Bill, No. 6 of 1932, and The Bamboo Paper Industry Protection Bill, No 7 of 1932.

These Bills are intended to protect Wire and Wire nail Industry and Bamboo Paper Industry by imposing a temporary protective duty on Wire and Wire nails and imported pulp, respectively, as recommended the Tariff Board. The latter bill was introduced on the 3rd February, and was referred to a Select Committee. In their report, the Select Committee have added a provision to exempt the proposed duty from the operation of the surcharge imposed by the Finance Supplementary Act, 1931.

The Wheat Import Duty (Extending) Bill, No. 8 of 1932.

The object of this Bill is to extend the existing duty on wheat and wheat flour up to 31st March, 1933.

The Workmen's Compensation (Amendment) Bill, No. 9 of 1932.

Since the coming into force of the Workmen's Compensation Act, 1923, a number of modifications were suggested by various authorities and interests These suggestions were referred to the local Government for opinion and to the Royal Commission on Labour who submitted a report making several recommendations. The Bill is intended to give effect to their recommendations. Many sections of the Act of 1923 are substantially altered.

The Indian Income Tax (Amendment) Bill, No. 10 of 1932.

The statement of objects and reasons recites that the procedure for the levy of Income-tax at present followed in India is antiquated and summary and places an undue power in the hands of the assessing authorities who have been given the final right of hearing the so-called appeal of the assessee. The Bill is intended to remove the most glaring defects in the method of assessment and its control, by bringing the assessors under some popular and judicial control. The most important provisions in the Bill are (*i*) that the Income-tax authorities shall act with the concurrence of three or more assessors and (*ii*) that all appeals against assessments shall lie to a Court connected with the assessing department. In associating the Income tax authorities with assessors and providing for appeals to the Civil Court, the Bill follows the principle of the English Tax Act and it deserves the general support of the rate payers of this country.

Notes of Recent Full Bench Rulings.

ALLAHABAD.

Agra Tenancy Act, 1926, s. 99—Whether retrospective.

Section 99 of the Agra Tenancy Act of 1926 does not apply to a suit in respect of which the cause of action, *i. e.*, the wrongful ejectment or the wrongful resistance to possession arose before the said Act came into force, and the jurisdiction of the Civil Court to entertain such a suit is not barred under s. 230 of the said Act. (Sulaiman, C. J, Boys, Mukerji, King, and Bajpai, JJ) *Ram Karan Singh*, v. *Ram Das Singh* 136 Ind. Cas. 145.

Appeal—Dismissal under O. XLI, r. 11—Contents of judgment.

In a judgment delivered on hearing an appeal under O. XLI, r. 11, Civil Procedure Code, by a Court subordinate to the High Court, compliance with the provisions of O. XLI, r. 31, is necessary. The question

whether in a particular case there has been a substantial compliance with the provisions of O. XLI, r. 31, depends on the nature of the judgment delivered in each case.

Mortgage—Mortgagee in possession—Duty to render accounts—Contract to the contrary—Validity—Transfer of Property Act, 1882, ss. 76 (h), 77.

Where the mortgage is governed by the Transfer of Property Act the mortgagee cannot contract himself out of the liability imposed upon him by s. 76(*h*) of the said Act to give credit for the receipts in the accounts unless he can bring himself strictly within the exception provided by s. 77; 7 Ind Cas. 293, overruled. (Suliaman, C. J., Mukerjee, J, and Boys, J.) *Mohammad Ishak Khan* v. *Rup Narain Singh*, 136 Ind. Cas. 363.

Probate—Oral Will.

An application for the grant of probate of an oral Will can be entertained under the Probate and Administration Act, and the fact that the substance of the oral Will was taken down at the time the Will was made would not make any difference in law. [Sulaiman, Mukerjee and Young, JJ.,] *Pitam Lal* v. *Kalla Ram*, (136 Ind. Cas. 284).

Provincial Small Cause Courts—Officer without Small Cause powers hearing Small Cause Suit which was pending before predecessor—Appeal.

When an officer who has no Small Cause Court jurisdiction hears a case which was pending before his predecessor in-office exercising Small Cause Courts jurisdiction and makes the decree the decree is appealable. 13A 323, overruled. (Sulaiman, A. C. J., Mukerjee, J., and Boys, J.) *Bhagvati Pande* v. *Badri Pande*, 136 Ind. Cas 357.

BOMBAY.

Caste—Right of member to inspect documents.

Every member of a caste is entitled at all reasonable times and on proper demand to inspect the documents of title relating to the caste property and all account books, papers and vouchers regarding its management in the absence of any special rules framed by the caste relating thereto. (Beaumont, C. J., Rangnekar, and Nanavati, JJ.) *Nagin Das N. Lavar* v. *Somnath P. Laver*, 34 Bom. L. R, 343.

Costs—Costs of application for stay of execution pending appeal—Costs in appeal.

In the absence of special circumstances the costs of an application for stay of execution pending an appeal should be costs in the appeal. (Beaumont, C. J, Rangnekar and Nanavati, JJ.) *Yeshwant Kashinath Padwal* v. *Genajee & Co*) 34 Bom. L R 230.

MADRAS.

Execution of decree—Change of territorial jurisdiction after decree—Jurisdiction of second Court to execute decree without transmission by former Court.

Where after the passing of a decree relating to immoveable property, the property in dispute is brought within the territorial jurisdiction of another Court by a notification of Government, the Court which acquires jurisdiction under the notification cannot entertain an application to execute the decree without the transmission of the decree from the first Court which passed the decree. (Beasley, C. J., Ramesam and Cornish, JJ.) *Rama Ayyar* v. *Muthukrishna Ayyar*. A A.A. O. No. 186 of 1929. Mad.

Limitation—Period expiring on holiday—Adjudication of debtor on re opening day—Debt whether provable without filing suit—Limitation Act, s. 4.

If the period of limitation for instituting a suit to enforce a debt expires on a public holiday and on the next re-opening day the debtor is adjudicated an insolvent, the debt is provable in the insolvency. It is not necessary for the creditor for the purpose of keeping his debt alive, to file a suit on the re-opening day, after the intervention of the insolvency. (Beasley, C. J., Ramesam and Cornish, JJ., *Fatma Bi* v. *Nagoorkhan*). 62 M. L J. 256.

NAGPUR.

Limitation—Suit for damages for breach of covenant of title—Limitation Act, Arts. 97, 116.

Under Art, 116 of Sch. I of the Limitation Act, in the case of a suit for damages for breach of covenant of title contained in a registered deed, where the vendee has been put in possession of the property by the vendor and the sale is void *ab initio* as against the rightful owner, limitation begins to run not from the date of sale but from the time the vendee is dispossessed by the rightful owner. *Pirbhu* v *Wazirbi* (1), distinguished. (Jackson, C. J. C., Subedhar and Neogi, A. J. Cs.). *Kasi Ram* v. *Zabu* (136 Ind. Cas. 225).

OUDH

Limitation—Execution of decree—Certification of payment, whether step in aid—Order recording such payment—whether final order—Limitation Act, Art. 182.

(1) The certification to the Court under sub-r. (1) of r 2 of O. XXI, of the Code of Civil Procedure, of a payment of money payable under a decree is not an application to take some step-in aid of execution of the decree within the meaning of sub-cl (5) of Art. 182 of the Indian Limitation Act. (2) The order of the Court under sub-r. (1) of r. 2 of O. XXI, recording such payment is not a final order on such application within the meaning of sub-cl. (5) of Art. 182. (Wazir Hasan, C. J. Raza, J., and Bisheshwar Nath, J.) *Ram Bharose* v. *Ramman Lal.* 9 O. W. N. 208.

Notes of Recent English Cases.

Bankruptcy—Principal and Surety—Rule against double proof.

F guaranteed advances by B to a limited Company. F became insolvent, and the Company was ordered to be wound up. The liquidator proved against F's trustee for monies due by F to the Company and B proved for monies due from F as surety. B also proved against the Company for monies advanced to the Company which had been guranteed by F. The Court held, that F's trustee was not entitled to set off against the liquidator the contingent liability of F on his gurantee and the trustee admitted the liquidator's proof for the full amount, and declared and paid an interim dividend to B but claimed to retain the dividend payable to the liquidator in order to make good the dividend paid to B.

Held, that the trustee was bound to pay the whole of the dividend to the liquidator inasmuch as retention by the trustee of the dividend payable to the liquidator would infringe the rule against double proof. (Luxmore, J.) *Fenton In re, Deed of Arrangement Trustee* v. *Fenton Textile Association, Ltd.*, (1932) 101 L. J. Ch. 1).

Interest—Unreasonableness.

In determining whether interest is excessive or a transaction is harsh and unconscionable the Court may consider among all the circumstances the fact that the borrower himself had never suggested that the interest is excessive or the transaction is harsh and unconscionable and that he has not appeared and does not defend the action or asked for any relief. It was held that the interest 160% per annum was not excessive though very high. (Swift, J.), *Parkfield Trust Ltd.*, v. *Dent* (1932) 101 L. J. K. B. 6.

Income Tax—Income from shares in Company—Mode of calculation for purposes of sur-tax—Deduction at the source.

For purposes of sur-tax the income which an assessee receives from shares in a Company in any year is the sum actually paid to him by the Company added to the amount deducted for income-tax at the standard rate for the time being. The income should not be calculated by adding to the sum actually paid to him a sum calculated from that actually paid by the Company as income-tax during the same year, and proportionate to the assessee's interest in the Company, inasmuch as the Company is entitled under the rules to deduct from the dividends the tax appropriate thereto and the expression tax appropriate thereto means the tax calculated at the rate prevailing at the date of the payment of the dividend, that is, appropriate to the dividend. (Lord Hanworth, M. R., Lawrence, L. J. Romer, L. J.) *Hamilton* v. *Inland Revenue Commissioners*, (1931) 100 L. J. K. B. 693 (C. A.)

Income-Tax—Theatrical actress entering into contract of employment—Mode of assessment—Meaning of employment.

'Employment' as used in the Finance Act, 1922, s. 18 (1) means something analogous to an office or post as opposed to a mere engagement in the course of carrying on a profession. Therefore, where an actress enters into contracts of employment with theatrical firms she can be assessed only as following her profession of an actress and cannot be assessed as exercising certain employments under the particular engagement which she has made. (Rowlat, J.), *Davis* v. *Braithwaite* (1931) 100 L. J. K. B. 619.

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Notes on Current Topics.

The English Bar Council Report.

Though the theme of professional ethics is well worn, now and then practical difficulties on which different views might reasonably be held arise. In the last report of the General Council of the English Bar some questions of general importance have been answered. The Council has expressed its opinion that members of the Bar should not write articles for, or give interview to, newspaper representatives with regard to pending cases, nor regarding cases where the time for appeal has not expired. The *Solicitors' Journal* doubts the propriety of this rule and says that "a barrister in respect of cases under appeal should not have less freedom of comment than a layman and that criticism of the law laid down by a judge if properly made should surely be allowable at any time and it is not likely that the judges in the court of appeal would be unduly influenced if they read it." The position of a barrister is much more responsible than that of a layman. He is an officer engaged in the administration of justice and his opinion is bound to have a greater influence, whether for good or bad, and it is not proper to claim for a barrister the same latitude as for a layman. Again, granting that the assumption that such comments are not likely to influence the judges is correct, the fact that our judges may be too strong to be influenced is no excuse for making such comments. *Ex parte* comments are bound to prejudice the minds of the public and create a want of confidence in the administration of justice and should be avoided. We may refer our readers in this connection to Art. 20 of the Code of Ethics of the American Bar Association which runs as follows:

"*Newspaper Discussion of Pending Litigation*:—Newspaper publications by a lawyer as to pending or anticipated litigations may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously."

To the question whether a barrister could appear for a creditor in a bankruptcy petition when he himself was also a creditor of the bankrupt, the Council replied that as a general rule it is undesirable for a barrister to appear in a matter in which he is himself pecuniarily interested. It was, however, a matter for counsel individually to determine when they may properly make exception to the general rule.

The question whether an ex-Indian Judge could practise in the Privy Council was also considered by the Council of the English Bar and in its report it has recorded the opinion that in the absence of any objection or question raised by the Indian Government, India Office or Board of the Privy Council, generally or in a particular case, there is no objection to an ex-Indian Judge practising before the Board of the Privy Council.

Law of Negligence: Theory of fantastic possibility.

The House of Lords has recently decided an interesting case on the law of negligence: (*Fardon* v. *Harcourt—Rivington* January 22, 1932: Lords Dunedin, Warrington, Atkin, Macmillan and Thankerton). The defendant parked his car in a street leaving a young dog inside the car While the plaintiff was passing by, the dog started jumping about on the seat and smashed the glass panel at the back of the car with the result that a splinter of the glass entered the left eye of the plaintiff and his eye had to be removed. There was no evidence to show that the dog had a dangerous propensity. The jury found for

the plaintiff and awarded him £2,000 damages. The Court of Appeal allowed the defendant's appeal and in the House of Lords the decision of the Court of Appeal was affirmed. Their Lordships held that the danger of a piece of glass being knocked by a dog out of a widow at the back of a car and of a splinter of glass hitting a passer-by was such an unlooked-for event that no one could reasonably say that the defendant ought to be convicted of negligence for not taking precautions against it. A person must guard against a reasonable probability of danger ; he is not bound to guard against a fantastic possibility.

"It is better that ten guilty men should escape than that one innocent man should suffer."

The *Law Times* (February 6) contains an interesting note on the evolution of this legal maxim. The first mention of the idea is to be found in Fortesque's "De Laudibus". Two hundred years later Hale in his "Pleas of the Crown" restated the aphorism though in a slightly different form. In 1823, Mr. Justice Holroyd stated the maxim in its present form, and in this form it is reported by Sir Gregory Lewin in his Crown Cases. Though, as the *Law Times* has humourously observed, the number of guilty persons who should escape rather than that one innocent should suffer has varied from time to time, and as Mr. C. K. Allen in his "Legal Duties and other Essays in Jurisprudence" has observed, ideally the acquittal of ten guilty persons is exactly ten times as great a failure of justice as the conviction of one innocent person, the maxim embodies in a striking way the sanctity of innocence and emphasises the caution which criminal courts should exercise before coming to a conclusion adverse to an accused person.

Section 80, Civil Procedure Code, and suits for injunction.

For many years there had been a marked difference of opinion between the High Courts of India on the applicability of s. 80, Civil Procedure Code, to suits for injunction. In *Bhagchand's case* (I. L. R. 51 Bom. 725) the Privy Council thought that it was undesirable that the difference of opinion on this point should be left unresolved and after discussing the rulings of the Indian High Courts and the object of the section observed:—

"Section 80 is express, explicit and mandatory and it admits of no implications or exceptions. A suit in which *inter alia* an injunction is prayed is still "a suit" within the words of the section and to read any qualification into it is an encroachment on the function of legislation.....Section 80 imposes a statutory and unqualified obligation upon the Court." In *Krishnaswami Sastri* v. *Syed Ahmed* (34 L. W. 993) Curgenven, J., of the Madras High Court has, however, held that the words 'in respect of any act purporting to be done by any such officer in his official capacity' in s. 80, Civil Procedure Code, clearly refer to a past act and not to any action merely contemplated or threatened and that s. 80 is not applicable to suits for injunction in respect of such acts. Curgenven, J, is of opinion that *Arunachalam Chetti* v. *David* (I. L R 50 Mad. 239) in which such a view was held is good law, notwithstanding the later decision of the Privy Council, as their Lordships have not considered the meaning of the words "for any act purporting to be done" in *Bhagchand's case*, Curgenven, J., would confine the decision in *Bhagchand's case* to suits for injunction based on past acts. We think that the decision in *Arunachalam Chetti's case* was based on certain considerations applicable to suits for injunction in general and as those have been disapproved by the Privy Council the said decision is no longer law. If any part of the judgment in that case still holds good it is the view expressed by both the learned judges that, gramatically, the words "acts purporting to be done" are wide enough to cover future acts. Again, though suits for injunction may be based on past acts, they are, save in the case of mandatory injunctions directed against future acts. We think, after all, this is the same old controversy in a new shape and that in the face of the definite pronouncement of the Judicial Committee in *Bhagchand's case* of the scope and object of s. 80, Civil Procedure Code, it is now too late in the day to contend that s. 80 is not applicable to suits for injunction in respect of future acts.

A Curious Anomaly in the Penal Code.

Section 392, Penal Code, prescribes the punishment for robbery and dacoity and the

next section prescribes the punishment for attempt to commit such offences. Section 397 prescribes that, if at the time of committing robbery or dacoity, the offender uses any deadly weapon or causes grievous hurt etc, the imprisonment with which such offender shall be punished shall not be less than seven years; and s. 398 provides that if at the time of attempting to commit such an offence the offender is armed with any deadly weapon, the imprisonment with which such offender shall be punished shall not be less than seven years. As these sections stand, the minimum punishment of imprisonment for seven years applies in the case of a completed offence of robbery or dacoity if a deadly weapon has been *used* and in the case of an attempt to commit robbery or dacoity if the offender *is armed with* any deadly weapon. The result is that if the offender is merely armed with a deadly weapon and does not use it, if the offence is merely an attempt, the minimum sentence of seven years has to be imposed, but if the offence is actually committed the Court is not bound to give any minimum sentence. This is certainly a curious anomaly requiring the immediate attention of the Legislature. The matter has been brought to light recently in a case decided by the Oudh Chief Court, *Chandra Nath* v. *Emperor* [9 O. W. N. 152.]

In *Nga I.* v. *R.* (1911, 6 L. B. R. 41, 14 Ind. Cas. 651) the word 'uses' in s. 398 has been interpreted in a wide sense so as to include cases where the offender is possessed of a weapon for the purpose of overawing the person robbed. We cannot get over the anomaly even by giving such an interpretation, as it is impossible to widen the meaning of the word 'uses' to such an extent as to cover all cases of *being armed with*, for instance, where the offender keeps the weapon concealed in his dress so as not to be visible to outsiders while committing the offence. By the way, we doubt whether the remark made by Sir H. S. Gour in his Penal Law that if 'uses' is interpreted in the wide sense referred to in *Nga I's case* the next section would be superfluous is correct as s. 397 deals with actual robbery or dacoity and s. 398 deals with mere attempts.

Amendment of decree and s. 5, Limitation Act.

It was held by Mookerjee, J., in *Brojolal Rai Chowdhury* v. *Tharaprasanna Bhattacharjee* (3 C. L. J. 188) that if the amendment of a decree has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, the appeal should not be admitted out of time and this decision was followed by the Allahabad High Court in *Gajadhar Singh* v. *Basant Lal*, (I. L. R 43 A. 380). But the soundness of this proposition has been challenged in the recent decision of the Calcutta High Court in *Nandlal Ganguli* v. *Dasarathi Mukerjee* (36 C. W. N. 218, Mukerjee, J., and Mitter, J.) In the later case Mukerjee, J., referring to the above proposition says "With this proposition, I am afraid, I cannot agree, because it means to circumscribe and limit the discretion which s. 5 of the Limitation Act confers upon a court by the terms in which that section is expressed. In my opinion even in a case in which the amendment has no relation to the grounds upon which the validity of the decree is sought to be challenged in appeal, circumstances may appear which may justly bring the case within the meaning of the expression 'sufficient cause' which appears in that section." It is doubtful whether in *Brojolal's case* the learned Judge intended to lay down an invariable proposition of law, but if it was so, we think that the later decision lays down the correct law.

Notable Dicta.

Enmity.—Enmity is a double-edged weapon and what would be a reason for murder might well be a reason for fabrication of a false case also. *R.* v. *Bharat Singh*, 9 O. W. N. 45.

Suppression of Facts.—If in a criminal case the complainants choose to suppress the real facts and give false or unreliable evidence in order to implicate their enemies, the only result is that the persons who are probably guilty have to be acquitted, *R.* v. *Bharat Singh*, 9 O. W. N. 45.

Law.—"The law is not made by casual and hasty decisions in courts of first instance. Its guiding principles and the harmony of its controlling ideas must be sought in the considered judgments of the higher tribunals".—Sir Frederick Pollock.

Text Books.—"Of the first three editions of a law treatise the third is usually the worst."—Pitt Taylor.

Common Law.—"The common law consists of about half a dozen obvious propositions but unfortunately no one knows what they are"—Lord Sterndale.

Points in everyday practice.

Insolvency.—Possession of assets is not a condition for adjudicating a debtor as an insolvent. *Doraswamy Chettiar* v. *Abdul Subhan Sahib*, 35 L. W. 148.

Court Fees—An application for restoration of an appeal dismissed for default in payment of paper-book cost is not an application for review. A Court-fee of Rs. 2 is sufficient. *Nalini Sundari* v. *Narendra Chandra*, 36 C. W. N. 246.

Complaint.—Dismissal of an application for making a complaint under s. 476, Criminal Procedure Code, does not bar a second application for the same purpose. *Kalastri Mudali* v. *Emperor*, 136 Ind. Cas. 313.

Withdrawal of suits. An application for withdrawal with liberty to institute fresh suit must be treated as a whole and the Court cannot allow the prayer for withdrawal alone without giving liberty to bring fresh suit. It must grant the petition as a whole or allow the plaintiff to proceed. *Marudhchala Nadar* v. *Chinna Muthu Nadar*, 136 Ind. Cas. 316.

Appeal after review.—It is open to the aggrieved party to appeal from an order granting review without appealing from the altered decree itself. If the order granting review is set aside all subsequent proceedings taken under that order must also the regarded as having been set aside. *Radhakrishnadas* v. *Beni Madhabdas and others*, 36 C. W. N. 212.

Arbitration.—A person who is to be appointed umpire should not be at the same time an arbitrator. *Kafurchand Fulchand* v. *Jewaraj Chunilal*, 36 C. W. N. 332.

Partnership—A partner has no authority to bind the other partners by a reference to arbitration. *Rajendra Prosad* v. *Pannalal Champalal*, 36 C. W. N. 8.

Extracts from Contemporaries.

An All-India Federation.

The great attempt at the making of a Constitution for India which, in continuation of the Round Table Conference of last year, has been in progress for the last three months, has come to an end without specific result, but is to be carried on by a small representative Committee which will meet in India. Starting from the declaration made by Mr. Montagu in the House of Commons in August, 1917, that the policy both of the British Government and the Government of India was "the increasing association of Indians in every branch of the Administration, and the gradual development of self-governing institutions with a view to the progressive realisation of responsible Government in India as an integral part of the British Empire"; and proceeding by the conferring of increased powers on the Provincial Legislatures by the Government of India Act, 1920; the British Government prepared the way for further development by the appointment, under that Act, in November, 1927, of the Indian Statutory Commission, of which Sir John Simon was the Chairman. The Report of the Commission, issued in June, 1930, is valuable for its wide survey of the conditions to be dealt with, but its actual constructive proposals have formed little more than the groundwork for the discussions in the two Round Table Conferences. There remains, however, to the credit of the Commission the conception of a Federal India, and the working out of this conception has been the task of the Lord Chancellor's Federal Structure Committee of the Conference. At the time of the Report, the Statutory Commission were not able to speak confidently of the attitude of the Indian Princes to Federation, but the doubt in that respect has been, in principle, removed and the central point in the Prime Minister's statement of the Government's Indian policy at the closing sitting on the 1st instant of the Round Table Conference was that "the great idea of an All-India Federation still holds the field." The statement has been issued as a Parliamentary Paper (Cmd No. 3972), and was approved by the House of Commons last week after a two days' debate by 369 to 43, and it has been under consideration in the House of Lords this week.—*Law Journal.*

India and Dominion Status.

The discussions on the Government of India, coming at the same time that the Statute of Westminster has been in progress, have naturally raised the question whether the new conception of Dominion Status can properly be applied to India. In the past there appeared to be no objection to treating India on the same footing as the other Dominions of the Crown, and if the term "Dominion Status" was applied to them, it was natural for the same status to be anticipated for India. But whether this is now appropriate in view of the altered conception of Dominion Status which is embodied in the Statute of Westminster has been doubted. Mr. Churchill, writing to *The Times* (25th ultimo) says: 'The Imperial Conference of 1926 had transformed the meaning attached to the loose term 'Dominion Status' in such a way as to abolish all conception of Imperial supremacy; and this vast change was subsequently to be prescribed in the rigid language of a Statute." That has been done, and as we have pointed out, the translation of Dominion Status into statutory form was inevitable so soon as the Dominions desired that their legislative independence should be thus declared. Of course, the conditions as to self-government in India are very different from those in the Dominions which prompted the late Lord Balfour's formula of equality of status, and it was never contemplated that the Statute of Westminster should apply at this stage of her development to India. The Statute is restricted to the six Dominions mentioned in it, and these do not include India. But it can hardly be doubted that the same goal will be the object of Indians, though how long and difficult may be the way to it cannot be foreseen.—*Law Journal.*

Lawyers and Jokes.

Mr. Justice MacKinnon is recently reported to have given the following advice to the members of a Law Society. "There is only one golden rule if you wish to succeed either as a young solicitor or barrister That is, never make a joke. I have known many people blessed with a happy wit who have failed when others have succeeded with a portentous solemnity."

Expression of Views by the Bench.

We think that His Honour Henry Terrell, K. C., has rendered a public service by drawing attention in his letter to The *Times* of the 2nd December, to the growing practice for Judges of the King's Bench Division and others holding judicial office to express their views from the seat of justice, on matters which are the subject of controversy with the general public. His Honour's letter was prompted by the recent observations made by Mr. Justice McCardie regarding the crime of procuring abortion. We are not concerned with the moral aspect of the matter upon which, as a famous Magistrate is reported to have said, to the apparent satisfaction of all parties, "there is much to be said upon both sides," but it is, in our view, undesirable that a judge should, speaking from the Bench, express his personal opinion on such a vexed question, especially as his remarks appear to invite the commission of what, as the law now stands, is a crime. As His Honour indicates in the letter to which we have referred, expressions or pronouncements from the Bench on religious, political or other matters upon which there is a division of opinion amongst the public may call in question the complete impartiality of those indulging in them and tend to undermine confidence in the administration of justice. There is, of course, no suggestion that in fact the learned judge would allow his personal views to interfere with his public duty, but we cannot regard it as other than inadvisable that he and others should place themselves in a position which, to the uninformed, might give ground for suspicion that in certain classes of cases the Bench might be expected to be biased on one side or the other—*Solicitors' Journal.*

A Husband's Rights.

The remarkable trial which took place at Cambridge Assizes a few days ago (*Place* v. *Searle*, *Times*, January 19 20) reminds us that a husband still has at common law the old remedy of action against those who by enticement or persuasion, deprive him of the "help, society, and comfort" of his wife. It is not, however, enough to show that the wife has left after advice given by another. The jury must find that the advice or persuasion cause her departure. Acquiescence by an outsider in the wife's voluntary act, too, is not enough. This appears pretty clearly from the charge of Mr. Justice Wright to a jury at Leicester nearly thirty years ago (*Smith* v. *Kaye*, 20 T. L. R 261.) The leading case is

Winsmore v. *Greenbank* (1745, Wills 577), where some interesting old law is collected. It was laid down there that declarations by the wife were not admissible—a point which seems to have been overlooked at Cambridge. Another point elucidated there is that there is no need to give particulars of the means adopted by the defendant. A verdict on a general declaration of persuading, enticing, and procuring will stand.—*Law Journal.*

Punishment varies as the Judge.

The punishment of offenders varies as the Judge, his head, his heart, his liver, his stomach, his philosophy and his marital condition, or any one or more of many causes. And this is a terrible defect in our justice. We all know or the judge who thought it his duty to impose the maximum penalty in every case; or of the other who, after describing a crime as the worst in his experience, would pass a light sentence of six months on the worst offender.—*Law Journal.*

Law Reporters as Judges.

It is not to be supposed that law reporters do not practise. Many of them do, although their practice is naturally not so large as to justify them in giving up the certain, if small, income derived from law reporting. I have heard men wonder why they are not more frequently chosen for the position of Magistrate or County Court Judge: for most of them have unusual knowledge not only of case law, but of legal principles, and a cultivated faculty for rejecting the irrelevant and for discerning the material points in a mass of evidence. Moreover, most of them are patient men.—*Law Journal.*

Judicial Dress.

The story of clothes is a not unimportant part of social and economic history. Industries have bloomed and decayed as the result of changes in fashion and there can be no doubt that the shape and colour of human habiliments are affected by and in turn affect men's mentality.....The Bench and the Bar no more than other men can escape from the effect of their cosutme .....The Judges cannot be accused of embarrassing their costumiers by frequent and hasty changes of fashion. Their official garb is largely as it was ordained by the judicial body in 1635. Wigs were added at the end of the seventeenth century and have persisted, though not without modification to the present day. There is a great deal to be said for the pageantry of justice and we would not willingly part with it. But it might be fairly asked whether so many and various garments are essential for the Judges. There is nothing to be said for wigs which are definitely said to be insanitary and but rarely becoming—*Justice of the Peace.*

Recent Legislative Measures.

Indian Khadar (Name Protection) Bill No. (11 of 1932).

Owing to the considerable progress made in the manufacture of *khadar* spurious *khadar* is manufactured both in India and abroad and as there is a likelihood of purchasers being misled, this Bill has been introduced by Mr. Gaya Prasad Singh to extend the protection afforded by the Merchandise Marks Act, 1889 to the names *khadar* and *khadi* which have come to denote hand-spun and hand-woven cloth only.

Indian Coastal Traffic Reservation Bill (No. 12 of 1932).

Mr. Sarabhai Haji's Indian Coastal Traffic Bill was referred to a Select Committee and the report of the said Committee was presented to the House but the Bill lapsed owing to the dissolution of the Assembly. Mr. B. V. Jadhav has submitted the same Bill as approved by the Select Committee. The object of the Bill as is well-known is to provide for the employment of Indian tonnage in the coastal traffic of India, and the Bill is intended to serve as an aid to the rapid development of an Indian Merchant Marine.

Hindu Untouchable Castes (Removal of Disabilities) Bill (No. 13 of 1932).

This Bill has been introduced by Mr. Shunmugam Chetty with the object of

removing the disabilities of the so-called untouchables in Hindu society. The Bill provides that no person belonging to the Hindu community shall be deemed to be incapable by reason of his caste, of sharing the benefit of Hindu religious and charitable trusts of a public nature and of conveniences like public wells, tram-cars buses etc, which are maintained or licensed for the use of the public

Prevention of Dedication of Devadasis Bill (No. 14 of 1932).

This is another Bill introduced by Mr Shunmugam Chetty to put an end to the practice of dedicating girls to Hindu temples for the purpose of service to the idol which has degenerated into a method of initiating young women to a life of immorality and prostitution. The Madras Presidency, the United Provinces, and the Mysore State have already adopted Legislative measures to deal with this evil and the object of the present Bill is to enact a comprehensive measure dealing with this evil wherever it exists in British India.

Hindu Inheritance (Amendment) Bill (No. 15 of 1932).

This Bill has been introduced by Sir Hari Singh Gour to amend the Hindu Law of Inheritance by providing that a son's widow shall be entitled to rank in the order of succession next after the sister's son.

Child Marriage Restraint, Repeal and Amendment Bills (Nos. 16, 17, 19 & 20 of 1932).

These Bills are intended to amend the Child Marriage Restraint Act of 1929. Mr. Bhuput Singh wants provision to be made for those cases in which parents or guardians may, by reason of their conscience or exceptional family circumstances, have to marry their children before they have attained the age prescribed by the Child Marriage Restraint Act Mr. Wajihuddin, wants the Act to be repealed altogether or at least so far as the Muslims of British India are concerned, and Mr. Krishnamachariar wants Brahmins, Vaisias, Sourashtras and other communities amongst whom post-puberty marriage is forbidden, to be excluded from the operation of the Act.

Criminal Procedure Code (Amendment) Bill (No. 18 of 1932).

The main amendments proposed in this non-official Bill are the following.—(*i*) Omission of ss. 30 and 34, (*ii*) amendment of s. 103 by substituting the word 'vicinity' for 'locality' and by inserting a new provision that no evidence other than the search list shall be admissible to prove the articles discovered, (*iii*) amendment of s. 167 by providing that the accused or his counsel shall be heard, if he so desire, and (*iv*) repeal of ss. 412 to 415. Certain amendments to ss. 205 (1), 386 (1) and 406 are also proposed.

Notes of Recent English Cases.

Bankruptcy—Hire purchase agreement—Hire falling due after adjudication—Whether vests in Receiver or prior purchaser.

An owner of goods let them on hire purchase agreement under which the hire was payable monthly in advance and the agreement might be determined at any time. He assigned the benefit of the hire purchase agreement and then became bankrupt:

Held, that the monthly payments which accrued due after the date of the bankruptcy were 'debts growing due' within s. 38 (*c*), Bankruptcy Act, 1914, and, therefore, passed to the trustee in bankruptcy and not to the assignee. (Lord Hanworth, M. R, Lawrence, L. J. Romer, L. J.,) *Blakey* v. *Trustees of the Property of Pendlebury*, (1931) 100 L. J. K. B. 399 (C. A.)

Will—Gift for the benefit of the community as a whole—Validity.

Where a testator made a gift "unto my country England to and for.....own use and benefit absolutely": *Held*, that the gift was a valid charitable gift (Lord Hanworth, M. R, Lawrence, L. J. and Romer, L. J.) *Smith, In re*; *Public Trustee* v. *Smith*, (1931) 100 L. J. Ch. 409 (C. A.)

Vendor and purchaser—Auction—Misrepresentation in particulars of sale—Rescision of contract.

In the particulars of an auction sale certain lease hold premises which were put up for auction were described as 'valuable business premises' though there were covenants in the lease against carrying on any business except that of ladies' out

fitter, fancy draper and manufacturer of ladies' clothing. A dairyman purchased the premises and finding that there were such restrictive covenants refused to complete the purchase. In a suit for specific performance by the vendors: *Held*, that inasmuch as the use of the premises was restricted to one trade they were not 'valuable business premises' and as the purchaser had been misled by the particulars of sale he was entitled to avoid the contract and recover the deposit he had paid. (Clauson, J.) *Hunt (Charles) Limited* v. *Palmer*, (1931) 100 L. J. Ch. 356.

Husband and wife—Domicile. Where the circumstances of a case are such as to raise a presumption that an alien has acquired a domicile in England the acquisition is not negatived by the fact that during his residence in England he was subject to the Aliens' Restriction Act 1914, and the Aliens' Order, 1920. *Boldrini* v. *Boldrini*, (1932) 101 L. J. P. 4 (C. A.)

Divorce—Costs—Wife's petition.—A wife's right to receive from the husband the costs of an abortive trial is not absolute. The Court has a discretion to reserve its decision until the determination of the final issue. *Grist* v. *Grist* (1932) 101 L. J. P. 1.

Patent.—In a 'threats' action to restrain the defendant from alleging that his patent has been infringed by the plaintiff, the plaintiff is entitled to raise the question of the validity of the patent *Pittevil* v. *Brackelsberg Melting Processes Limited* (1932) 101 L. J. Ch 8. (C. A.)

Companies—Winding up—Solicitor's costs—A compulsory order was made for the winding-up of a company and for taxation and for payment of costs of the petition out of the assets of the company. These costs were taxed upon the basis that the company was insolvent and were allowed at the sum of £ 83. The company turned out to be solvent and the solicitor claimed to prove as creditor for the balance of the costs due to him. At the date of the winding-up order the company was indebted to the solicitor for costs in the sum of £433. The liquidator rejected the proof.

Held, the liquidator was bound to admit the proof subject, if he so wished, to taxation of the whole bill. *C B & M (Tailors) Ltd., In re* (1932) 101 L. J. Ch. 6.

Review.

The Punjab Criminal References, Vol. II, 1920—1930: By Rai Bahadur DIWAN CHAND OBHRAI, B.A., LL.B, Ex-Government Pleader and Public Prosecutor, Peshawar: Advocate, High Court of Lahore. Price Rs. 12—Nett

The first Volume of Mr. Obhrai's Punjab Criminal References was published some time back. Mr Obhrai has now brought out the second volume. The present volume deals with all the Criminal Rulings of the Lahore High Court from the beginning of 1920 to the end of 1930. The important feature of Mr. Obhrai's work is the exhaustive analytical abstract of each case.

The learned author has taken great pains to find out the legal principles enunciated in each case and to state them accurately and clearly. The facts of the cases are also briefly stated and all notable remarks and *dicta* of the Judges are faithfully reproduced. Notes of cases cited and the subsequent history of each case are also given. The work entirely differs in its plan from the ordinary digests and is far more useful.

It fulfils the purposes of a concise reporter, a digest, a subject index and an index of cases judicially noticed. In fact we get in Mr. Obhrai's book all the information which a practitioner or a text-book writer is likely to require about a case.

The publication is the result of immense labour on the part of an able and experienced lawyer and we have not come across any other book which will be so useful to the criminal practitioners of the Punjab as Mr. Obhrai's Punjab Criminal References.

INDIAN CASES

1932.

Vol. 136 JOURNAL Part 4

Notes on Current Topics.

The Centenary of Sir T. Muthuswami Iyer.

The centenary of Sir T. Muthuswami Iyer, the first Indian judge who sat on the Bench of the Madras High Court, was celebrated recently by the members of the Madras High Court Bar under the auspices of the Advocates and Bar Associations. The Advocate-General, Sir Alladi Krishnaswamy Iyer, in delivering the welcome address spoke about the great qualities of Sir T. Muthuswami Iyer, about his classical judgments and his high conception of duty. The Chairman, Sir C. V. Kumaraswami Sastriar, made a short speech paying tribute to the greatness of Sir T. Muthuswami Iyer in the course of which he laid stress on the importance of such functions. The Chairman said that the recalling of the memories of great men was a necessity. It was an expression of gratitude to those who have been our leaders and who by their genius, precept and example have dignified as well as lightened our labours. It was the effort of man to defy the tendency of time to obliterate memories and to wrest from the destroyer at least the fragarance of the ashes of remembrance. Justice Sir Vepa Ramesam, Dewan Bahadur T. R. Ramachandra Iyer and other leading members of the Bar also spoke on the occasion.

The late Sir T. Muthuswami Iyer's youth was spent in poverty, hard work and privations. He started his life as a Tahsildar's clerk and the Tahsildar who was struck by his ability and intelligence educated him up to the F. A. Class. Muthuswami Iyer then entered service in the Inam Commissioner's Office and after serving as District Munsif and Presidency Magistrate he became the judge of the Small Cause Court. After Lord Lytton's Durbar when it was proposed that an Indian judge should be appointed to the High Court, Sir T. Muthuswami Iyer was selected and appointed. He served in the High Court for sixteen years and an idea of his sense of duty and devotion to work can be had from the fact that during this long period of sixteen years he took leave only once and that, just before his death. He has expressed his high conception of the duties of a Judge in these memorable words :—

"The Court of Justice is a sacred temple; the judges presiding over it are, though men, the humble instruments in the interests of truth and those who enter this holy edifice with unholy thought or desecrate it with unworthy actions are traitors to their God and to their country. Those of you who may rise to the Bench should recollect that the power you may be called on to exercise in the name of your sovereign is according to one of your ancestors a power divine."

The Electric Comb Case.

The recent case of *Wood* v. *Letirk Limited* (146 L. T. 36) bears a close resemblance to the well known case of *Carlill* v. *Carbolic Smoke Ball Co.*, and affirms the principle laid down in that case. In *Wood's case* the defendant company advertised their comb as follows:—"New hair in 72 hours. Letrik Electric Comb. Great news for hair sufferers. What is your trouble? Is it grey hair? In 10 days not a grey hair left. £ 500-guarantee." The plaintiff whose hair had turned grey purchased the comb and followed closely the directions given by the company but nothing happened except that his head began to ache by constant combing. He sued the company. Mr. Justice Rowlatt gave a decree for £100. As Lord Justice Lindley observed in the *Carbolic Smoke Ball Co's case* where there is a distinct promise expressed in language which is

perfectly unmistakable, the promisor cannot escape by saying that his promise was a mere puff.

Amendment Depriving Defendant of the Defence of Limitation.

An important aspect of the law of limitation in relation to amendment of plaint was recently considered by the Court of Appeal (Scrutton and Greer, L. JJ.) in *Mabrao* v. *Eagle Star and British Dominions Insurance Co Ltd.* (Law Times, page 131). Order XVI, r. 2 of the Rules of the Supreme Court which corresponds to O. I, r. 10, of our Civil Procedure Code provides that where an action has been commenced in the name of a wrong person or where it is doubtful whether it has been commenced in the name of the right plaintiff, the Court or a judge may..... order any other person to be substituted or added upon such terms as may be just. In this case two persons *A* and *B* effected an insurance in 1922, and sued on the policy in 1925. In 1931, an application was made that *C* should be added as plaintiff as he *C* was the person really interested in the insurance, *A* and *B* being merely agents for collection. The application was refused by Branson, J., and the Court of Appeal held that Branson, J., was right in refusing the application as it would take away from the defendants a defence which had already accrued to them by virtue of the Statute of Limitations. Though s. 22 of the Indian Limitation Act provides that where a new party is substituted or added, the suit shall as regards him be deemed to have been instituted when he was so made a party, doubts have been entertained as to the applicability of the rule to cases where the Court adds a party under O. I, r. 10, Civil Procedure Code (*vide* 66 Ind. Cas. 217) and to cases like the present one where the person interested in name is already on record and the real person is sought to be added at a subsequent stage. The trend of the recent decisions of the High Courts of India is towards the view that s. 22 applies even to such cases (*vide* I. L. R. 35 Cal. 519; A. I. R. 1930 Lah. 747) and there are numerous rulings to the effect that a plaint cannot be amended so as to base the claim on a cause of action which is time barred. But the matter does not seem still to be beyond doubt. Beaumont, C. J., for instance, in a recent case of *Parbhudas Girdhardas* v. *Lallubhai Khushal*, 34 Bom. L. R. 35, observes that there is no invariable rule that an amendment should not be allowed so as to base the claim on a time-barred cause of action, and that even if the amendment introduces a new cause of action it is within the powers of the Court in special circumstances to allow the amendment even though the cause of action may be barred by limitation. The decision of the Court of Appeal does not, however, seem to support the theory that the Court has a discretion in the matter.

Arbitration between Companies.

It was held by the Lahore High Court in *Sundar Mal-Lakhu Mal* v. *Paris Business Corporation Ltd.* (132 Ind. Cas. 398; A. I. R. 1931 Lah. 555) that s. 152 of the Companies Act does not empower a Court situated in a local area to which the Indian Arbitration Act has not been extended, to apply the provisions of the said Act to arbitration between companies or between companies and third persons. In 1931 *Company Cases* Jour. page 3 in commenting upon this case it was observed as follows:

"It seems to be plain from the section itself that its object is to make the provisions of the Arbitration Act applicable to all arbitrations under the Companies Act and with all respect to the learned Judge we think the decision does not lay down correct law."

We are happy to find that this view has been approved in a very recent judgment of the Patna High Court in *Roop Lal Agarwala* v. *Dhanasar Coal Company* (13 Patna Law Times 169) decided on February 12th. In this case Scroope, J., after considering the history of the Companies Acts of 1882 and 1913, and the language of s. 152 observes:

"The object of the relevant sections of the Companies Act of 1882 was to give facilities to companies for arbitration so as to bind the corporate body and it was never one of the purposes of the Arbitration Act to restrict these facilities to Presidency towns or local areas notified as such" and in his Lordship's view the position has not been altered by the passing of the new Indian Companies Act VII of 1913. With reference to the Lahore case, Scroope, J. says:

"I cannot therefore agree with the view of Jai Lal, J., in the above case."

We think that it may now be taken to be settled law that the facilities given by s. 152 to Companies for reference are not restricted by s. 2 of the Arbitration Act which limits its application to cases where the subject matter could be the subject of a suit in a Presidency town. Limited companies which

would otherwise have been deprived of the facilities for arbitration given by s. 152, Companies Act, in respect of dealings in the *moffusil* are sure to read this decision with great relief.

Power to apply for copy of judgment.

Section 61 of the Income Tax Act provides that any assessee who is entitled or required to attend before any Income-tax authority in connection with any proceeding under the Act may attend either in person or by any person authorised by him in writing in this behalf. In *Basantlal Ramjidas* v. *The Commissioner of Income Tax, Bihar and Orissa* (136 Ind. Cas. 302) the Chief Justice of the Patna High Court has held that a pleader who is authorised to conduct an appeal before an Assistant Commissioner of Income-tax is not entitled, in the absence of express authorisation in that behalf, to apply for copies of the judgment of the Assistant Commissioner in that case. "It does not follow," says his Lordship, "that because an agent is duly authorised to conduct the business of the appeal before the Assistant Commissioner he is *ipso facto* authorised to obtain copies of the Assistant Commissioner's judgment or indeed to perform any act preparatory or incident to the conduct of an appeal." His Lordship holds that it is reasonable and proper for the department to require that any person asking for the copy of the judgment should be expressly authorised in writing in that behalf. With all respect to the learned Chief Justice we think that it is not correct to regard an application for a copy of the judgment as an act *preparatory or incident to an appeal*. It is surely an act which a pleader has to perform *in the conduct of the case itself* and authority to conduct a case necessarily confers authority to apply for copies of the judgment given in that case. Again, when the section says 'any person authorised' it does not seem proper to introduce the word '*expressly*' into the section, and further, even granting that express authority is necessary, a person who is expressly authorised to conduct a case is expressly authorised to apply for copies of the judgment pronounced in that case. Anyhow, until this case is reconsidered, lawyers practising in courts which are bound by this ruling have to see that the *vakalatnamas* contain an express authority to apply for copies of the judgment, especially in income-tax cases.

Defendant's Right to Execute Decree for Specific performance.

The interesting question whether the defendant can execute a decree for specific performance against the plaintiff has been recently discussed with reference to principle and authority by Rankin, C. J., of the Calcutta High Court in *Heramba Chandra Maitra* v. *Jotis Chandra Sinha*, (36 C. W. N. 172). As the learned Chief Justice has observed it is not a very usual thing for any person to be so foolish as to bring a suit for specific performance, prosecute it to a decree and then change mind and it is not a very remarkable thing that the text books do not contain precedents of so extraordinary a position. But the principle that a decree for specific performance enures for the benefit of both parties seems to have been regarded as a maxim in equity in England and in *Baikarima Bibi* v. *Abderahman* (I L. R. 46 Bom. 590) it was held that a decree for specific performance was capable of being executed by the defendant as well as the plaintiff. The lucid judgment of Rankin, C. J., in this case has put the matter beyond all controversy. Whether the defendant should proceed by way of execution or by summons in the same suit is a more difficult question. On this point the learned Chief Justice has expressed the opinion that the definition of the word 'decree-holder' in s. 2, Civil Procedure Code, is quite applicable to the case of the defendant in a suit for specific performance, but his Lordship has left the matter open with the remark that even if the defendant proceeds by way of execution it would be open to the judge to treat the tabular statement as a summons in the suit, where the Court to which application is made is the same as that which passed the decree.

'Appearance' of party.

It has been for long a vexed question whether where a pleader appears on behalf of a party and presents an application for adjournment and on the application being refused retires from the case, the party should be taken as having appeared. On this point the High Courts of Calcutta, Madras and Patna followed one view and a contrary view was taken by the Allahabad and Bombay High Courts.

So far as the former High Courts are concerned it is now settled that in such cases there is no appearance by the party. The earlier decisions of the Calcutta High Court are confirmed in two recent decisions, namely, *Sikandar Ali* v. *Kushal Chandra Sarma* (36 C. W. N. 159) and *Sirdar Mal Seraogi* v. *Jaharmal Chiranji Lal* (36 C. W. N. 160). The Allahabad High Court has put its view of the matter beyond controversy so far as the United Provinces are concerned by adding an explanation to O. XVII, r. 2, Civil Procedure Code. (See *Baldev Singh* v. *Chhaju Singh, and others*, 133 Ind. Cas. 622). The Rangoon High Court has followed the view of the Calcutta, the Madras and the Patna High Courts in preference to that of the Bombay and the Allahabad High Courts: *vide Maung Pway and another* v. *Sayape* (I. L. R. 4 Rang. 408). The Nagpur Judicial Commissioner's Court has followed the Allahabad and Bombay rulings.

Such open conflict of views in a matter of such great importance in practice is undesirable and we hope that the legislature will intervene and make the point clear at an early date.

Attestation of will by infants.

The *Law Times* draws attention to the curious fact that there appears to be no decision on the question whether there is any age limit for a witness to a will, though numbers of wills must have been admitted to probate where at least one of the witnesses was under age. The question was recently raised in *Smith* v. *Thompson*, 146 L. T. R. 14, but it was not necessary to decide the question. In the absence of authority or any definite rule on the point we think the only rule that can be applied is, as the *Law Times* has suggested, the rule as to the competency of witnesses; and an infant who has sufficient intelligence to understand what is being done must be held to be competent to act as witness.

Extracts from Contemporaries.

Attorneys and Solicitors

Though the term "Attorney" is still in use in India it will be interesting to note that for reasons which are not very clear, the term has fallen into disrepute in England. The *Law Times* contains an interesting note on this subject which we reproduce below:—

Readers of Boswell may recall that on one occasion when enquiry was made regarding the vocation of a certain person, Johnson said that "he did not care to speak ill of any man behind his back, but he believed the gentleman an attorney"; and the old unfounded prejudice was handed down to succeeding generations, so that when at last the "attorney" was absorbed in the "solicitor," Mortimer Collins could write: "A crocodile is not improved by calling him an alligator. Still, the attorney is gone. He used to like to call himself a solicitor—now he can do it with a clear conscience, if he has such a thing," which was rather a cruel hit. While the "attorney" has disappeared, it is odd that the name should still be the designation of the chief law officer of the Crown, while the name "solicitor" should be that given to the second law officer. In court, as everyone is aware, the judges address these dignitaries respectively as "Mr. Attorney" and "Mr. Solicitor."—*Law Times.*

How Briefs Came.

The Bar has often been likened to a lottery in which one person draws a lucky ticket which means fame, while his neighbour on the same staircase draws a blank. It sometimes seems as if this description were an accurate one, so mysterious are the springs which operate in the distribution of rewards and failures, and so odd are the accidents, or what seem to be so, which lead on to fortune or its opposite. The study of legal biography brings this home to the reader, although it cannot always explain why *A* has succeeded and *B* has gone empty away. Chances may come to all, but it depends very largely how these are met whether success or failure is to be the outcome. No reader of the life of Erskine, who eventually became Lord Chancellor, but must have been struck by the circumstance in which his first brief came to him, and the further accident by which he was enabled to address the court when it appeared most unlikely that he would have that satisfaction. The incident is worth recalling. A Captain Baillie, who had been Governor of Greenwich Hospital, had printed and circulated a statement pointing out various abuses in the establishment and reflecting severely upon Lord Sandwich, the First Lord of the Admiralty,

and was proceeded against by way of criminal information Before the case came on Erskine chanced to dine at a friend's table at which Baillie also was a guest. The action taken by Lord Sandwich naturally engaged the attention of those present, and Erskine, who was not then aware of the identity of Baillie, expressed himself with some warmth on the scandalous practices attributed to the First Lord in connection with the management of the hospital. Baillie nudged the person who sat next to him, and asked who it was who had interested himself in his behalf. On being told that it was Erskine, who had just been called to the Bar and had formerly been in the navy, Baillie exclaimed with an oath: "Then I'll have him for my counsel." In due course a retainer was given to Erskine, and that was followed by a brief which, however, was marked with no fewer than four names in front of his own, so that the likelihood of his being able to address the court seemed to be extremely remote. All the four addressed the court at great length; the counsel immediately above Erskine—Hargrave by name—was long-winded and tired Lord Mansfield intensely, but, as Erskine afterwards said: "As my good fortune would have it, he [Hargrave] was afflicted with strangury, and was obliged to retire once or twice in the course of his argument. This protracted the cause so long that, when he had finished, Lord Mansfield said that the remaining counsel should be heard the next morning. This was exactly what I wished. I had the whole night to arrange, in my chambers, what I had to say the next morning, and I took the court with their faculties awake and freshened, succeeded to my own satisfaction (sometimes the surest proof that you have satisfied others), and as I marched along the hall after the rising of the judges, the attorneys flocked around me with their retainers. I have since flourished, but I have always blessed God for the providential strangury of poor Hargrave." The last remark rather savours of what the Germans call *schadenfreude*; but perhaps it was excusable in a young man who welcomed the opportunity of making a name for himself, and thought of his little children as plucking at his robe, and saying: "Now, father, is the time to get us bread."—*Law Times.*

A Picturesque Institution.

So the House of Lords has been called although the description is a little wide of the mark in ordinary times. It was once literally true. We are told that well into the last century each peer, in full dress, with stars, garters, and ribbons, on entering the House bowed to every other peer. As a member of the peerage, writing on the subject a generation ago, said, all this is now changed—the peers enter the House with as little ceremony as if it were a club or a theatre, dressed like other people, except on rare occasions, as, for example, when the sovereign opens Parliament in person, when they wear their robes. Another occasion when the House shows colour is when assent is given to Bills by a Royal Commission; each member of the commission is attired in his robes, with his three-cornered hat, which he takes off whenever the clerk at the table, who reads the commission, mentions his name. Still on another occasion the House is treated to a little colour, and that is when a new peer is introduced, or when a peer is advanced a step in dignity, as happened last week, when the Lord Chancellor was introduced with the usual formalities on being created a viscount. The new peer or one who has been moved up to higher rank is attended by two peers of his own degree, one on each side, all in robes and holding cocked hats. In the case of the Lord Chancellor, he was introduced by Viscount Dunedin and Viscount Hailsham, conducted to the Viscount's bench, where he and his sponsors sat down and took off their hats three times to the occupant of the Woolsack; they then proceeded to the table. On such occasion the clerk reads the patent of peerage, the new or advanced peer takes the patent and presents it to the Lord Chancellor or other peer who happens to be presiding in the absence of the Chancellor, and then gets up and shakes hands with him, bustles out, takes off his robes, and re-appears in ordinary costume, looking rather shy. The writer already referred to calls this an "alarming ceremonial," as indeed it is, when a man finds himself encumbered with costly robes which he finds a difficulty in managing with ease and dignity. Happily, the occasions for adorning themselves in the robes and cocked hats are comparatively rare.—*Law Times.*

Recent Legislative Measures.

New Acts.

The Indian Companies Amendment Act I of 1930. The Employers and Workmen Dispute Repealing Act II of 1932. The Wheat Import Duty Extending Act III of 1932. The Indian Finance Supplementary and Extending Amendment Act IV 1932. The Wire and Wire-Nail Industry Protection Act V of 1932. The Bamboo Paper Industry Protection Act (VI of 1932).

The above five Acts received the assent of the Governor-General on the 5th March 1932.

We have stated the object and purport of these Acts in our previous issues (see 136 Indian Cases Journal Section, pages 7, 21 and 22).

New Bills.

The Indian Trusts Act Amendment Bill No. 21 of 1932.—The Townsend Committee on Co-operation and Royal Commission on agriculture recommended following the precedents of Land Credit Institutions in Europe and America that the Debentures of the Central Land Mortgage Bank should be made trustee securities and the bill is intended to give effect to this recommendation by adding these kinds of debentures in the list of securities enumerated in s. 20 of the Indian Trusts Act.

The Indian Registration Amendment Bill, No. 22 of 1932.—This is a private bill which is intended to remove the inconvenience and expense caused to the public by the fact that Deputy Commissioners of the Punjab who are *ex officio* Registrars of each District are compelled to remain absent from the office although present at the head quarters.

The Indian Limitation Amendment Bill, No 23 of 1932.—This is also a private bill proposing extension of the period of limitation for certain suits in view of the present economic depression.

The Indian Trusts Amendment Bill, No. 24 of 1932—The object of this bill which has been introduced by Hajee Abdulla Haroon, is somewhat similar to that of Bill No 21 of 1932. The Bill proposes that bonds of the Karachi Municipality should also be included in s. 20 of the Indian Trusts Act in the list of approved securities.

The Special Marriage Amendment Repealing Bill, No. 25 of 1932—The Special Marriage Act of 1872 was intended to meet the demand of Brahmos and other Hindu dissenters. Mr. Krishnamachariar who has introduced the bill is of opinion that since the passing of the Act no large section of the country has taken advantage of it, that the Act is a blot on the Indian Legislature and that it should be repealed.

Notes of Recent English Cases.

Banking—Cheque—Signature forged by wife—Husband not informing Bank—Suit by husband against Bank after death of Wife—Estoppel—The plaintiff's wife forged his signature on a large number of cheques drawn on the defendant Bank with whom the plaintiff had dealings and though the plaintiff came to know that his wife had drawn moneys on these forged cheques he did not inform the Bank till his wife died. The plaintiff then brought a suit against the Bank for the amount covered by the forged cheques. It was found that the Bank was careless in honouring the forged cheques. *Held* by the Court of appeal that though the Bank was negligent, as the Bank had lost its right of action against the wife on account of the husband's failure to inform the Bank until his wife was dead, the husband was estopped from alleging that the signatures were forged and not his own and he could not recover the amount from the Bank. Scrutton, Greer, Romer, L. JJ. *Greenwood* v. *Martin's Bank Ltd.*, (1932) 101 L. J. K. B. 33; 146 L. T. 32.

Insurance—Marriage settlement—Covenant by husband to pay insurance premiums—Default—Payment by trustees—Right to recover from husband—By a marriage settlement the husband transferred a policy of insurance on his own life to the trustees and agreed that he would not allow the policy to become void and that he would duly pay all the moneys payable for keeping on foot the policy. There was no express covenant to reimburse the trustees any payments made by them though the trust deed provided that the trustees may in their discretion apply the income of the settled funds in making payments for keeping the policy on foot. The husband failed to pay a premium, and the trustees paid it and claimed the amount and the fine paid by them as a debt from the husband: *Held*, that there was an implied term to reimburse the trustees for payments paid by them, to keep the policy on foot that the claim sounded in damages and the trustees were entitled to recover not merely nominal damages but the entire amount paid by them. McCardie, J. *Schlesinger and Joseph* v. *Mostyn*, (1932) 101 L. J. K. B. 62.

Sir T. MUTHUSWAMI IYER

(*An Address by* SIR ALLADI KRISHNASWAMI IYER, *Advocate General of Madras.*)

The idea of celebrating the centenary owes its inception to my esteemed friend Mr. V. V. Sreenivasa Iyengar and the function has been arranged under the auspices of the Madras Advocates' and Bar Associations with the sympathetic co-operation and help of his Lordship the Chief Justice and the other learned Judges of this Court. In craving your indulgence for a few minutes to pay my humble tribute to the memory of the great judge that once adorned this Court and whose statue still adorns its premises my only justification is my happening to be the accredited representative of the Bar for the time being.

In the task which I have undertaken I am labouring under this disadvantage that I do not belong to the generation that has seen and known the Judge at work. I am not, therefore, in a position to expatiate upon the great qualities which he displayed while at work on the Bench,—his Socratic method of elucidating the points in controversy, his beautiful summing up in terse language the long and elaborate arguments of counsel, the judicial dignity and bearing which he brought to bear in regard to the proceedings in his Court the unbounded confidence of his colleagues in his guidance and judgment, and his kindly and courteous treatment of the Bar—qualities to which contemporary opinion bears eloquent testimony. I can only give expression to the impressions derived from the reported decisions and his public utterances which form by far the best monument to his deep learning, his profound wisdom and his greatness as a Judge.

SIR MUTHUSWAMI IYER'S CONCEPTION OF A JUDGE'S DUTY.

You are all aware that he fought his way up from small beginnings to the position of a Judge of this Court, the highest position then open to a son of the soil, and his career reminds one of the careers of men like Lincoln and the traditions associated with the White House. When he was called to his high office he felt the hand of Destiny in it. He had a lofty conception of his function as a Judge which permeated his work throughout his judicial career. In the inimitable language of his Convocation Address, "the Court of Justice is a sacred temple; the judges presiding over it are, though men, the humble instruments in the interests of truth and those who enter this holy edifice with unholy thought or desecrate it with unworthy actions are traitors to their God and to their country. Those of you who may rise to the Bench should recollect that the power you may be called on to exercise in the name of your sovereign is according to one of your ancestors a Power Divine."

HIS JUDGMENTS.

During his long career on the Bench, he enriched British Indian jurisprudence in almost every department of law, and the learning enshrined in the law reports of the period is ample proof of it. In evaluating his work, one, of course, cannot overlook the fact that he had the evident advantage of being somewhat in the position of a new explorer, at least in certain departments of law, and he did not suffer from what under particular circumstances would be termed the 'dead weight' of binding judicial precedents, and he had many gaps to fill in the law.

It would not be just to Sir T. Muthuswami Iyer to regard him merely as a Hindu lawyer of great distinction. The reports are all replete with classical and leading judgments of his in every department of law. He was equally at home in dealing with a recondite case on the law of trusts, a complicated question in the law of torts, State rights in regard to property, caste autonomy or *quasi* ecclesiastical jurisdiction, State responsibility in regard to the wrongs of servants, or in formulating the exact scope of an act of State. In his judgments possibly you might miss the subtlety and over-ratiocination of a Selborne or a Bhashyam Iyengar or the bold and challenging statement of principle that you find in the judgment of a Macnaughten or a Subramania Aiyar. The balancing of considerations and the weighing of a number of reasons are, if I might say so, both the merit and the weakness of his reported judgments, but there can be no doubt as to the cogency of his reasons and the soundness of his conclusions.

In his work as a Judge, he struck the happy mean between "judicial valour and judicial discretion." He did not start with the discontent that all is wrong with the

law and he was there to reform the jurisprudence of his country, nor did he set before himself the ideal that it is not the province of a Judge to make the law under any circumstances but only to find and administer it, which if I may venture to say, is in many cases more in the nature of a legal myth than a working rule of judicial administration. If he was against the Judge assuming the role of a social legislator, he was equally against going back to the Vedic or the Smritic period without reference to the custom obtaining in the country and the Hindu Law as accepted by the Hindu community.

He regarded the form and style in which the judgments are couched as important as the substance. He cultivated a chaste style which was free from the vice of unnecessary ornamentation or wearisome repetition. His style bears the impress of an intensive study of the classics of English literature which marked the generation that produced men like Gopal Rao and Ranganatham and that first came under the spell of English literature. The decisions in the Tirupanandal and the Ramnad cases show that he was a master of judicial and historical narrative, which is in its proper setting and which fits in with the determination of the issues that arise for consideration in the case.

His Advice to Young Lawyers.

Though he never practised the profession of law, he was deeply alive to the value and importance of the legal profession in the mechanism for the sound administration of justice. He always impressed upon the profession the nobleness and dignity of their task. These are his words to the alumni of the University: "You should remember, if you desire to rise to professional eminence, that law is both a science and an art, and that your success whether at the Bar or on the Bench will depend on the clearness with which you understand the principles of the science, and on the readiness with which you will pass through a complicated mass of facts in the midst of animated and often eloquent addresses taking in as it were by intuition each fact, referring it to its appropriate principle, and estimating its legal value within a given time. The study of law, as has been well said, is in its higher sense the study of the philosophy of social life. The art you have to practise is one of the noblest; its object is the protection of human interests in all the relations of life and the methods by which rules of decision are deduced must satisfy at once the requirements of legal science and of substantial justice. .. You should never be hasty or impulsive and thereby shut out even the faintest ray of light from forensic discussion. You should never heed any appeal to your passion or frailty, and never allow your attention to stray from legal points of a case either amidst violent declaration or pathetic appeals and always see before you pronounce your decision that the responsibility rests not with you individually but either with the law-giver or with the science of jurisprudence."

His Public Activities.

His activities were not confined to his work on the High Court Bench. His advice was sought by the Government on all important proposals for legislation and his minutes on several important Bills reveal a keen grasp of the principles and proper scope of legislation and have been of considerable assistance even in legislation recently undertaken by the Indian Legislatures. He took a keen interest in public and philanthropic movements of this Presidency and was an active member of the University and several educational organisations.

Loyalty to the British throne and connection was a part of religious faith with him. While he was proud of the greatness of his country in the past, he had a clear vision of its future and destined goal. It may be of interest to know that he envisaged the conception of partnership between England and India as the goal of Indian political aspirations and the Balfour formula of the British Empire being the Commonwealth of free peoples. In his own words "even when India is regenerated, I for one think that our relation to Great Britain must be that of a Colonial Constitutional Government affiliated to and in federal loyal union with the present constitution," and he expressed the hope that the two nations will regard each other with that brotherly feeling with which they regarded one another before they left their Caspian home in remote antiquity.

I hope and pray that the memory of this great Judge will continue to animate successive generations of Judges and lawyers. The growth of democracy and the levelling up of the common man being the rightful social objective have not shaken my faith in the belief that the greatness of a country is measured by the number of great men it produces. May this old country continue to produce many more men of that type.

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Notes on Current Topics.

Executor's Right of Retainer against the Crown.

The House of Lords has recently decided an important point relating to an executor's right of retainer, in *Jackson* v. *Attorney-General* (173 L T. 150). In this case Clauson, J., had held that the executor's right of retainer had priority over the Crown's claim for income-tax and super-tax. This decision was affirmed by the Court of Appeal (Romer, J., dissenting). The House of Lords has reversed the decision of the majority of the Court of Appeal and has held that an executor cannot exercise his right of retainer against the Crown as a preferential creditor for income-tax and super-tax. The principle underlying the decision is that the right of retainer could be exercised under the common law only against debts of equal degree, and in so far as the Bankruptcy laws had given priority to Crown debts they were debts of a higher degree than the executor's, and the right of retainer could not therefore be availed of against such debts.

Power of a Company to grant pensions and annuities.

An interesting question of company law was decided by Eve, J., in *In re Lee Behrens & Co. Ltd.*, (173 L. T. 151). Under its memorandum of association a company had power to make provision for persons in the service of the company and their widows and children. After the death of a managing director, by a resolution of the directors the company executed a deed in favour of his widow agreeing to pay her an annuity of £ 500. The company went into liquidation and the widow lodged proof for the capital value of the annuity. Eve, J., held that such gifts could be made by a company only if (*i*) they were reasonably incidental to the business of the company, (*ii*) were *bona fide*, and (*iii*) were made for the benefit or prosperity of the company. The claim was rejected as there was no evidence to prove conditions (*i*) and (*iii*). The decision was also based on the further ground that, as the annuity was given to one of the body of directors, it could not be valid unless it was specially authorised by the instruments governing the company or by a general meeting. In commenting upon this case the *Law Times* draws attention to cases on the other side of the line and summarises the position thus: "Put quite shortly the position with regard to all classes and employees seems to be this. Given the power, an enlightened selfishness should guide the company. They should have regard to labour and all other conditions and make payments which will cause the company and its directors to be generally regarded by employees and others as 'decent people to work for.'"

The Law of Restitution.

In *Satgur Prasad* v. *Mahant Harnarain Das* (136 Ind. Cas. 108; 36 C. W. N. 461) the Judicial Committee has answered the difficult question whether, when a conveyance is set aside on the ground of undue influence and fraud the plaintiff is entitled to mesne profits from the date of the conveyance or only from the date on which the conveyance was avoided. Though the point appears to be a simple one, it raises several difficult questions relating to the law of restitution, and the true interpretation of the definition of 'mesne profits' in the Civil Procedure Code and of s. 65 of the Cont[illegible] Act. In the first place their Lord[illegible] have held, applying the maxim that [illegible]an be allowed to take advantage of [illegible]n wrong, that as between the purch[illegible]r and the person defrauded the possession of the former is wrongful, within the meaning of s. 2 (12), Civil Procedure Code, from the date

of the transaction. Secondly, it has been held that a case like this would fall within the terms of s. 65 of the Contract Act. Their Lordships view that there is no difficulty in holding that the words "when a contract becomes void" in s. 65 are wide enough to cover a voidable contract which has been avoided, sets at rest a point upon which there was some controversy in India and much argument before the Board. Their Lordships were further of opinion that, regarding the transaction as one that has passed out of the realm of contract, it fell within s. 88, of the Trusts Act and the purchaser was bound under that section to hold any advantage so gained for the benefit of the plaintiff. The fourth and the strongest ground upon which their Lordships have based their decision is that, apart from these statutory provisions, the plaintiff is entitled in a case of this nature to succeed in his claim upon general principles of equity. Where there is no difficulty in putting the parties back in the position which they had occupied on the date of the document and where there is no proof of undue delay on the part of the plaintiff in bringing a suit he should have an account of the rents and profits from that date, the defendant being entitled to credit in the account for all payments made by him to the plaintiff. The conclusion cannot be otherwise. But the view that the possession of the purchaser is wrongful from the date of the transaction may give rise to some difficulties when questions of limitation or adverse possession arise.

Preliminary issues of fact: A dangerous practice.

Order XIV, r. 2, Civil Procedure Code, empowers the Court to frame preliminary issues of law and to postpone the settlement of the issues of fact until after the issues of law have been determined. The rule does not contemplate preliminary issues of fact but a practice seems to prevail under which at times issues which raise questions of fact and which can be conveniently tried before the other issues are framed on a summ[illegible]aken out for that purpose. The le[illegible]f this practice was considered by Be[illegible], C. J., of the Bombay High Court i[illegible]abai v. *Sir Thukoji Rao Holkar* (34 Bom. L. R. 6.) After referring to the corresponding practice of 'demurrer' in England his Lordship says that strictly speaking under O. XIV the Court has no power to frame something in the nature of a preliminary issue of fact. His Lordship further points out that it is a dangerous practice because unless the Judge has before him and present to his mind all the issues which arise he may fail to realise that the particular issue which he has framed really depends on the answer to other issues. We may also refer our readers to the case of *Bhimnath* v. *Jaggar Nath* (89 Ind. Cas. 814; 7 P. L T. 82; A. I. R. 1925 Pat. 674) in which Mullick and Ross, JJ., have condemned the practice of framing preliminary issues of fact. In this case Mullick, J, said that the Court is competent to postpone the trial of issues of fact if the case can be decided on issues of law only, but there was no authority under the Code for postponing the trial of an issue of fact except on the ground of embarassment. Ross, J., was also of the same opinion.

Admissibility of statements made by accused persons to the Police.

In *Syama Maha Patro* v. *Emperor* (Cr. App. Nos 705 & 706 of 1931) decided on January 29, (Reilly, Anantakrishna Iyer, and Sundaram Chetty, JJ,) the Madras High Court has struck a bold note of dissent from the views of the Patna, Lahore, Rangoon and Calcutta High Courts upon the important question whether statements made by accused persons fall within the purview of s. 162, Criminal Procedure Code. In view of the fact that four High Courts had taken a different view, Reilly, J, who has written the leading judgment has examined in detail the rulings of these High Courts but after a close examination of the reasonings on which they are based says that he cannot agree with the reasoning in any of them. Reilly, J., refutes the first argument advanced for the contrary view, namely, that based on s. 161, Criminal Procedure Code, by challenging the view that s. 161 applies only to witnesses. With regard to the argument that s. 27, Evidence Act, would be practically repealed if s. 162, Criminal Procedure Code, is so interpreted as to include statements of accused persons Reilly, J., without disputing the principle that general provisions do not derogate from special provisions, holds that the proper application of this rule would lead to a contrary result and that the method in which the other High Courts have applied this rule is 'clearly fallacious.' As regards the third argument which has been advanced in support of their view

by the Patna and Calcutta High Courts *viz.*, that to bring the statements of accused within s. 162 would be to 'deprive the accused of what so often is a mainstay of a good defence—the right to show that the moment he was challaned he gave the explanation on which he now relies', Reilly, J., holds that the interpretation put by these High Courts would expose the accused to the risk of most damaging statements made by them to the Police being proved against them and that, if it were justifiable to let the balance of benefit or risk to the accused to affect the interpretation of the section, it would be better for the accused to read the section in its plain meaning. The Nagpur and the Sindh Courts have adopted the view of the majority. Though the weight of authority is heavily against the view of the Madras Full Bench, we think that Reilly, J., is right in his interpretation of s, 162. This view has in its favour the fact that it takes the plain and literal meaning of the words 'any person' uninfluenced by farfetched considerations of doubtful relevancy. Anyhow we await with interest the opinion of the Bombay and the Allahabad High Courts.

Notable Dicta.

The Law.—"Those who go to prison make the law."—*Law Journal.*

Duty of a Judge.—The ideal that it is not the province of a Judge to make the law under any circumstances but only to find and administer it is in many cases more in the nature of a legal myth than a working rule of judicial administration.—*Sir Alladi Krishnaswamy Iyer.*

Case Law.—An ounce of principle is worth tons of case law.—*Sir Charles Spencer, C. J.*

Origin of confessions.—"When a case is dependent upon circumstantial evidence we often find a confession to bolster up that circumstantial evidence". *Maclean, C. J.* cited in 9 O. W. N. 274.

Suspicion —The gravest suspicion against the accused will not suffice to convict them of a crime unless the evidence establishes it beyond doubt. 9 O. W. N. 170.

Weight of evidence.—The testimony of the senses cannot implicitly be relied on even when the veracity of the witnesses is above all suspicion. *Gajadhar* v. *Emperor*, 9 O. W. N. 32.

Extracts from Contemporaries.

The Number of Judges.

In the course of our legal history the number of judges by whom the Courts have been staffed has varied from time to time, although it is curious to observe that little increase has been made in any way proportionate to the increase of the population. In the early days, according to the Comte de Franqueville, the usual number was twelve—that is, four for each of the common law Courts, although occasionally this number was exceeded. Fortescue says that in the King's Bench the number of the judges was sometimes five, and in the Court of Common Pleas the number varied between five and six. James I. fixed the personnel of each Court at five, for the reason that *numero Deus impare gaudet*; but at a later date the number was again fixed at four, and it stood at this for a long period. In 1830, and again in 1868, the numbers were increased, and by the Appellate Jurisdiction Act 1876 provision was made for two Additional Judges in certain eventualities, but as we all know, the more recent legislation has required that before any additional judge or judges can be appointed if the number of the puisnes in the King's Bench Division amounts to fifteen, it is necessary that there should be a resolution of both Houses of Parliament to the effect that the state of business in that Division requires the Additional judge or judges. It was after this procedure had been followed that Mr. du Parcq, the new recruit to the Bench, was appointed.—*The Law Times.*

Lord Dunedin and the Parliamentary Bar.

In his impressi[illegible] the Bench and Bar during the la[illegible] years contributed to *The Tim[illegible]* week, Lord Dunedin tells the story of the interchange of pleasantries between Bidder, Q.C., and Balfour Browne, Q.C., when the former appealed to the Chairman of

Committee of the House of Lords to "ask Mr. Balfour Browne to allow me to speak without interruption, his voice worries me," and Balfour Browne's counter stroke with, "Mr. Chairman, would you ask Mr. Bidder not to keep looking this way? his face worries me," which has a certain piquancy. The incident was, we believe, first given publicity, minus the names of the protagonists, by the late Mr. Foote in his charming book, "Pie Powder." Then it got into Balfour Browne's own reminiscences, "Forty Years at the Bar," where Bidder's name is disclosed, but a discreet silence is observed as to the name of his opponent, the comment being added: "There is no record of how these cross-applications were dealt with by the tribunal!" Balfour Browne's book reveals that at the Parliamentry Bar in his time irascibility was by no means uncommon. Of E. H. Pember, Q.C, we are told that on one occasion he was greatly irritated by his client setting him right on some trifling matter. Pember turned upon the client as if he would have rent him, and his annoyance even went the length of some not very complimentry expressions. With the view of throwing oil upon the troubled waters, the Chairman said: "Go on, Mr. Pember." But the interposition was not successful. I "can't go on, my Lord," said Pember, "I hate being corrected from behind." "It reminds him of his youth," cruelly whispered one of the Counsel on the other side!—*The Law Times.*

Spiritualism and the Law.

While we hold no brief either for or against spiritualism as a cult, we rather welcome the observations of Mr. Justice Humphreys in an action tried last week where the plaintiff was a medium.

The learned Judge said he could see no evidence that the plaintiff earned money in an illegal way. So far as her astrology went she called herself an entertainer, which was what the Judge thought she was. As to the power of communicating with persons who [illegible] passed into another sphere, [illegible] Justice Humphreys said:—

"I say in all [illegible]usness that one has no right to laugh at people who hold these beliefs. They are held by people of the highest standing in this country—scientists and others. One must not make fun of people who believe these things Holding seances clearly is not illegal."

That there are frauds committed in the name of spiritualism, that there are some dishonest mediums, and that harm is caused by charlatans trading on the credulity of weak-minded people by fortune-telling, is beyond dispute. There remain, however, the conscientious people who believe in a spiritualism which, whether its belief be truth or error, is far removed from all taint of trickery and fortune-telling. These are entitled to be treated seriously and to be regarded as respectable people.—*Justice of the Peace.*

Current Crime in London.

Students of crime and criminals might look into the current calendar of the London Sessions. The average age of the ninety-five prisoners is twenty-six years. Twenty-eight of them are under twenty-one years of age. And unhappily a good many have appeared in the courts a number of times before, and their re appearance would suggest that they have not derived much benefit from the efforts made to amend them. An encouraging fact is that under five per cent. of the total prisoners are women. This cannot altogether be explained by the fact that sex debars them. Theft, *e g*, is as easy, if not easier, for women than for men. The fact is that they are more lawabiding citizens. Their work in the home may conduce to that. But it is indeed a matter for anxiety that so many youths and boys seem set on crime. Is the cause laziness, or the spirit of adventure, or crass indifference to moral considerations?

The excuse commonly alleged is want of work. As has been often pointed out by the chairman and deputy chairman that excuse has no legal validity. And on the moral side, the appeal it makes is weak. Even in these days unemployment insurance goes a good way. It is a sad fact that some young people will go wrong in spite of every effort made to help them. They are morally diseased, perhaps beyond hope of cure, as much as some people are similarly diseased physically. In some cases the moral trouble may be associated with physical abnormality. Its treatment, if attempted, calls for prolonged isolation.—*Justice of the Peace.*

Carlyle and the Law.

The announcement that a new edition of Carlyle's "Reminiscences"—the work which on its first appearance brought down fulminations on the head of Froude, quite unjustifiably, as not a few competent observers thought—is to be included in the forthcoming addition to the Everyman's Library, will excite pleasurable anticipations in the minds of many who, owing to the cost of the original issue and the fact that for some time it has not been easily procurable, have been unable to obtain it. In the sketch of Lord Jeffrey, Carlyle tells us how, when a mere lad, he visited the Parliament House, Edinburgh, and gazed with wonderment on the advocates in their professional garb of wig and gown. One figure of the many whom he saw on that day stood out conspicuous in his memory ever after: this was John Clerk, with "his grim strong countenance, with its black far-projecting brows and look of great sagacity." Clerk was then in the front rank of Scottish pleaders, a man fiercely combative who feared no one and who retained the Doric when it was fast disappearing from the language of the courts. It is possible that to this youthful visit to the Court of Session may be attributed the transient desire that Carlyle had for entering the legal profession. We know that after he had abandoned the idea of entering the Scottish church he dallied with the law; in fact, he read a good deal of legal literature and also attended the lectures of Hume, the nephew of the philosopher, on Scots law; but like so much else with which he intermeddled in his youth, he soon tired of this inclination for the law, and, as he says, "the admired lecturing Hume himself," and lawyers generally, appeared to him "mere denizens of the kingdom of darkness, pointing to nothing but money as wages for all that bogful of disgust." So the legal studies were given up, and the only subsequent connection he had with legal affairs was when he was summoned to act as a juror. But the paper already mentioned remains as a remarkable tribute to the skill of Jeffrey as an advocate, and as a good friend of Carlyle when he had not too many of them The account of Jeffrey's defence of one Nell Kennedy, charged with wholesale murder, is done in Carlyle's best style —*The Law Times*

Lord Macnaghten and the Reporters.

No one needs to be told that Lord Macnaghten was a very distinguished lawyer; one has only to read a few of the judgments he delivered to be convinced of this. Not so many, perhaps, are aware, however, that he had also a pretty wit which he could display at times with considerable effect. Only the other day, the present writer, while looking for something else, stumbled again upon an example of this, in which the noble Lord indulged in the playful pastime of pulling the nether limb of the reporters. The passage in question occurs in the well-known case of *Keighley, Maxsted and Co.* v. *Durant* (1901) A. C. 240, the decision which laid it down that an undisclosed principal cannot ratify a contract by his agent in his own name in excess of his authority. Lord Macnaghten in his judgment has occasion to examine somewhat minutely the older case of *Bird* v. *Brown*, 4 Ex 786 on which great reliance had been placed by Lord Justice Collins in the Court of Appeal. That case, said Lord Macnaghten, "is instructive, I think, and useful, because it tends to shake one's confidence in the infallibility of reports, which always seem to carry the more weight the less opportunity there is of testing their accuracy. Why should an obscure report be taken for gospel merely because it is old? *Bird* v. *Brown* was heard by four judges. Only one judgment was given. The Exchequer Reports, attribute the judgment to Baron Rolfe. The *Law Journal* ascribes it to Baron Parke. The *Jurist* puts it in the mouth of the Chief Baron Pollock. No one gives it to the fourth judge but then there were only three sets of reports current at the time. The *Weekly Reporter* did not begin till later." Having thus thrown doubt upon the authorship of the judgment in question, Lord Macnaghten proceeds to question the correctness in point of law of a paragraph which appears in the Exchequer Reports and in the *Jurist* but not in the *Law Journal*. It is all very amusing, but the incident shows that even Lords of Appeal, just like the humble reporters, are not exempt from the liability [illegible]ing slips; and Lord Macnaghten [illegible]ne when he stated that at the ma[illegible]e only three sets of reports covered [illegible]ourt of Exchequer. There was the *Law Times* (Old Series) which reported the case of *Bird* v. *Brown*, 14 Law Times (O. S.) 399, and the curious in the matter will find that the report there

agrees with that of the *Law Journal* in attributing the authorship of the judgment to Baron Parke, and further agrees with it in omitting the paragraph which met with Lord Macnaghten's disapproval.—*The Law Times.*

Lord Dunedin on Judges, New and Old

Lord Dunedin, in his fine article in *The Times*, after making due allowance for "the natural feeling of awe and respect which one had for the Judges and leading Counsel of one's youth," gives it as his considered opinion that the erudition of the older generation was greater than that of the present; but that the younger generation are more inclined to go straight to the point. It is improbable that our modern Judges would admit their own comparative lack of erudition, or that junior Counsel are speedier than those of their own generation in getting to the point. Yet, on the whole, it is probably true in the main, that estimate of Lord Dunedin's. The Law of so long ago was within reasonable bounds. Erudition was possible in farily large departments.

Now there are so great a multitude of Statutes, so many amendments of and exceptions to the Common Law and the Statutes themselves; so vast a body of legislation by reference, and so little force in legal and learned technicalities which of old were all important, that Judges are tending more and more to rely on what they believe to be commonsense and less on old formulæ and precedents. No generation of Judges, I am sure, can compare with our own in the faculty or gift of finding the hidden meaning in the obscure clauses of Statutes. The occasion has produced the men; and necessity has once more proved to be the mother of invention.

Our Own Individuality.

Yet, when Lord Dunedin declares that, in his opinion, there was more striking individuality in the older generation, one cannot so readily agree that this was so in any favourable sense. Without mentioning any names, following the principle *de mortuis nil nisi bonum*, one can say that by all accounts there were some extremely rude, unpleasant and overbearing Judges and leading Counsel of the older generation, and if this was a sign of superior individuality and personality, it is matter for congratulation that they have passed peacefully away—*The Law Journal.*

Recent Legislative Measures.

Council of State Bills.

Three Bills have been recently introduced in the Council of State. The statement of objects and reasons to the first Bill recites that there is no special provision in the law of India prescribing the procedure to be followed in cases where Courts in British India are required to take evidence for foreign tribunals in civil and commercial matters and that the object of the bill is to lay down the outlines of the procedure to be followed so as to secure a general uniformity in the practice of the Indian High Courts. The procedure which is intended to be laid down is on the lines of that followed in England. Power is reserved to the High Courts to supplement the rules in order to adapt them to their own special needs. New sections are proposed to be added at the end of O. XXVI, Civil Procedure Code, under the heading "Commissions issued at the instance of foreign Tribunals".

In regard to suits relating to public charities and trusts the Local Government had taken the view that under s. 93, Civil Procedure Code, it was sufficient for them to give previous sanction to the Collector or to the Special Officer generally and not in respect of each particular case. It has been held, however, by the Privy Council (*Prem Narayan* v. *Ramcharan*, (1932) A. L. J 182) that the previous sanction must be recorded in respect of each particular suit. As a large number of suits which have been instituted without particular sanction are now pending, Bill No. 2 of 1932, proposes to validate all such suits, and to provide for retrial of claims which may have been dismissed for absence of the requisite sanction.

Bill No. 3, (a non-official Bill) proposes to add to the Indian Life Assurance Companies Act, 1912, a new section to the effect that the whole of the Life Assurance Fund of the Indian Companies should be

invested in India, and that Companies having head offices outside India but carrying on business in India should invest in India from their life fund a sum not less than the share of their Indian business. It is also proposed to provide that not less than 25 per cent. of the life fund should be invested in Government Securities as defined by The Indian Securities Act, 1886.

Legislative Assembly Bills, Nos. 26 to 29.

Bill No 26 is intended to extend the operation of the Salt Additional Import Duty Act, 1931, to a further period of one year. The next Bill, No. 27 of 1932, (the Indian Tariff Wireless Broadcasting Amendment Bill) proposes to provide funds to enable the Government to continue wireless broadcasting in India by increasing the import duties leviable on wireless reception apparatus The Bill proposes to increase the present duty of 25 per cent. to 50 per cent. Bill No. 28 of 1932 (the Tea Districts Emigrant Labour Bill) amends the law relating to emigrant labourers in the Tea District of Assam in accordance with the recommendations of the Royal Commission on Labour. Another Bill to amend the Indian Merchant Shipping Act, 1923 in accordance with the recommendations of the *Haj* enquiry committee appointed in 1929 to enquire into the arrangements for pilgrims proceeding to the Hejez, has also been introduced.

Notes of Recent English Cases.

Interpretation of deeds—'Minerals'—Whether include sand and gravel—Rules of construction.

The word 'minerals' in a grant of conveyance is capable of restriction or expansion and must be interpreted in each case according to the apparent intention of the parties, local custom etc. This principle applies not only to cases where land has been taken under statutory authority but also to conveyances between private persons.

(In this case it was held that the term 'minerals' did not include sand and gravel) Lord Hanworth M.R., Lawrence, L.J., Romer, L. J. *Waring* v. *Foden* (1932) 101 L. J. Ch. 33 (C. A.)

Principal and agent—'Sole selling agency'—Sale by principal direct—Breach of agreement.

The defendant company who manufactured bricks entered into a contract with the plaintiffs, a firm of merchants, appointing the latter their 'sole selling agents' for the sale of bricks for a period of three years. During the currency of the period the defendant company wrote to the plaintiffs that a certain person who was the director of the defendant company intended to sell all bricks manufactured in the future without the intervention of the plaintiffs, claiming that the company did not lose its right to sell its own bricks provided they were not sold through some other agents. *Held*, that inasmuch as the defendant company had appointed the plaintiffs as their sole selling agents they (the defendant company) were not entitled to sell either directly or through an agent and therefore the defendant company's letter amounted to a repudiation of the contract and the plaintiffs were entitled to damages for breach of contract. Wright, J., *W. T. Lamb & Sons* v. *Goring Brick Co*, (1932) 101 L. J. K. B. 42.

Bankruptcy—Limited partnership — Sole general partner—Mode of proof.

An ordinary partnership is not a legal entity in the sense that a limited company is a legal entity, and the Limited Partnership Act, 907 does not create a limited partnership a legal entity. Therefore, the method of administering a estate in Bankruptcy where there is an ordinary partnership is to be applied, so far as is possible, in the case of a limited partnership. Where a person was the sole general partner in two limited partnerships and these partnerships were [illegible]sively adjudicated *Held*, that the [illegible]s were entitled to prove in the same [illegible] as they would be entitled to prove against an individual in successive bankruptcies, Farwell J., *Barnard, in re*; *Martin's Bank Ltd.* v. *The Trustee*, (1932) 101 L. J. Ch. 43.

Company — Liquidation — Copyright—Author's Rights—Applicability of Bankruptcy Rules.

Section 262 of the Companies Act, 1929, does not incorporate s. 60 of the Bankruptcy Act of 1914 which provides that where the property of a bankrupt comprises the copyright in any work and he is liable to pay to the author of the work royalities or a share of the profits in respect thereof the trustee shall not be entitled to sell any copies of the work except on the terms of paying to the author such sums by way of royalty or share of the profits as would have been payable by the bankrupt and that the trustee shall not without the consent of the author or of the court be entitled to assign or transfer the interest in the copyright except upon terms which would secure to the author his royalties The rights of the parties in the winding-up of a publishing company should be decided without reference to s. 60 of the Bankruptcy Act, 1914. Maugham, J., *Health Promotion, Ltd., In re*, (1932) 101 L. J. Ch. 58.

Easements—Light and air—Dominant tenament pulled down—Rights of dominant owner.

The plaintiffs' building which was entitled to ancient lights was pulled down and a new building was erected in its place. After the new building had been completed the defendants pulled down their building and began to erect a new building. The plaintiffs sued for an injunction to restrain the defendants from obstructing their ancient lights. There was no proof of the extent of the identity of the old and new windows of the plaintiffs' building but it was admitted that there were pencils of ancient light admitted through the new windows. *Held* (*i*) that the mere lack of evidence of an intention by the plaintiffs to preserve their ancient lights was not by itself sufficient to prove an intention to abandon them; (*ii*) that having regard to the uncertainty as to the exact dimensions of the windows and lights it was impossible to determine whether a nuisance would be caused by the new building which the defendants intended to erect and the plaintiffs were not therefore entitled to the injunction claimed. Farwell, J., *News of the World Ltd.*, v. *Allah Fairhead & Sons Ltd*, (1932) 146 L. T. 11.

Wit and Humour.

Both Correct.—The suit was for slander, and had assumed the form of a cross suit for the improper use of the unruly member. Counsel on each side was of the highest standing. All Virginians will assent to this when told that Samuel Taylor was for the plaintiff and Benjamin Wat Kenis Leigh for the defendant. The court being opened and the case being called, the Judge said, "Mr. Taylor, are you ready in this case?" Mr. Taylor replied, "If Jarry Moody is here, I am ready" "Mr. Leigh, are you ready?" May it please your honor, I am ready if Jerry Moody is here." "Sheriff, call Jerry Moody." The Sheriff went to the door and lustily called thrice for Jerry Moody to come into court. Soon Jerry, a tall, thin, straight man, came forward. The Jury were sworn. Then Jerry was sworn. In his solemn and forcible manner Mr. Taylor said to the witness; "So good as to tell the court and jury [illegible] know about this case." Witness sa[illegible]ll, I have often heard the defendan[illegible] that the plaintiff was a rogue, a thief, and a liar; and I have often heard the plaintiff say that the defendant was a rogue, a thief, and a liar; and they were the only times I ever heard either of them tell the truth."—*Case and Comment.*

Not Half Stript.—During the hearing of a case, the Judge was disturbed by a youth who kept moving about in the rear of the court.

"Young man", he exclaimed, "you are making a good deal of unnecessary noise. What are you doing?"

"I have lost my overcoat and am trying to find it," replied the offender.

"Well," said the Judge, "people often lose whole suits in here without all that fuss."—*Case and Comment.*

Squaring the Circle.—Bursting open the door marked "Private," the butcher confronted the local lawyer.

"If a dog steals a piece of meat from my shop, is the owner liable?" he asked the man behind the desk.

"Certainly," replied the lawyer.

"Very well, your dog took a piece of steak worth half a dollar about five minutes ago."

"Indeed," he returned smoothly. "Then if you give me the other half, that will cover my fee."—*Case and Comment.*

INDIAN CASES

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Notes on Current Topics.

Judges' Salaries and the Economy Act.

The keen controversy that prevailed in England on the reduction of Judges' salaries has been temporarily set at rest by the statement made by Mr. Baldwin in the House of Commons that "Nothing has been further from the intention of the Government than to derogate in any way from the special position in which His Majesty's Judges stand by virtue of the Act of Settlement, the Act of 1 George III and later Statutes, or to affect, directly or indirectly, the independence, security or prestige of their high office." The decision of the question whether the National Economy Act which directed the cut in salaries 'in respect of any office in His Majesty's Service, applies to the salaries of the Judges of the Supreme Court has, however, been avoided and the cut is to continue, though the constitutional position of the Judges has been recognised.

Imprisonment for debt

While the jails of India are being filled with political prisoners people in England are becoming alarmed at the number of persons who are imprisoned for debt every year. More than three thousand persons are reported to have been sent last year to the Buxton prison alone on this account. This increasing number is attracting the attention of our English contemporaries and creating doubts in their minds as to the wisdom of sending persons to jail and keeping them there for failure to pay debts. The *Justice of the Peace* observes: "When debtors are committed to prison, and remain there, there is a presumption that the law has failed in its object."

An Unusual Order.

In the recent case of *Tuan Man and another* v. *Che Som and others* decided on the 19th February, (136 I. C. 632) the Judicial Committee has made some important observations on the procedure to be followed by an appellate Court when it remands a case for bringing a party on record. In this case the appellate Court in remanding a case for impleading a necessary party ordered that the suit should stand over for a period to enable the plaintiffs to remedy the defect caused by that person not being party to the suit. If the defect was not remedied within the period, the defendants, the order continued, might apply to the trial Judge for an order dismissing the suit. If the defect was remedied the plaintiffs might apply to the trial Judge for a decree to be made by him in terms which had been set forth in the order of the Court of appeal. Their Lordships said that the order as an unusual one and observed: "It is hardly in accordance with precedent, that a Court of appeal should, after sending a case back to the trial Judge for the purpose of having a necessary party brought before the Court, proceed (before the new party has been joined or heard, and without considering what defences may be available against him) to indicate the order which the trial Judge should make when he tries the case in the presence of the proper parties."

A Salutary Rule of Practice.

We invite the attention of judicial officers to the decision of Mukerji, J., in *Ajai Verma* v. *Baldeo Prasad* (16 R. D. 56). In this case Mukerji, J. in restoring to the file certain appeals which had been

dismissed for default of appearance without sending for the Pleaders engaged, observes:

"There is nothing to suggest that the two Pleaders who had been engaged in the appeals were ever sent for. As a matter of practice, when there are Pleaders in a case they are always sent for by the court and this is a salutary practice. No doubt, the peon calls out at the door of the court and that is very often sufficient, but when there are Pleaders, the ordinary practice of sending for them should not be discontinued. This practice is followed even in the High Court. In appeals especially, it is not necessary that parties should be present in person when there are constituted agents in the shape of Counsel in court. Counsel would be busy in several courts and it is conducive to good work that they should be sent for."

We may in the connection refer to an important aspect of the matter which the learned Chief Justice of the Patna High Court has forcibly expressed in these terms:—

"No human ingenuity has been able to solve the problem of the administration of justice whereby two cases are liable to come up in different courts at the same time. There is no way of getting out of the difficulty. The profession itself, I know, would welcome any suggestion by which any solution of the difficulty could be found." *In the matter of N, a Pleader* [116 Ind. Cas. 764; 10 P. L. T. 664; A. I. R 1929 Pat. 153.]

It would be impossible for Pleaders under such circumstances to be always waiting in any particular court and it is only fair that they should be sent for. This is a matter of judicial etiquette and is observed by the Judges of the superior Courts of India. The practice of dismissing cases for default when Pleaders are engaged in another court has also been condemned in strong terms by Mears, C. J. and Young, J., of the Allahabad High Court in *Nathu* v *Babu Ram* [I. L. R. 51 A. 758, 119 I. C. 435]. In this case the Subordinate Judge, in dismissing a suit suit, observed: 'it is their (the clients') duty to attend in time or to engage a Pleader who could attend in time'. Their Lordships said that this was a 'much too narrow view of the matter' and reminded the Subordinate Judge that 'it is the practice of Pleaders to earn their livings in other courts than his.' It was definitely ruled by their Lordships in this case that if a suit is dismissed for default under such circumstances without adjourning the case to give time to the Counsel to attend, and the Counsel, on returning from the other court, explains his absence and asks for restoration 'it would be the duty of the Judge to restore the case at once.'

Decree against dead person.

The recent decision of Court of Appeal in *Lazard Bros. Co.* v. *Banque Industrielle De Moscou* (1932, 101 L. J. K. B. 65 Scrutton, L. J., Greer, L. J., Slesser, L. J.,) throws considerable light upon the procedure which a court should adopt when it has served a writ upon a dead person or a dissolved corporation and passed a decree in default of appearance. If a person injuriously affected by a judgment by default and not a party to that action desires to set aside the judgment he must apply either in the defendant's name if he is entitled to use it or in his own name by a summons served both on the plaintiff and the defendant to have it set aside. Their Lordships hold in this case that this rule cannot be applied to the case of a non-existent person or defendant on whom no summons can be served and that it is the duty of the court to set aside the judgment on its own motion. "Indeed," says Scrutton, L. J., "in my opinion, if it comes to the knowledge of the court that it has entered judgment in default of his appearance against a man who was at the time dead, or a company which was at the time dissolved or non-existent according to the law of its country of origin, the court is bound, after hearing the parties interested, of its own motion to set the judgment aside. Such a judgment is null and void."

A Bogus Doctrine Exposed

The supposed rule that where a contract between A & B creates a charge on immoveable property in favour of C, C is entitled to enforce the charge though he was not a party to the original contract has exploded. The decisions which are cited as authorities for this proposition are *Iswaran Pillai* v. *Tharakan* (38 M. 753) and *Subbu Chettiar* v. *Arunachalam Chettiar* (53 M. 207; 124 I. C. 55 and the headnotes of these cases clearly enunciate such a rule. Jackson & Pakenham Walsh, JJ. of the Madras High Court have recently, in *Suryanarayana Rao* v. *Basivireddy* (1932 M. W. N. 44), traced the origin of this rule and have come to the conclusion that the supposed exception to the general rule is 'absolutely and entirely unwarranted by the judgments in these two cases' and that it has originated from 'pure interpolations in the headnotes.' The two rulings have been laboriously analysed by their Lordships and they have come to the conclusion that 'nothing so

crude has ever been ruled by this court.' Walsh, J. who was a member of the Full Bench in *Subbu Chettiar's Case* says that an error had crept into an *obiter* remark in that case in consequence of an entirely misleading and incorrect headnote in *Iswaran Pillai's case*.

Successive Complaints on Same facts: A Full Bench Ruling.

The important question whether, where a complaint has been dismissed by a Magistrate of superior jurisdiction under s. 203, Criminal Procedure Code, a Magistrate of inferior jurisdiction has power to entertain a charge sheet founded on a subsequent complaint on the same facts when the previous order of dismissal has not been set aside, was referred to a Full Bench of the Madras High Court in *In re Ponnuswami Goundan* (62 M. L. J. 469). Though in 1905 a Full Bench of the same High Court had by a majority decided in *Emperor* v. *Chinna Kaliappa Goundan* [I. L. R. 29 M. 126] that a Magistrate who had dismissed a complaint had jurisdiction to entertain a fresh complaint, the correctness of that decision was challenged in this case. Their Lordships have, however, unanimously re-affirmed the principle laid down in the earlier case and further extended it to cases where the dismissal was by a different Magistrate, even a Magistrate of superior jurisdiction.

The other High Courts of India have also taken the same view [*vide* 28 C. 211, 36 Cal. 415, 36 A. 129, 92 I. C. 895 (All.); 84 I. C. 838 (Rang.), 87 I. C. 527 (Bom.), 120 I. C. 15 (Lah.)]. In the Lahore High Court it has been held that a second complaint is maintainable even where the order of dismissal has been confirmed by a superior Court (Bhide J. in *Alla Ditta* v. *Karam Bakhsh*. 120 I. C. 15). As sections 203 and 403, Criminal Procedure Code, stand, it is impossible to come to a different conclusion. We would, however, invite the attention of the Legislature to the following pertinent observations which their Lordships have made in this case:

"It is curious no doubt that the Code, while empowering superior courts to direct further enquiry into complaints that have been dismissed under s. 203 which would seem to supply a complete and adequate remedy against improper dismissal, should, at the same time, allow a complainant and a Magistrate to dispense with that formality and permit the one to present and the other to entertain a complaint on the same facts as a complaint that has already been presented and dismissed. But that is not our concern."

Unpaid Vendor's rights.

There is some conflict of opinion between the Madras High Court on the one hand and the Allahabad and the Calcutta High Courts on the other on the question whether in a suit by a vendee for possession it is competent to the Court to pass a decree for possession conditional on the vendee paying the unpaid purchase money. The decisions of the Madras High Court are based principally upon the ground that under the Transfer of Property Act the vendee is entitled to possession and the vendor has only a statutory charge on the property. There is no provision for a vendor's lien in that Act and it is not permissible for a court to invoke equitable principles to modify the provisions of the Statute law The Allahabad High Court, on the other hand, is of opinion that the court may on equitable grounds pass a decree in favour of the purchaser for possession conditional on the payment of the purchase money and direct that in default of such payment the purchaser shall forfeit his right to recover possession. The Calcutta High Court agrees with the Allahabad High Court on the ground that it is undesirable to drive the vendor to file a separate suit to enforce his charge. The view of the Madras High Court that equities cannot be invoked to modify the Statute law receives considerable support from the decision of the Privy Council in *Ariff* v. *Jadunath Majumdar* (1931; 33 Bom. L. R. 913). In a recent decision *Basa Lingava* v. *Chinnava* (34 Bom. L. R. 427) the matter came before the Bombay High Court. Baker, J. followed the Allahabad and Calcutta rulings. On Letters Patent Appeal the point was discussed in great detail by Patkar and Barlee, JJ, and their Lordships have followed a middle course. They agree with the Madras view that the vendee is entitled to possession and that equities cannot be invoked against this right, but at the same time they agree with the Calcutta High Court that the vendor should not be driven to a separate suit to enforce his statutory charge for unpaid purchase [illegible]. The correct procedure accordi[illegible] the Bombay High Court is, therefe[illegible] to pass a conditional decree for [illegible]sion but to pass a decree for possess[illegible] with a declaration that the vendor is entitled to a statutory charge and giving the vendor liberty to apply for sale to enforce his

charge if the unpaid purchase money is not paid within a specified date.

Effect of Partition on Widow's right to maintenance.

A point of Hindu Law upon which there seems to be no direct authority has been decided in *Bhagavanulu Narasimham* v. *Venkatasubbamma* (62 M. L. J. 632). The point at issue in this case was whether when the widow of a coparcener sues for maintenance after there has been a partition, she can enforce her rights against all the surviving co-parceners or only against those who have taken her husband's share. Relying on the principle laid down in *Jayanti Subbayya* v. *Alamelu Mangamma* (I. L. R. 27 M. 45) that the widow's right to relief against the family is limited to the value of her husband's share, Waller and Jackson, JJ., have held that the widow cannot enforce her rights against any of the surviving co-parceners except those who have taken her husband's share. *Subbarayulu Chetty* v. *Kamavalli Thayarammal* (I. L. R. 35 M. 147) in which it was held that a widow's right for maintenance was enforceable against the whole family and not merely against her late husband's branch of it is distinguished on the ground that there the suit for partition was filed after the suit for maintenance. The decisions relied on by the learned Judges only lay down that the widow's right of maintenance is limited to the value of her husband's share. The matter is not free from difficulty but we think it is not safe to lay down as an invariable proposition of law that where there has been a partition the "widow cannot enforce her rights against any of the surviving co-parceners except those who have taken her husband's share." The equities and circumstances of the case may necessitate resort to the entire co-parcenary estate to secure the widow's rights and a partition to which she is not a party cannot operate as a legal bar or be allowed to prejudice her rights.

Notable dicta.

Legal profession:—In civilised society law is the chimney through which that smoke discharges itself that used to circulate through the whole house and put every one's eyes out. No wonder therefore, that the vent itself should sometimes get a little smoky.—Sir Walter Scott quoted by Lord Macmillan.

Excellence of law:—The law might do well sometimes to recall its excelle ces instead of bewailing itself and rending its garments in public.—Lord Macmillan.

Tribute to the law:—One of the greatest tributes paid to the law in these times is that whenever a particularly difficult, complicated and unremunerative job was on offer the suggestion was invariably made that it should be given to one of His Majesty's Judges.—Lord Macmillan

Leaning of Judges:—A Judge, being but human, will, in order to rectify what he may imagine to be a natural bias often tend to lean, if anything more in favour of a poor man than his rich opponent. *Law Journal.*

Points in everyday practice.

Memo. of objections: Court fee.

A memorandum of objections filed under O. XLI, r. 22, Civil Procedure Code, is neither a petition nor an application and no Court-fee is required. *Mohammad Salim Ullah Khan* v. *Khalil-ul Rahman Khan*, (1932) A. L. J. 149.

Pleader's fees.

If Pleader's fees have not been actually paid but only p[illegible] *e. g.*, by the execution of a pro[illegible] note, the fees cannot be taxed [illegible]sts against the opposite party Ch[illegible] XXI, r. 1 of the Allahabad Rules contemplates actual payment, *Bhagwant Singh* v. *Bhao Singh*, 136 Ind Cas. 817.

Attachment of debt.

It is not open to a Court attaching a debt either before or after judgment to determine whether the debt is actually due It can only sell the debt or appoint a Receiver. *Alwar Aiyangar* v. *Subrahmanya Dikshitar.* 136 Ind. Cas. 337.

Attestation.

A person who signs on behalf of the executant cannot also sign as an attestor of the document. *Venkatarama* v *Nagamma*, 136 Ind. Cas. 343.

Appeal.

Where an objection really falls under s. 47, Civil Procedure Code, the order

thereon is appealable even though the objection was treated as one under O. XXI. r. 58. *Gopal Das* v. *Ishar Das*, C. A. No. 754 of 1931 (Lahore)

Evidence.

A litigant should not be allowed to avail himself of evidence which his opponent has adduced in support of a different story which has been disbelieved by the Court *Raymond Lincoln* v. *Mrs Alice Poupinel*, 136 I. C. 451. (P. C.)

Pleader's power to refer.

A Pleader cannot refer to arbitration on behalf of his client unless he is authorised in writing to do so. *Amir Shah* v *K. S. Abdul Aziz* C. R. No. 376 of 1931 (Lah.)

Vendor and purchaser.

In a suit by a vendee for possession the court has no power to pass a decree for possession conditional on payment of unpaid purchase money. It can only declare a charge for unpaid purchase money and give liberty to sell (Bombay view). *Basalingava* v. *Chinnava*, 34 Bom. L. R. 427.

Extracts from Contemporaries.

Big Silks and Little Judges?

I have heard it said, more than once of late, that at the Common Law Bar the number of leading silks who on their records are entitled to regard themselves as "superior" to some of the Judges shows a regrettable increase. If this be so, and if the reason for their continuance at the Bar is the unattractive remuneration of the Bench, ought not the judicial salaries to be increased rather than diminished; or, alternatively, would it not be advisable for the Government to levy a special tax on eminent Counsel's income from fees above a certain amount? *The Law Journal.*

Books of Authority

Occasionally one hears a Judge speaking from the Bench in appreciative terms of a textbook on some branch of law; but the recognition of the labours of their writers is scarcely commensurate with the amount of labour involved in the compilation of the works, or the value they possess even for those who are assumed to have all the law in their heads. Textbooks, as is generally known, have no binding authority, and are supposed to be prohibited from being cited in court during the lifetime of their authors. Why they should be regarded as assuming a degree of authority immediately on the demise of their writers has never been satisfactorily explained, if, indeed, it is susceptible of an explanation. We have said that textbooks have no binding authority, and this is true of all modern works, however much they possess of academic distinction; but a few old works seem to enjoy the right to be called authoritative, hence the name "books of authority." What are these? Mr. Fifoot, in his recently published book, English Law and its Background, enumerates them as follows: Littleton's Tenures, Glanvil, Bracton, Coke, and Blackstone. Not all agree in giving this rank to those just named. Sir Frederick Pollock, in his First Book of Jurisprudence, says that "no general description can be given of what constitutes a 'book of authority.' It is a matter of judicial custom and professional tradition . . . Some books which are highly esteemed, and which it is not improper to cite in argument, are still short of having authority in the professional sense; Blackstone is the leading example. Sir Michael Foster's treatise on Crown Law, first published in 1762, only three years before Blackstone's Commentaries, is said to be the last book to which authority in the exact sense is ascribed." The subject is curious rather than practical, for the occasions when older writers are cited, the authors of "books of authority" are comparatively rare. Most practitioners clamour for the latest treatise on the branch of law in which at the moment they are interested, and we hear these cited in court totally regardless of the circumstance that they are not books of authority—*The Law Times.*

The Old Inns of Chancery.

In early times there had been little difference in the education and discipline of the two branches of the legal Profession, both Barristers and Attorneys being members of the same societies, but in the course of time the Inns of Court began to exclude the

nonforensic branch from their rolls. The change, which had been gradual, was complete by the end of the sixteenth century, and it is from that time that personal intercourse with lay clients, which had hitherto been shared, became confined to solicitors, and so completely distinguished the two branches. Gradually the Old Inns of Chancery became monopolised by attorneys, writ clerks, and other minor officials, and when the decay of the Profession occurred in the eighteenth century it was felt more acutely by the less affluent of the Inns of Chancery. Whereas the members of Barnard's Inn had numbered 120 in the days of Queen Elizabeth, they could not muster more than eighteen in the middle of the last century. Two Special Committees reported in the course of the century, and as a result of their findings a scheme was propounded whereby the control of all attorneys and solicitors should be entrusted to one central authority. In 1843 the Master of the Rolls entrusted the custody of the Roll of Attorneys to the newly founded Law Society, and gradually the old societies died out—*The Law Times.*

Repudiation of Debts.

A Joint debate between the United Law Society and the Hardwicke Society was held last Monday, the 29th February in the Middle Temple Common Room. Mr. George Bull was in the chair. The Hon. Dougall Meston moved, and Mr. R. W. Bell seconded:

"That this country should repudiate its War debts to the United States of America."

Mr. A. Newman-Hall and Mr. A. A. Baden-Fuller opposed the motion on behalf of the Hardwicke Society. There also spoke: Messrs. P. K. Cross, M. V. Rabagliati, D. A. Stride, H. H. West, S. A. Redfern, T. A. Marfers, P. O. Hereward, and J. Harcourt Barrington. Mr. A. Newman-Hall having replied, the motion was put to the House, and there voted for the motion three, and against fifteen. The motion was therefore lost by twelve votes—*The Law Times.*

Notes of Recent Full Bench Rulings.

CALCUTTA.

Limitation Act (IX of 1908), s. 12—Original Side appeals—Time requisite for copies.

In the case of an appeal from the original side the time requisite for obtaining a copy of the decree or order may begin to run before an application for a copy has been made. The appellant may be entitled in a proper case to exclude the time which elapses between the making and the drawing up of the decree even though he had not applied for a copy prior to the drawing up of the decree. 32 C. L. J. 127, overruled. (Rankin, C. J., C. C. Ghose, J., Buckland, J., Pearson, J., Mukerji, J.,) *In re Parijai Debi*, 36 C. W. N. 469.

MADRAS.

Criminal Procedure Code, ss. 203, 403—Dismissal of complaint by Magistrate of superior jurisdiction—Power of Magistrate of inferior jurisdiction to entertain fresh complaint.

Where a complaint has been dismissed by a Sub-Divisional Magistrate under s. 203, Criminal Procedure Code, a Sub-Magistrate has jurisdiction to entertain a charge sheet on a subsequent complaint even though the order of dismissal of the previous complaint has not been set aside. *Emperor* v. *Kaliappa Goundan* 29 M. 126 approved. *In re Ponnuswami Goundan* (Waller, Pandalai and Ourgenven, JJ.) 35 L. W. 478; 62 M L. J. 469.

Criminal Procedure Code, s. 476—False charge to Police against A & B—Complaint by Police against A alone—Jurisdiction of Court to make complaint in respect of charge against B—Telegram containing false complaint to Police filed in Criminal Court—Effect—'In relation to proceeding in the court', meaning of.

(*i*) When a charge is made by a complainant to the Police against more than one individual and the Police, while charging before the court one or more of such individuals with the offence complained of, do not charge them all, the court has no jurisdiction to take action under s. 476 against the complainant in respect of those not so charged. (*ii*) The mere fact that the telegram of complaint to the Police in such a case is filed and exhibited in the case does not make the contents of it a matter in relating to the

proceeding in court so as to give the court jurisdiction to take action under s. 476. (Wallace. Waller and Pandalai, JJ.) *Registrar, High Court, Madras* v. *Kodangi*, 62 M. L. J. 425; 35 L. W. 481.

Criminal Procedure Code, s 162—Whether applies to statements of accused persons.

The expression 'statement made by any person' in s. 162, Criminal Procedure Code, includes statements made by accused persons—(Reilly, Anantakrishna Iyer and Sundaram Chetty, JJ.) Criminal Appeals Nos. 705, 706 of 1931.

Malabar Law—Kanom—Melcharth *before expiry of term—Absence of legal necessity —Validity*

A melcharth granted by a *karanavan* before the expiry of the previous *kanom*, without legal necessity or benefit to the *tarwad* is not invalid but only voidable at the instance of the next *karnavan* or the members of the *tarwad*. Jackson, Reilly and Anantakrishna Ayyar, JJ. (Mad.) S.A. No. 1199 of 928.

Revenue Recovery Act (Madras)—Revenue sale—Confirmation by Deputy Collector—Power of District Collector to set aside sale.

In the case of confirmation of a revenue sale by the Deputy Collector the District Collector has power to set aside the sale. 14 M. L. J. 433, followed. 51 M. 695, overruled. *Chitanda Chittayya* v. *Secretary of State*, 35 L. W. 516.

Stamp Act s. 37—Government of India Stamp Rules, r. 18—Promissory note affixed with quarter anna stamps—Whether can be validated.

A promissory note stamped with quarter anna postage stamps is a document bearing stamps of improper description and can be validated by the Collector under r. 18 of the Government of India Stamp rules. (Beasley, C. J., Ramesam & Cornish, JJ.) *Martis* v. *D'Souza*, 35 L. W. 518.

Civil Procedure Code (Act V of 1908), O. XXI, r 2—Uncertified adjustment whether can be pleaded against transferee of decree.

A judgment debtor who is debarred under the provisions of O. XXI, r. 2 from pleading adjustment of a decree for failure to certify the adjustment cannot plead such adjustment in opposition to an application under O. XXI, r. 16, Civil Procedure Code, by a person to whom the decree has been transferred. 119 I. C. 480, approved. 47 Bom. 643 dissented from. 40 M. 296, overruled. (Beasley, C.J., Ramesam and Cornish, JJ.) *Nalam Subrahmanyam* v. *Devara Ramaswami*, (1932) M. W. N. 990.

OUDH.

Religious Endowments Act (XX of 1863), s. 14—Applicability—Temples for the maintenance of which no endowment in land is made.

The provisions of s. 14, Religious Endowments Act, are not applicable to temples for the maintenance of which no endowment in land has been made *Kedar Nath Pandit* v. *Pearey Lal Gupta*, 9 O. W. N. 229.

Notes of Recent English Cases.

Will—Power to appoint between two persons —Death of one before testator—Effect.

Where power is given by will to appoint between two named persons and one of them dies during the life-time of the testator the power itself is limited because it can be exercised only in favour of the survivor and the will ought to be construed as if the power over the share which might have been appointed to the deceased object had *pro tanto* lapsed.

Where the donee of a power of appointment has exercised the power for an amount greater than that over which it was given, the appointment is good with regard to the correct amount—(Maugham, J.)—*Turner, In re*; *Hudson* v. *Turner*, (1932) 101 L. J. Ch. 49.

Will—Gift for open air recreation—Validity—'Charitable gift'.

Where a testator by his will created a trust for providing grounds for open air recreation, such as 'playing fields, parks, or gymnasiums or other plants which will give recreation to as many people as possible.' *Held*, that the dedication of land to the public for recreation was a chartitable object and the will, therefore, created a valid charitable trust, [illegible]gham J.) *In re Sunnyfield*, (1932) 10[illegible]h. 55.

Will—Settled [illegible]equest for up-keep of graves so fa[illegible] trustees can legally do so—Validity—Rule against perpetuities.

Where a gift was made by will and the testator directed that the trustees should

use the income of the fund for the upkeep of graves etc, in a cemetery 'so far as they legally can do so': *Held* that the provision meant 'so long as the law for the time being permits' and the trust was valid for a period of 21 years from the testator's death. (Maugham, J.) *Hooper, In re*; *Parker* v. *Ward*, (1932) 101 L J. Ch. 61.

Corporation—Service out of jurisdiction—Dissolution before date of service—Duty to set aside judgment.

If it comes to the knowledge of the court that it has entered judgment in default of appearance against a company which was at the time dissolved or non-existent according to the law of its country of origin the court is bound after hearing the parties interested of its own notion to set the judgment aside. As the Russian Government and the Russian Courts do not recognise the pre-revolution Banks as existing in Russia, British Courts would be slow in granting leave to serve notices of writs or substituted service of writs on the old banks without very clear evidence that they exist, (Scrutton, L. J., Greer, L. J., Slesser, L. J.) *Lazard Bros., & Co.*, v. *Banque Industrielle De Moscou* (1932) 101 L J K. B. 65.

Torts—Negligence statutory authority—Omission to perform statutory obligations—Liability

The Port of London Authority owned a bridge which was partly a Railway bridge and partly a road and foot bridge and they were under a statutory obligation to maintain and repair it. The public had an unrestricted right of access to the bridge when it was not required to be thrown up for dock traffic. Owing o the non-repair of the bridge by the Authority the plaintiff while walking over the bridge struck his foot against a nail projecting from the footway and fell and sustained personal injuries In a suit for damages: *Held*, that the bridge was not a highway and the position of the defendants being that of a person who had a statutory duty to repair, the defendants were liable for the ordinary consequences of injuries which resulted from their negligence. (Humphreys, J.) *Guilfoyle* v. *Port of London Authority* (1932) 101 L. J. K B. 91.

REVIEWS.

The Indian Income Tax Act: By S. M DAS GUPTA, M.A., B.L., Pleader, Judge's Court, Khulna: 1932: Eastern Law House, Calcutta: Price Rs 6.

We are having many commentaries on the Income Tax Act but the law is so important, and intricate and is undergoing so many changes every year that the legal profession is sure to find something new and useful in all these commentaries. Vast changes have been recently introduced by the Finance Acts of 1930 and 1931, and the Eastern Law House have brought out this edition of the Act at a very opportune time. Beside a commentary on the Act, this book contains the Rules of the Central Board of Revenue and twelve useful chapters dealing with various miscellaneous matters relating to income-tax practice.

The Up-to-date Criminal Reference: By B. K. PAL: Fourth Edition: 1932: Eastern Law House, Calcutta: Price Rs. 7.

Mr. B. K. Pal's Criminal Reference is well known to the legal profession and needs no introduction. The size and nature of Indian Case-Law is such that books of reference in which honest labour has been bestowed are sure to be useful to the profession. In this edition the book has been thoroughly revised and improved and brought up-to-date. New matter covering over 400 pages has been introduced though the price is still the same.

INDIAN CASES

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Notes on Current Topics.

Pre audience of the Acting Advocate General.

It was decided by the Bombay High Court in 1865 (Sausse, C. J., and Westrop, J.) that the Acting Advocate-General had a right of pre-audience when appearing for the Crown but not when appearing for a private litigant. The question how far recent legislation had altered the position was considered by a Full Bench of the Bombay High Court (Beaumont, C. J., Rangnekar, J. and Barlee, J.) in *In re Pre-audience of the Acting Advocate-General* (136 Ind. Cas 793) Mr. Taraporewala, the Acting Advocate-General, contended that under the Government of India Act of 1915, and the Bar Councils Act of 1926, the Acting Advocate-General had the right of pre-audience in all cases. Their Lordships held that notwithstanding the decision of 1865, by virtue of s. 114 of the Government of India Act, 1915, and the Bar Councils Act, 1926, and the amending Act of 1927, the Acting Advocate-General is entitled to a right of pre-audience over all other Advocates in respect of all business, whether for the Crown or of a private nature. With regard to the right itself their Lordships observe that it is not a personal privilege or a privilege based on any preference in respect of Crown business.

It may be noted that though the expression 'Advocate-General' is used only in the three major Presidencies, as their Lordships' ruling is mainly based on the Bar Councils Act and inasmuch as s. 2 of that Act defines 'Advocate-General' as including the Government Advocate where there is no Advocate-General, this ruling will apply to Acting Government Advocates of the other provinces also.

Liability of Dormant Partners.

Under the English Law if a partner not known to be such retires from the firm he cannot be made liable for debts contracted by the firm after his retirement, and apart from the solitary decision of Beaman, J. in *Giswani Gorio & Co* v. *Kalyanji* (30 I. C. 864) which has been dissented from in all the subsequent cases, the uniform trend of the rulings of the High Courts of India was to the effect that the law in India is the same. We may refer to *Greaves Cotton & Co.* v. *Purushottam Dharamsi & Co.* (5 Bom. L. R. 366), *Jwala Datt* v. *Bansilal* (104 Ind. Cas 520): 29 Bom. L. R 1244) and *Bhai Sankar* v. *Lakshmi Dyeing Works* (129 Ind. Cas 538; 32 Bom. L R. 1031) of the Bombay High Court; to *Ramasami* v. *Kad r Bibi* (9 M. 492) of the Madras High Court; *David Sassoon & Co. Ltd., In re* (100 Ind. Cas 389) of the Sind Judicial Commissioner's Court; and *Hashmat Ali* v. *Lachmi Narain* (75 P. R. 1905), and *Bichhia Lal* v. *Munshi Ram* (68 Ind. Cas. 932) of the Lahore High Court. That s. 261 of the Contract Act does not apply to dormant partners was in fact taken to be settled law in *Jwala Datt* v. *Bansilal* (104 Ind. Cas. 520) and by the Counsel who argued this case on appeal before the Privy Council. Rankin, C. J. and Buckland, J. of the Calcutta High Court h[illegible] however, in a recent case *Pramat[illegible]dra Kar* v. *Bhagwandas Madan L[illegible]* Ind. Cas. 529; 59 Cal. 40) dissente[illegible] these rulings and held that a retiri[illegible]artner would be liable if he does not give notice even though he was not known to be a partner. With all respect to these eminent Judges, it is difficult to find any principle of law upon which legal liability could

be founded in such a case and we think that if the Legislature had intended to make such a deliberate deviation from a well recognised rule of the English Law and to extend the ordinary limits of liability to such an extent it would certainly have made the point clearer in s. 264 of the Contract Act.

Their Lordships lay much stress upon the wording of s. 264 But that section after all, merely says that persons dealing with a firm will not be affected by a dissolution of which no public notice has been given. It does not lay down what the rights of such persons are against dormant partners and for ascertaining these rights we have to search the general law of partnership and under this law dormant partners are only liable for debts contracted up to date of their retirement.

Anyhow we are glad to find that the new Partnership Bill which has just been passed by the Legislative Assembly follows the earlier rulings of the Indian High Courts which are in harmony with the English Law and general principles, and that this new ruling of the Calcutta High Court will cease to be law on the introduction of the Partnership Act. (Vide cl. 32 (3) of Bill No. 8 of 1931).

Limitation Act, Art. 123: A conflict set at rest.

Before the ruling of the Judicial Committee in *Maung Tun Tha* v *Ma Thit* (38 Ind. Cas. 809; I L. R. 44 Cal. 379) there was a long series of decisions in India that Art. 123 of the Limitation Act only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate, In the above mentioned case the article was applied by their Lordships to a case of partition though it was argued by the learned Counsel for the appellants, Sir Erle Richards, K. C., that Art. 123 could not be applied as the claim was not one for a distributive share; (see 38 Ind. Cas. 809 at page 811). Since then there has been much conflict in India as to the scope of Art 123 [illegible] ne cases it was held that the Judicial Committee had impliedly overruled the Indian authorities (*vide* 51 I. C. 209; I. L. R. 43 Bom. 845) but the contrary view was taken in some later cases of the same High Court. In the Allahabad High Court the question was finally referred to a Full Bench in *Nurdin* v. *Umrao* (111 I. C. 809; I. L. R. 51 A. 101) and their Lordships expressed the view that the Privy Council had not in *Maung Tun Tha's case* overruled the earlier decisions. The matter has now been placed beyond all dispute by the Judicial Committee itself in *Ghulam Mohammad* v. *Ghulam Husain* (136 I. C. 454). Their Lordships have, after considering the Indian decisions, stated that it was not intended by the judgment in *Maung Tun Tha* v. *Ma Thit* to overrule the earlier decisions of the Indian High Courts and that these cases should be followed at all events in cases from the Indian Courts. This case shows the danger of departing from a course of decisions in India on the basis of an implied decision of the Privy Council.

Counsel on each side declining to rely on his evidence.

In a recent appeal from the Supreme Court of Mauritius *Raymond Lincoln* v. *Alice Poupinel De. Valence* (136 Ind. Cas. 451) their Lordships of the Judicial Committee had the remarkable experience of hearing Counsel on each side declining to rely upon the testimony of his leading witness and seeking to base his case on the evidence of his opponent. In India such instances are not rare and the judgment of their Lordships in this case throws much light upon the procedure to be adopted in such cases. In this case the plaintiffs sued for damages for injuries suffered by the alleged negligence of the defendant's chauffeur in driving the defendant's motor car. The evidence of the two participants in the accident, namely, the plaintiff and the defendant's chauffeur, was not accepted by the Judges who heard the case and was not put forward by either side before their Lordships as reliable. But the plaintiff tried on appeal to base his case on the admissions made by the defendant's chauffeur and on the facts found by the trial court. Their Lordships held that the appellant cannot legitimately invoke for this purpose evidence directed to another and quite different story which has not been believed. In their Lordships' opinion it was dangerous to allow the appellant to establish a new ground of negligence against the defendant's chauffeur on the reconstituted facts as found by the court below and accepted by their Lordships. Failure of the appellant to establish the case averred in his pleadings and spoken to in his evidence would in a case of this nature justify the dismissal of the appeal on this ground alone.

Rights of inferior proprietors of Central Provinces.

The rights in respect of village waste and forest produce are much valued in the Central Provinces and the decision of the Judicial Committee in *Lal Indra Shah* v. *Sheo Sankar* (136 I. C. 628) will affect the inferior proprietors of the Central Provinces to a far reaching extent. Their Lordships have held in this case overruling the Judicial Commissioner's decision, that there is no presumption that the inferior proprietors of a village in the Central Provinces are entitled to such rights even though the inferior proprietors of the adjoining districts enjoy such rights. They can only succeed if they show that they have acquired those rights by custom or those rights were granted to them at the time of the subsettlement. Their Lordships have further held that where the existence of such rights before the settlement is not proved the mere absence of any entry in the *wajib-ul-arz* prepared during that settlement does not lead to any inference in favour of the inferior proprietors.

Suit by Major as minor.

In *Ghasi* v. *Manga* (136 Ind. Cas. 710; 33 P. L. R. 263) a suit was instituted by a next friend on behalf of a person who was described as a minor but who was a major in fact, and during the pendency of the suit an application was made by the real plaintiff to continue the suit as a major. The mistake seems to have crept in "by a slavish following of the recital in a sale deed, possibly by the lawyer engaged" but there was no evidence whatsoever as to how the mistake was made. The District Judge found that the mistake was *bona fide* and permitted the plaintiff to amend the plaint. On second appeal, Harrison, J., held that it was necessary for the plaintiff to show that he was acting *bona fide* throughout and refused to accept the finding that the mistake was *bona fide* as there was nothing to show that due care and attention had been exercised or how the mistake arose. We think his Lordship has taken a too narrow view of the matter and that in the absence of anything to show that the plaintiff had acted *mala fide* that is, with sinister motives, the amendment should have been allowed. The correct view in our opinion is that expressed recently by Bose, A. J. C., of the Nagpur Judicial Commissioner's Court in the case of *Sukh Dev* v. *Yasoda Bai* (135 I. C. 409) in which a suit was instituted in the name of a wrong person and an application was made to substitute the right person. The learned Judicial Commissioner said :

"It has been objected on behalf of the defendant that the mistake cannot be called *bona fide* for it was clearly made without the exercise of due care and caution. I am of opinion that this is not necessary. It is true that in many branches of the law these elements are necessary to constitute good faith..... .....But, there are also other places where human nature is treated for what it is, and not for what it might and ought to be; where we look to the knowledge a man actually did have,and not what he might have had nor what some other man, deemed reasonable, would have had. There are branches of the law where, though a man was stupid, ignorant and careless, he is still deemed to have acted in good faith provided his blundering was honest.....And this is the rule which has been applied to O. I, r. 10, in *Nistarini Dasya* v. *Sarat Chandra Mazumdar*. In my opinion it is the right rule to apply in cases of this kind."

As Bowen, L J , had said in *Cropper* v. *Smith* (1884,26 Ch. Div. 700) "there is no rule of law that only slips or accidental errors are to be corrected". Mistakes like these almost always arise through the carelessness of somebody and very often it is difficult to prove how they arose. The proper punishment for carelessness in cases of this nature is to order the party to pay the costs of the other side and not to dismiss his suit.

Limitation of application to set aside ex parte decree passed after substituted service.

The provision contained in O. V, r. 20, Civil Procedure Code, that substituted service by order of the Court shall be as effectual as if it had been made on the defendant personally, has given rise to considerable divergence of opinion on the question whether in the case of an application to set aside an *ex parte* decree passed after substituted service the period of limitation runs from the date of the decree or when the decree comes to the knowledge of the defendant. We find from the reported cases that four different views have been held, though some of the decisions do not clearly realise this distinction, namely :—

First, that substituted service is due service only for the purpose of proceeding with the suit if the applicant merely shows that service was effected by substituted service. The period of limitation begins only from the date of the applicant's knowledge of the decree.(See *Venkatachalam* v. *Subbayya* (105 I. C. 889; A. I. R 1923 Mad. 655, Srinivasa Ayyangar, J.)

The second view is that substituted service may or may not be due service and if the

applicant shows that such service was ordered or obtained on insufficient materials, the service is not due service within the meaning of Art. 164. (See *Krishna Padayachi* v. *Sri Vinayakaswamiar* 122 I. C. 35; A.I. R. 1930 Mad. 222, Venkatasubba Rao, J.: *Ramkishen* v. *Mula*, 69 I. C. 467 (Lah), Chevis, J.)

A third view is that due service implies knowledge of the claim and even though all the formalities of substituted service have been carried through and service was properly ordered, if the service has not achieved the object of bringing the claim to the knowledge of the defendant, it is not due service. (*Gyanammal* v. *Abdul Hussain Sahib*, 134 I. C. 1202, Reilly and Anantakrishna Iyer, JJ.)

The last and the strictest view is that once the Court has ordered substituted service, whether on sufficient or insufficient materials, the service cannot be invalidated by showing subsequently that the order was made on insufficient grounds; (See *Shariba Beebi* v. *Abdul Salam*, 110 I. C. 490; 51 M. 860 Phillips and Madhavan Nair, JJ.; *Doraiswamy Iyer* v. *Balasundaram Iyer*, 102 I. C. 243; *Hansraj* v. *Narain Singh*, 131 I. C. 344)

We have no doubt that the last set of cases take a rather narrow view of the matter and give a finality to *ex parte* orders passed after hearing one side alone, which such orders are not entitled to If the Court finds after hearing the other side that it was wrong in ordering substituted service it is difficult to hold that service was still due service. The correct view in our opinion is that which has been taken by Venkatasubba Rao, J., of the Madras High Court in *Krishna Padayachi* v. *Vinakaya Swamiar* (122 I. C. 35) and Chevis, J. of the Punjab Chief Court in *Ramkishen* v. *Mula* (69 I. C. 467). In *Rajagopalachari* v. *Subrahmanyam* (1932) M. W. N. 133, Curgenven, J., has drawn a still more subtle difference and holds that in order to show that substituted service was not due service 'it must be established that the applicant for substituted service did not believe or had no reason to believe in the representations, and not that those representations were in fact not well-founded.' We do not agree with this view and think that if the court finds that the representations on which substituted service was ordered were not in fact sufficient or well founded, the service is not due service.

An Allahabad Full Bench.

This question was recently referred to a Full Bench of the Allahabad High Court in *Ram Bharose* v. *Ganga Singh*, (136 I. C. 609, Sulaiman, A. J. C., Boys and Mukerjee, JJ.). The law on the point is thus lucidly stated by Sulaiman, C. J., "As at the time when the substituted service is ordered the proceedings are *ex parte*, it would be open to the defendant when he appears later to challenge the propriety of the order and ask the Court to re-examine its fitness. If in view of any additional circumstances which he is able to place before the Court he can satisfy that he was not keeping out of the way and that there was no sufficient reason why the summons could not be served in the ordinary way or that the manner of service decided upon was not fair and just to him he would have discharged the burden of showing that there was no due service." Boys and Mukerjee, JJ, have also taken the same view. We have no doubt that the opinion expressed by the Full Bench of the Allahabad High Court in this case which coincides with that of Venkatasubba Rao, J., and Chevis, J., is the correct view of the matter and that the Madras and the Lahore High Courts in which there is still a conflict of rulings on this important question will refer the matter to a Full Bench to set it at rest.

Citation of overruled cases.

There is a curious feature in *Ghasi* v. *Manga* (136 I. C. 710) to which we may draw the attention of our readers. The cases of *Sheorania* v. *Bharat Singh* (20 A. 90) and *Ruhul Amin* v. *Shankar Lal* (45 A. 701) which were cited before his Lordship Harrison, J., in this case and which had to some extent influenced his decision had been expressly disapproved by a Full Bench of the Allahabad High Court in *Wali Muhammad Khan* v. *Ishak Ali Khan* (134 I. C. 26; 1931 A L. J. 777) and though the Full Bench decision was published many months before the decision of Harrison, J., this fact does not seem to have come to the notice of the Counsel on either side or the learned Judge. Indian case-law is changing so rapidly that without great vigilance it is difficult to be thoroughly up to date. We find from the latest number of the *Law Journal* of England that a new feature styled "up to the minute case-law" has been introduced in that Journal. This case has impressed upon us the necessity of bringing all Full Bench decisions to the notice of our readers as early as practicable.

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Notes on Current Topics.

Case Law.

Mr Justice McCardie is recently reported to have said that if it were open to him he would "wipe out two thirds of these decisions and five-sixths of the *dicta*". An observation like this coming from a Judge who is reputed to possess an intimate knowledge of case law is bound to set people thinking and a member of the Parliament asked the Prime Minister whether he would consider the desirability of setting up a commission for the purpose of codifying the whole range of English case law. The Prime Minister after consulting the Lord Chancellor replied that he was satisfied that to set up a commission for this purpose would not produce any useful result. The large number of decisions that are being reported and its probable consequences on the administration of justice and the development of the law have attracted the attention of eminent lawyers long before this and evoked strong criticisms of the common law system of precedents Various remedies have also been suggested, for instance, censorship on reporting, codification, and doing away with case law altogether, but all these proposals have ended in mere academic discussion. Mr. Justice McCardie's remarks and the questions raised in the Parliament have shared the same fate. The truth seems to be, as the *New York Law Notes* observed sometime back, that the common law is firmly wedded to the system of precedents and it is now too late to think of divorcing this system altogether.

The condition of Indian case law is infinitely worse. Its 'enormous quantity and uncertain quality' have recently called forth certain scathing remarks from Sir Frederick Pollock. The observations that this great jurist has made and the caution he has given deserve the close attention of the Judges of the Indian High Courts and the Editors of Indian law journals and it is their bounden duty to check the 'present disastrous course' that Indian case law is taking. The matter requires notice in greater detail and we hope to return to it later.

New points in appeal.

Points of law involved in a case are often overlooked in the lower Courts and raised for the first time in the Court of appeal, and the appellate Court is then confronted with a difficult situation. The principle by which the appellate Court should be guided in such cases is stated by their Lordships of the Privy Council in *The Official Liquidator of M. E. Moolla & Sons Ltd.* v. *Mrs. P. R. Burjorjee* (136 I. C. 737—March 3, 1932). In this case the claim was one for damages for breach of contract of an agreement of sale and the appellant for the first time raised in his application for leave to appeal to the Privy Council the question of the non-registration of the agreement. Their Lordships quote with approval a passage from the judgment of Lord Watson in *The Connecticut Fire Insurance Co* v. *Kavanagh* (1892 A. C. at p. 480) in which his Lordship said as follows:

"When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below." 71; 40 A. 899; 2 [illegible]

After stating [illegible] principle their Lordships held that [illegible] the Indian Registration Act [illegible] properly construed did not compel the Court to take notice of the non-registration of an admitted docu-

ment unless, at any rate, such document ought, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document. In this particular case, applying the general principle their Lordships refused to allow the appellant to raise the plea as the parties were not agreed upon the facts and there were indications of a course of conduct on the part of the appellant which precluded him from raising new pleas.

In another recent case *Raghunandan Prasad Singh* v. *Kirtyanand Singh* (136 I. C. 629) the Judicial Committee refused to allow the respondent to raise the plea that the appellants ought to have proceeded in the Court of first instance by way of a suit and not by way of an application on the ground that if it was allowed to be taken at that stage the appellants would be barred by time, though their original application was in time.

A Full Bench of the Allahabad High Court recently considered this subject at length in *Ram Kinkar Rai* v. *Tufani Ahir* (133 I. C. 428; 53 A 65) In this case their Lordships have laboriously classified the questions which could be taken and those which could not be taken and have laid down certain rules as to when they could be taken and when not. The question does not however seem to us to be one for such classification and cut and dried rules but a matter to be left to the discretion of the appellate Court, which should be exercised with reference to all the circumstances of the case, the conduct of the parties in the lower Courts and the demands of justice.

The Law of Income-tax: Privy Council defines 'income' and 'business'.

The judgment pronounced by the Judicial Committee (March 14, 136 I. C. 742) in the appeal preferred by the Commissioner of Income Tax, Bengal, from the decision of the High Court of Calcutta in *Shaw, Wallace & Co's Case* (134 I. C. 899; I. L. R. 58 C. 1153), lays down some fundamental principles of the law of income-tax. The facts of the case, it will be remembered, were as follows:—For a number of years Shaw Wallace & Co., were the distributing agents of the Burma Oil Company and the Anglo-Persian Oil Company though there was no formal agreement with either company. In 1927 the two companies decided to make other arrangements, the agency of Shaw, Wallace & Co. was terminated and they were paid a certain sum of money 'as full compensation for cessation of the agency'. The question that had to be decided was whether this sum of money could be taken into account in determining the income of Shaw Wallace & Co for purposes of income-tax. The High Court (Rankin, C. J., Ghose, J., and Buckland, J.), answered the question in the negative. The decision of the High Court has been confirmed by the Judicial Committee though their Lordships have arrived at the same result on slightly different grounds. Their Lordships have made an authoritative pronouncement in this case on the meaning of the word 'income' which has not been defined in the Income Tax Act:

> "Income, their Lordships think, in this Act connotes a periodical monetary return 'coming in' with some sort of regularity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive but it must be one whose object is the production of a definite return excluding anything in the nature of a mere windfall..... ..... It is essentially the produce of something which is often loosely spoken of as 'capital.' But capital though possibly the source in the case of income from securities is in most cases hardly more than an element in the process of production."

Again, in considering the meaning of the word 'business' in s. 6 (*iv*) their Lordships say that, though the words used in the definition of business in s 2 (4) are no doubt wide, underlying the definition of business there is the fundamental idea of the continuous exercise of an activity. The words "carried on by him" in s. 10, express this central idea and are an essential constituent of that which is to produce the taxable income. It is to be the profit earned by a process of production. Their Lordships held following this line of reasoning, that as the moneys sought to be charged were not the produce, or the results of carrying on the agency of the oil companies but were received as some sort of *solatium* for its compulsory cessation they were not 'income' within the meaning of the Income Tax Act and were not assessable.

Though the decision of the High Court of Calcutta under appeal has been affirmed, the case of *In re Turner Morrison & Co*, (117 I. C. 68; 56 C. 211) in which it was held that moneys paid to the managing agents of a company on the winding-up of the company as compensation for the loss of their office were 'receipts arising from business' within s. 4 (3) (*vii*) of the Income Tax Act, and were not exempted under that clause has been disapproved by the Judi-

cial Committee and this case has to be treated as no longer law.

Decisions on the English Income Tax Acts as precedents.

Before leaving this case, we may invite the attention of our readers to the word of caution which the Judicial Committee have given on the use of decisions on the English Income Tax Statutes. Their Lordships observe: "Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of English Income Tax Statuties—both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not in *pari materia*; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations." A similar observation was made recently by the learned Chief Justice of the Bombay High Court (Beaumont, C. J.), in *In re Sarsapur Mills*, 34 Bom. L. R 1[illegible]4).

Income-tax on moneys received under insurance policies.

Another important question relating to income-tax which may usefully be contrasted with the decision in *Shaw, Wallace & Co's case* and upon which there was an acute difference of judicial opinion in the lower Courts was decided by the Judicial Committee in *King* v. *The B. C. Fir & Cedar Lumber Co Ltd.* (136 I C. 863, March 8, 1932). The respondents who were manufacturers and dealers in lumber and lumber products had insured their plant and premises against loss and damage by fire. By policies separate but complementary to the main policies, they were also insured by the same companies against loss of profits resulting from the cessation of business due to fire. As regards the moneys paid under the main fire policies, being admittedly a receipt on capital account, no question was raised; but as to the moneys received under the use and occupancy policies the respondents disputed their liability to be assessed. The Supreme Court of Canada held that moneys paid by way of indemnity for profits not earned but lost, were not profits and that, in the absence of a clear provision of law authorising such a course, there was no warrant for taxing such moneys. Their Lordships of the Judicial Committee held that the 'loss of net profits' receipt, was necessarily a revenue receipt of the business, it can be fairly said that it arose from the business of the respondents, and being an income from a business had necessarily to be brought into account for determining the net income of the respondents for income-tax purposes. Their Lordships were of opinion that the Supreme Court had missed the true question at issue. "The real question", their Lordships observed, "was whether the insurance moneys in question constituted 'income' of the respondents within the meaning of the Taxation Act and not whether these moneys were 'profits' of its business. Moneys which are not strictly 'profits' of the business may yet be income of the tax-payer." Even on the question whether the moneys could be properly described as 'profits', their Lordships held following the reasoning of the House of Lords in *Gliksten & Son, Ltd.* v. *Green* (1928, 2 K. B. 193; 1929 A. C. 381) that the opinion of the Judges of the Supreme Court was not correct. It may be noted that s 4 (3) (*v*) of the Indian Income Tax Act, exempts only 'any *capital sum* received .....in payment of any insurance policy.....' and that the principle laid down by the Judicial Committee in this case would therefore apply to India also.

Power of Insolvency Court to decide questions of title.

Most of the High Courts have had to deal with the question whether the Insolvency Court has power under s. 4 of the Provincial Insolvency Act to set aside transfers made by an insolvent more than two years before his adjudication and the preponderance of authority is in favour of the view that s. 4 is wide enough to confer such jurisdiction on the Insolvency Court. Some distinction has been drawn between transfers which are *void ab initio* or *fictitious* and transfers which are genuine but intended to delay or defeat [illegible]itors. The matter came recently be[illegible] the Calcutta High Court in *Sree Sre*[illegible]*krishna Thakur* v. *Official Receive*[illegible] W. N. 492). Mukerji and Guha, [illegible], after discussing the point at some length have agreed with the view of the majority that s. 4 confers full power to deal with all questions of

title as between the Official Receiver and a stranger. This again was a case of a sham transaction and is not a direct authority for the view that even in the case of real transfers the Insolvency Court can interfere under s. 4 though the judgment of Mukerji, J., seems to support that view. Guha, J., proceeds on the ground that s. 53 is not applicable at all to cases where a person claiming to be in possession sets up a claim adverse to the insolvent and that such cases fall under s. 4. Whether the Insolvency Court can avoid real transfers effected more than 2 years before adjudication is still not beyond doubt.

Gas mains : whether 'immoveable property."

The decision of the Judicial Committee in *The Montreal Light, Heat and Power Consolidated* v. *City of Outremont* (136 I. C. 858—February 23, 1932) contains an interesting discussion of the meaning of the expressions 'immoveable property' and 'buildings' and decides a question of far reaching importance to Municipal Corporations. The appellants agreed to supply gas in the respondent City and laid gas mains under the public streets of the City. The gas works of the appellants were situated in the City of Montreal. The question that had to be decided was whether the gas mains lying under the streets were 'immoveable property' and whether the appellants were liable for municipal and school taxes in respect of them. The Quebec Civil Code provided that 'property is immoveable either by its nature or by its destination or by reason of the object to which it is attached or lastly by determination of the law', and that 'lands and buildings were immoveable by nature'. The last three of the four means provided in this definition being inapplicable, the question resolved itself to whether gas mains were immoveable by their nature. Their Lordships held that the term 'buildings' covered constructions such as these gas mains and that these mains must be regarded as immoveable by their nature in the territory in which they were physically situated and were therefore, taxable subjects in the respondent City. In these days of economic depression Municipal Corporations are sure to welcome this decision of the Judicial Committee.

Volenti non fit injuria.

The case of *Pidington* v. *Hastings and others* (*Times*, March 11) reminds us of our college days. The plaintiff, a lady, went to watch a game of polo. While she was sitting in a chair provided for spectators and watching the game a pony got over the fence surrounding the play grounds and struck her and she lost her thumb. She sued the secretary of the club, a member of the Committee and the polo player whose horse hurt her, but unfortunately did not name the persons who had placed the seats where they were. The action was dismissed. The *Law Journal* in commenting upon this case observes that the very danger of such occurrences casts a duty on those who set the seats at polo grounds and make a charge for them, to secure that the visitors shall be out of the reach of any danger which can reasonably be anticipated and thinks that if the plaintiff had named the persons who had arranged the seats, the question of their negligence would have gone to the Jury.

Acceptance of gifts : Burden of proof.

Under the English Law acceptance of a gift is to be presumed until dissent is signified and this rule was held applicable to India in *Muhammad Abdul Nayeem* v. *Jhoti Mahton* (41 Ind. Cas. 389). The wording of s. 122 of the Transfer of Property Act is not quite consistent with such a presumption and the ruling in 41 Ind. Cas 389 was doubted by a Division Bench of the same High Court (Patna) in *Jamuna Prasad* v. *Sheorati Kuar* (78 Ind. Cas. 469). In a recent decision of the Allahabad High Court, *Anandi Devi* v. *Mohan Lal* (1932 A. L. J. 335), Sulaiman and Young, JJ., had to consider the question. In their Lordships' view the provision contained in s. 122, that if the donee dies before acceptance the gift is void, makes it impossible to hold that there is a presumption of acceptance operating immediately upon the gift, whether known or unknown to the donee. The preponderance of authority is thus clearly against the view that the English rule applies to India. In Provinces like the Punjab where the Transfer of Property Act is not in force, the question must still remain open.

THE END.

INDIAN CASES

1932.

VOLUME 136.

LAHORE HIGH COURT.

Civil Revision Petition No. 602 of 1931
and
Civil Miscellaneous No. 680 of 1931.
December 22, 1931.

HARRISON, J.

ISHAR DAS—DEFENDANT—PETITIONER

versus

AYA RAM—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s 115, O. XXIII, r. 1—Order allowing plaintiff to withdraw suit—Revision, competency of.

Where a plaintiff is allowed to withdraw the suit with liberty to bring a fresh one, if the Court has given a considered decision that there is a formal defect in the plaint and that if the plaintiff is not permitted to withdraw the suit with permission to bring a new suit he will be denied justice, the order allowing withdrawal cannot be challenged in revision under s. 115, Civil Procedure Code. *Buta Singh* v. *Hardit Singh* (2), *Bisheswar Ahir* v. *Brijra Misser* (12) and *Kamta Singh* v. *Bhagwan Das* (13), distinguished. *Lal Chand Mangal Sen* v. *Behari Lal Mehar Chand* (1), and other cases referred to.

Petition for revision of an order of the Subordinate Judge, Second Class, Chiniot, dated the 9th July, 1931.

Messrs. *Shamair Chand* and *M. C. Mahajan*, for the Petitioner.

Lala *Badri Das*, R. B., and Mr. *Balwant Rai*, for the Respondent.

Judgment.—In this case the plaintiff brought a suit praying for an injunction restraining the defendant from building on a certain piece of land. Before issues were framed he put in an application asking for permission to withdraw his suit with liberty to institute a fresh one. He said that it had come to his knowledge that the defendant had actually finished his building and contended that this constituted a formal defect. Permission was granted, the trial Court giving a definite finding in a long and reasoned order to the effect that there was a formal defect and that the suit as it stood was bound to fail on account of such formal defect. The plaintiff was allowed to withdraw the suit with liberty to bring a fresh one.

From this order the present application for revision has been presented and Mr. Badri Das has taken a preliminary objection that under s. 115 read with *Lal Chand Mangal Sen* v. *Behari Lal Mehr Chand* (1) no such revision lies as there has not been any wrongful exercise of jurisdiction or failure to exercise jurisdiction or material irregularity in the exercise of jurisdiction. The question is not new and there is considerable divergence of authority thereon. The petitioner relies on *Buta Singh* v. *Hardit Singh* (2), *Saif Ali* v. *Chiragh Ali* (3) and *Ishar Das* v. *Lal Singh* (4), all Lahore cases, as also on *Mahabir Prasad* v. *Mohammad Ali Khan* (5), *Mahendre Ram* v. *Singi Lal* (6), *Pundalik* v. *Chandrabhan* (7), *Punjushet* v. *Motiram Budhu* (8) and *Palikanji Chettiar* v. *Krishna Iyer* (9), the latter rulings being of Madras, Bombay and Nagpur Courts.

On the other side Mr. Badri Das relies on several rulings of the Allahabad High Court, *Jhunku Lal* v. *Bisheshar Das* (10), *Ratan Lal* v *Mohamad Hamidullah Khan* (11), both Division Bench rulings, *Bisheswar Ahir* v. *Brijra Misser* (12) and last of all *Kamta Singh* v. *Bhagwan Das* (13). He also relies on *Bansi Singh* v. *Kishun Lall Thakur* (14)

(1) 84 Ind. Cas. 259; 5 L. 288; A. I. R. 1924 Lah. 425; 6 L. L. J. 558; 1 L. C. 36 (F. B.).
(2) 124 Ind. Cas. 686; A. I. R. 1930 Lah. 175; Ind. Rul. (1930) Lah. 558.
(3) 68 Ind. Cas. 785; A. I. R. 1923 Lah. 97.
(4) 90 Ind. Cas. 632; 7 L. L. J. 290; A. I. R. 1925 Lah. 497; 2 L. C. 151.
(5) 103 Ind. Cas. 229; A. I. R. 1927 All. 704; 25 A. L. J. 870.
(6) 48 Ind. Cas. 197; 3 P. L. J. 651.
(7) 43 Ind. Cas. 346.
(8) 94 Ind. Cas. 777; A. I. R. 1926 Bom. 315; 28 Bom L. R. 440; 50 B. 192.
(9) 94 Ind. Cas. 983; A. I. R. 1926 Mad. 863; 28 L. W. 525.
(10) 46 Ind. Cas. 71; 40 A. 612; 16 A. L. J. 495.
(11) 60 Ind. Cas. 899; 2 U. P. L. R. (A.) 403; 19 A. L. J. 47.
(12) 44 Ind. Cas. 4[illegible]. L. W. 233; 3 P. L. J. 630.
(13) 106 Ind. Cas. 431; A. I. R. 1928 All. 98; 25 A L. J. 943; 50 A. 199.
(14) 26 Ind. Cas. 293; 41 C. 632.

and *Sant Singh* v. *Mubarak Singh* (15) as explaining the very limited powers of the High Court on the revision side. The Privy Council authorities on the point are *Amir Hasan Khan* v. *Sheo Bakhsh Singh* (16) and *Balakrishna Udayar* v. *Vasudeva Aiyar* (17). *Ishar Das* v. *Lal Singh* (4) and *Saif Ali* v. *Chiragh Ali* (3) are both earlier than *Sant Singh* v. *Mubarak Singh* (15). It is true that both *Ishar Das* v. *Lal Singh* (4) and *Buta Singh* v. *Hardit Singh* (2) definitely refer to and disagree from *Jhunku Lal* v. *Bisheshar Das* (10). The question to me appears to be whether the Court, in deciding however wrongly and however whimsically, [to borrow an expression from the Privy Council judgment of *Balakrishna Udayar* v. *Vasudeva Aiyar* (17)] that there is a formal defect, can be said to be exercising its jurisdiction with material irregularity. If the word "discretion" be substituted for "jurisdiction" the whole aspect of the question changes and this is in effect what Counsel for the petitioner wishes me to do. In my opinion the Court exercised jurisdiction in the first instance when it entertained the application, it exercised jurisdiction throughout the proceedings and finally it did so when it decided the matter. Had it not decided the matter, as in *Kamta Singh* v. *Bhagwan Das* (13), it might be said that there was a failure to exercise jurisdiction, but where it decided it in terms, I do not think that it is within my powers to consider whether the decision was right or wrong. *Bisheswar Ahir* v. *Brijra Misser* (12) lays down that if the Court has not stated whether there is a formal defect or not and has given permission without doing so, the High Court will go into the question on revision. The rider to this appears to me to be that if the Court has stated that there is a formal defect the High Court will not go into the matter. The decision may be erroneous in law or fact, but the alleged error does not create a question of jurisdiction. I think it is possible to distinguish this case from *Buta Singh* v. *Hardit Singh* (2), for there the Court did not hold in terms that there was a formal defect but merely that the plaintiff had failed to plead a certain ground or basis for his claim. It did not go on to say in so many words that this constituted a formal defect though it treated the failure as such a defect. Here there is a definite finding that there is a defect and the giving of that finding is the exercise of jurisdiction. I cannot see how it can be said that the grounds on which it is attacked by Mr. Shamair Chand, amount to anything more than an allegation that mistakes have been made in law and fact in coming to that conclusion and I find that the words 'material irregularity in the exercise of jurisdiction' are entirely out of place as describing the function or activity of the Court in exercising its discretion or in deciding that it will do so. It is as if a man had a license to shoot and it were contended that he acted in contravention of his license because he did not shoot straight. The Court is given discretion by O. XXIII, r. 1. It has used it, says Mr. Shamair Chand, wrongly or unwisely or perversely. Perhaps it has, but not without jurisdiction. Whatever the reasons for the alleged mistake and however grievous that mistake may be, I do not think that O. XXIII, r. 1 has been transgressed in any way.

I hold, therefore, that where and if the trial Court gives a considered decision that there is a formal defect in the plaint, and that if the plaintiff is not permitted to withdraw the suit with permission to bring a new suit he will be denied justice, that decision cannot be challenged on revision as not coming within the scope of s. 115, Code of Civil Procedure.

The petition for revision is dismissed with costs.

A. *Petition dismissed.*

(15) 106 Ind. Cas. 901; 9 L. 308; 29 P. L. R. 42; 10 L. L. J. 51; A. I. R. 1928 L[illegible] 0.

(16) 11 C. 6; 11 I. A. 2[illegible] Sar. P. C. J. 559; Rafique & Jackson's P. C. No. 8[illegible].

(17) 40 Ind. Cas. 650; 40 M. 793; 15 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48; 44 I. A. 261 (P. C).

LAHORE HIGH COURT.

Civil Revision Petition No. 368 of 1931.

January 2, 1932.

SHADI LAL, C. J.

ARUR SINGH—GUARDIAN—PETITIONER

versus

GUR BAKHSH SINGH—MINOR—RESPONDENT.

Guardians and Wards Act (VIII of 1890), ss. 34, 45 —Benami lease by guardian—Summary order directing guardian to deposit lease money in Court, legality of.

Where a guardian leased to his brother-in-law a plot of land belonging to the minor and the Court, holding that the lessee was merely a *benamidar* for the guardian, called upon the latter to deposit the lease money in Court:

Held, that the claim made against the guardian could be sustained only on the basis of a contract or a *quasi* contract as the amount was not recoverable from the guardian in his capacity as such, and the claim could not, therefore, be enforced in a summary manner but only by way of a suit. [p. 3, col. 1.]

Petition for Revision of an order of the Senior Subordinate Judge, Amritsar, dated the 23rd of March, 1931.

Mr. *Arjan Das*, for the Petitioner.

Mr. *J. L. Kapur*, for the Respondent.

Judgment.—In March and April 1930, a plot of land belonging to the minor, Gurbakhsh Singh, was given on lease to one Mit Singh who is said to be a brother-in-law of the minor's guardian, Arur Singh. The Subordinate Judge, holding that Mit Singh was merely a *benamidar* for Arur Singh, has called upon the latter to deposit the lease money in Court.

The question for determination is whether the Court can enforce the payment of the money by a summary remedy or should refer the minor to a regular suit. Now, the only provision of the law, which has some bearing upon the question, is that contained in s. 34 of the Guardians and Wards Act, which authorises the Court to direct the guardian to pay into the Court the balance due from him on the accounts exhibited by him. It has, however, been held by the Calcutta High Court in *Jagan Nath* v. *Mahesh* (1) that the 'balance due' means the balance due as shown by the guardian in his accouuts, and not the balance found by the Court on an examination of the account, and that the payment of this latter balance cannot be enforced under s. 45. The same view has been taken by the Madras High Court in *Hari Krishna* v. *Govindarajulu* (2). On the other hand, the Allahabad High Court has expressed the opinion that the 'balance due' does not mean the balance shown by the guardian to be due from him in the accounts exhibited by him, but the balance which is found by the Court to be due from him upon the basis of a true and just account, and the Court can enforce the payment of the balance so found due, by means of the procedure prescribed by s. 45, and is not obliged to refer the minor to a regular suit: *vide*, *Sita Ram* v. *Gobindi* (3),

It is unnecessary to choose between the two views enunciated above, because it is not disputed that no accounts were exhibited by the guardian on the basis of which the money was found to be due from him. Indeed, the amount was not recoverable from the guardian in his capacity as such The claim made against him can be sustained only on the basis of a contract or a *quasi* contract, and such claim cannot be enforced by a summary remedy.

I accordingly hold that the order of the trial Judge directing the applicant to deposit the money in Court was without jurisdiction and must be quashed. I accept the application for revision and direct the respondent to pay the costs incurred by the applicant.

A. *Application accepted.*

(1) 36 Ind. Cas. 286; 21 C. W. N. 688; 25 C. L. J. 149.

(2) 98 Ind. Cas. 332; 50 M. L. J. 273; 23 L. W. 420; (1926) M. W. N. 359; A. I. R. 1926 Mad. 478.

(3) 80 Ind. Cas. 592; 46 A. 458; 22 A. L. J. 585; A. I. R. 1924 All. 593.

LAHORE HIGH COURT.

Miscellaneous First Civil Appeal No. 1112 of 1931.

December 22, 1931.

ADDISON, J.

FAKIR MUHAMMAD—GUARDIAN—APPELLANT

versus

Musammat BHARI AND ANOTHER—RESPONDENTS

Guardians and Wards Act (VIII of 1890), ss. 35, 36, 40, 41—Application for discharge of guardian—Power to go into accounts, and compel payment of amount found due—Proper procedure.

On an application under the Guardians and Wards Act for the discharge of a guardian the Court has no power to enquire into the correctness of the account submitted by the guardian and compel him to pay the amount found due by the Court. This can be done only by a suit under ss. 35 and 36 of the Guardians and Wards Act. *Bathina Subbaram Reddi* v. *Ganesam Pattabhirami Reddi* (2), followed. *Sita Ram* v. *Govindi* (1), dissented from. [p. 4, cols. 1 & 2.]

Miscellaneous First Appeal from an order of the Senior Subordinate Judge, Gujrat, dated the 14th February, 1931.

Mr. *Fakir Chand*, for the Appellant.

Chaudhri *Nazir Hussain*, for the Respondent.

Judgment.—The appellant Fakir Muhammad was appointed guardian of the minor Sultan on the 30th March, 1920. He was called upon on the 1st of August, 1924, to declare what was the income from the minor's property and when he had done so, the Judge ordered that there was no necessity to put in annual accounts as the income was very small.

On the 28th January 1929, Fakir Muhammad applied to be discharged from the guardianship stating that he had enough work of his own and that the minor had ceased to live with him. The Judge, by order dated the 21st of February, 1929, directed the guardian to file an account of the income and expenditure before he could be discharged. This was done although he had been previously excused from doing so on the ground that the income was insignificant. The guardian put

in a statement of account showing an expenditure of Rs. 3,264. On the 12th of April, 1930, the Judge accepted the guardian's resignation, directed the accounts to be sent to the Tahsildar for scrutiny and it was added that the question of the guardians' discharge would be gone into on receipt of the Tahsildar's report. The Tahsildar reported that the income was Rs. 2,277 for all the years in question. The Tahsildar also reported that *prima facie* the expenditure appeared to be correct. The Judge has now written a long order to the effect that Rs. 1,385 are due by the guardian to the minor and that he will be discharged only on his paying that sum for which he was given a month's time. Against this decision the guardian has appealed.

It seems to me that this is an order passed under s. 40 of the Guardians and Wards Act and that therefore an appeal lies under s. 47 (*h*). I accept the appeal for the following reasons:—

It has been laid down by the Calcutta and Madras High Courts that a Court should not hold an enquiry under the Guardians and Wards Act into the correctness of the accounts put in or determine what amount was really due by the guardian to the minor as the whole scheme of the Act provided for matters of this kind being disposed of by way of a suit by the minor or his next friend against the guardian and not by way of proceedings under the Act. Only one of these authorities, namely, *Bathina Subbarami Reddi* v. *Ganesam Pattabhirami Reddi* (1) need be referred to for this proposition. It is also said there that under s. 41 (4) the Court is not bound to declare the guardian discharged from his liabilities and so is not bound to make an enquiry into the correctness of the accounts filed by him. The Allahabad High Court has taken a contrary view: see *Sita Ram* v. *Govindi* (2). The question does not appear to have come directly before this Court.

In my judgment the Court must take the accounts as they are put in, but it need not discharge the guardian from liability. He was properly discharged from the office of gurdianship under s. 40 but that does not mean that he must also be discharged from his liabilities under s. 41 (4). In this case as the Court has not found that the accounts put in are correct, it should have refused to discharge him from his liabilities to account to the minor, but it has no power to compel him to pay the sum of Rs. 1,385 into Court on behalf of the minor. That can be done only by a suit under the provisions of ss. 35 and 36 of the Guardians and Wards Act.

There is another reason in this case why I think that an order should not be made that the guardian should pay the sum referred to into Court and that is that the evidence is very summary on either side. I would be very loath to declare the guardian liable to the extent indicated on such evidence.

I, therefore, accept the appeal, set aside the order of the Court below directing the guardian to pay Rs. 1,385 into Court and substitute for it an order that the guardian be discharged from his office but not from his liabilities. I make no order as to costs.

Appeal allowed.

(1) 80 Ind Cas. 592; [illegible]. 458; 22 A. L. J. 585; A. I. R. 1924 All. 593.

(2) 97 Ind. Cas. 578; 50 M. 80; 51 M. L. J. 249; (1926) M. W. N. 695; 24 L[illegible] W. 525; A. I. R. 1926, Mad. 977.

LAHORE HIGH COURT.

Civil Revision Petition No. 112 of 1930.

January 14, 1932.

BROADWAY, J.

Khwaja ABDUL GHANI—JUDGMENT-DEBTOR—PETITIONER

versus

SIMLA BANKING AND INDUSTRIAL CO., LTD., SIMLA AND OTHERS—DECREE HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 47, 151—Court-sale—Judgment-debtor leasing premises after sale—Power of executing Court to issue prohibitory order to judgment-debtor and tenant.

Where, subsequent to a Court-sale but before the confirmation of the sale, the judgment-debtor leases the premises sold, the Court has inherent power under s. 151, Civil Procedure Code, to issue a prohibitory order to the tenant and the judgment-debtor restraining them from paying the rent and receiving the rent, respectively. *Sukhdeo Das* v. *Rito Singh* (1), referred to.

Petition for Revision from an order of the Senior Subordinate Judge, Simla, dated the 27th October, 1929.

Mr. *Nawal Kishore*, for the Petitioner.

Mr. *Prem Nath*, for the Respondents.

Judgment.—The Simla Banking and Industrial Company Limited obtained a decree against Khan Bahadur Abdul Ahad of Simla on the 9th July, 1924. In execution of that decree a house named 'Dixie' in Simla was attached and brought to sale. The sale was held on the 26th Jun 1929 and the property was knocked dow

to one Banwari Das as the highest bidder. The 16th of August 1929 was fixed for further proceedings in the matter. On the 27th July, 1929, the auction-purchaser, Banwari Das, put in an application in the Court of the Senior Subordinate Judge, Simla, in which it was pointed out that the applicant was the auction-purcharser of the premises sold, *i. e.*, the house named 'Dixie', that no objection whatever had been filed to the sale and that as thirty days had elapsed the sale would have to be confirmed. It was further pointed out that subsequent to the sale, on the 7th of July 1929, the judgment-debtor had leased the premises sold and had realised a portion of the rent which, in accordance with the practice in Simla, had to be paid in advance. Banwari Das alleged that the rent in its entirety would be due to him inasmuch as, on confirmation of the sale, his right, title and interest in the property would take effect from the date of the sale itself, *i. e*, the 26th June 1929. He, therefore, prayed that the case should be heard that day *i e.*, the 27th July, or on the following Monday the 29th July, instead of the 16th of August.

The Senior Subordinate Judge passed an order on this application to the effect that he was unable to hear the case before the date fixed, but that, if the applicant paid in the necessary process-fees, prohibitory orders would issue to the judgment-debtor and the tenant. Banwari Das paid in the necessary process-fees and prohibitory orders were actually issued. Ultimately the tenant paid the remainder of the rent into Court.

The judgment-debtor through his agent objected to the course adopted by the Court urging that the prohibitory orders issued were *ultra vires*. This objection was dismissed by the Senior Subordinate Judge on the 27th October, 1929, whereupon this petition for revision was filed on behalf of the judgment-debtor, and I have heard Mr. Nawal Kishore at length in support of it.

It has been urged that the prohibitory orders could not have been lawfully issued under O. XXI, r. 46, and that they also could not have been issued under s. 47, Civil Procedure Code, a contention that appears to be correct and has been admitted to be so by Mr. Prem Nath for the respondent who has contended, however, that the order is covered by s. 151 of the Civil Procedure Code. Section 151 merely recognises the inherent powers of a Court to make such orders as the ends of justice might require. In *Sukhdeo Das* v. *Rito Singh* (1), it was held that a Court could, under this section, direct an auction-purchaser, in a case where he had paid the purchase-money and subsequently withdrawn it from the Court on the sale being set aside, to pay back the money into Court on the sale being confirmed in appeal. In my judgment the Court would be justified in protecting the interests of an auction-purchaser when justice required that to be done and, therefore, an order of this nature could lawfully be passed under s. 151, Civil Procedure Code.

It is true that the learned Senior Subordinate Judge referred to no section or rule of the Civil Procedure Code in his order directing the issue of the prohibitory orders. As his order could not be covered by either s. 47 or O. XXI, r. 46, Civil Procedure Code, I think it can and must be held that the learned Senior Subordinate Judge acted in the exercise of his inherent powers which have been recognised by s. 151, Civil Procedure Code. An order under this section is not open to appeal and in the present case I am unable to see any reason whatever for interfering in revision.

The petition is therefore dismissed with costs.

A. *Petition dismissed.*

(1) 39 Ind. Cas. 763; 2 P. L. J. 361; 1 P. L. W. 551.

LAHORE HIGH COURT.

Criminal Revision No. 698 of 1931.

January 26, 1932.

SHADI LAL, C. J., AND MONROE, J.

EMPEROR—PETITIONER

versus

C. BARWICK—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 306, 307—Jury trial—Disagreement between Judge and Jury—Duty of Judge—English and Indian Law—Reference to High Court—Power to interfere where verdict is not perverse or manifestly wrong—Criminal trial—Medical examination, necessity of—Investigation, delay in, effect of.

The absence of an early medical examination in the case of crimes of violence must be regarded as a very unsatisfactory feature of the prosecution case. [p. 6, col. 2]

It is not proper to abandon an investigation and resume it after some days, as delay of this kind may cause serious prejudice to an accused person by giving time to the witnesses to bring their evidence to harmony, by making identification less certain and by interfering with the preparation of the defence. [p. 7, col. 1.]

As lies on the prosecution to prove the case against the accused, if this has not been done it is not legitimate to draw any inference against the accused based on a criticism of the defence. [p. 7, col 2.]

In a trial by Jury the position of a Judge in India differs from that of a Judge in an English Court who is merely an instrument for passing a sentence or directing a release once a verdict is given. In India under the mandatory provisions of ss. 306 and 307, Criminal Procedure Code, the Judge must make up his mind whether he agrees or disagrees with the verdict and in the latter case form an opinion on the necessity for the ends of justice of submitting the case to the High Court. *Ramdas Rai* v. *Emperor* (1), commented upon. [p. 8, col. 1.]

Where a case has been referred under s. 307, Criminal Procedure Code, it is the duty of the High Court after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury to acquit or convict the accused. It is not necessary that the verdict should be perverse or clearly or manifestly wrong. *Emperor* v. *Lyall* (2), *Emperor* v. *Annada Charan Thakur* (3), referred to.

Case referred by the Sessions Judge, Lahore, with his No. 1063, dated the 22nd May, 1931.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Petitioner.

Messrs. *Behari Lal* and *Daulat Ram Kalia*, for the Respondent.

Monroe, J.—The facts of this case as alleged by the witnesses for the prosecution are briefly as follows. On the 12th of November, 1929, five boys, Kehar Singh, now aged about 13, P. W. No. 2, Jogindar, now aged 8, P. W. No. 5, Rajindar Singh now aged 8, P. W. No. 6, Sher Mohammad, now aged 10, P. W. No. 3 and Gulwant, now aged 7, P. W No. 4, were going home from Bibiwala School shortly after 4 P. M., to get to their homes at Joganand village. They had to cross a bridge over the canal and as they approached the bridge they saw an Englishman who had a bicycle resting at the bridge; he seized Kehar Singh, P. W. No 2 and Sher Mohammad, P. W. No 3, each by the neck and driving the other three boys in front of him brought all five to some bushes close by; Sher Mohammad then ran away; the accused made the other four boys take their trousers off and then committed sodomyon them severally and successively during the next few minutes; Sher Mohammad called out and the accused hearing the cries dismissed the boys; the cry attracted two persons Bhagwan Singh, P. W. No. 10 and Sant Singh, P. W. No. 7; the accused ran to his bicycle and rode away. Each of the four boys who was maltreated states that he told his parents on his return home; Sher Mohammad states that he went home and told no one.

For purposes of identification other witnesses have given evidence for prosecution, namely Santa Singh, P. W. No. 7, Bhagwan Singh, P. W. No. 10, Kishna, P. W. No. 11, a boy of 12 years, and Khair Din, P. W. No. 12. All of these persons are alleged to have seen the accused at or near the place of occurrence. Their evidence is discussed later.

The accused was accordingly charged under s. 367 of the Indian Penal Code and was tried before the Sessions Judge and a Jury at Lahore and on the 11th of May, 1931, the Jury by a majority found the accused guilty, though the learned Sessions Judge believes that the verdict of the Jury was considered and honest, he considers that the case against the accused was not proved and he has accordingly referred the matter to this Court under s. 307 of the Code of Criminal Procedure. The learned Sessions Judge has examined the evidence in his judgment and states that he has come to the conclusion, first, that it has not been shown that anyone committed any of the offences with which the prisoner is charged and, secondly, that, on the assumption that the offence has been committed, the identification of the accused as the person who committed the offence has not been effected.

The four boys, Kehar Singh, P. W. No. 2, Gulwant, P. W. No. 4, Jagindar, P. W. No. 5, and Rajindar, P. W. No. 6, the subjects of the actual offence are witnesses for the prosecution and their evidence, is in part corroborated by Sher Mohammad, P. W. No. 3, who, by reason of his running away, was not actually present during the whole period when the accused was with the other boys.

Fazal Karim, P. W. No. 9, the Head Constable in charge of the case did not immediately on the making of the report have the boys exemined by a doctor. To anyone putting faith in the description of the offences as given by the boys such an examination would at once have suggested itself as an obvious means of having that story corroborated. The value of an early examination in connection with crimes of violence is so well-understood in this country that the absence of such examination in the present case must be regarded as a very unsatisfactory feature.

The record shows that there is no material difference in the several accounts of what happened, but after a careful consideration of the details of the actual commission of

the offence I have come to the conclusion that the story as related is not credible. While it is almost certain that some incident took place in which one or more of these boys and a man, probably a European, took part, imagination has operated in the complication of the story told by the boys to such an extent that it is not, in my opinion, possible to come to any definite conclusion about what did actually take place. It is remarkable that though four of the boys state that they told their respective parents of the incident not one of these parents made a report to the Police, nor did Bhagwan Singh, P. W. No. 10 or Santa Singh P. W. No. 7, both of whom state that they were present immediately after the incident. The First Information Report was in fact made on the 13th of November on what, in urging that it should be neglected, the learned Counsel for the prosecution very properly described as third or fourth hand evidence. I, therefore, agree with the opinion of the learned Sessions Judge when he says, "I am not able to find that the offences with which the prisoner has been charged were committed by any body, though as already stated I think that some extraordinary incident did occur."

The investigation of the case and the identification of the accused now come to be considered. The date alleged for the offence is the 12th of November, 1929. The Police received information on the 13th and the Head Constable, P. W. No. 9, commenced his enquiry on the 13th or 14th. He abandoned it after two days and did not resume it again until the 26th of December. A delay of this kind causes serious prejudice to an accused person. It gives time to witnesses, even those who may not actually be dishonest to bring their evidence into harmony. It tends where identification is necessary to render it less certain and, above all, it may interfere with the preparation of the defence An accused person who is charged shortly after the commission of an offence may then have no difficulty in recalling what he was doing at the time of the offence and may have the advantage of the fresh recollection of the persons in whose company he may have been at that time. Few people whose life is not a monotonous routine could always recall what they had been doing at a particular moment six weeks previously. The long delay in the present case seems to have afforded to Soba, the father of Kehar Singh, P. W. No. 3, an opportunity for discussing the identify of the accused with some of the witnesses who took part in the identification.

When on the 26th of December the Head Constable, P W. No. 9, resumed his activitives he again went to Joganand village and "picked up" Sher Mohammad, P. W. No. 3 Kehar Singh, P. W. No. 2. Khair Din, P. W. No. 12, Santa Singh, P. W. No. 7, Sita Ram, P. W. No 13, the School Master at Bihiwala, and Bhagwan Singh, P. W No 10, or he sent a constable to bring these persons to Bhatinda where the accused lived He makes both statements. He took these persons to the Bhatinda Qasba where the Railway Officials of the station were collected for sports. It is significant that he does not mention that Soba Singh, father of Kehar Singh, was also of the party, especially in the light of the evidence of Sher Mohammad who in speaking of the visit to the Qasba says "Soba Singh, father of Kehar Singh, also picked him (*i e.*, the accused) out because he had seen him before". The evidence of Kehar Singh himself is to the same effect; he says "my father told me many times that he had seen the prisoner before". Two witnesses, Sher Mohammad, P. W. No. 3 and Khair Din, P. W. No. 12, testify to the presence of Kishna, P. W. No. 11, in this party, though the Head Constable himself does not mention him. It is curious that so many persons should have been collected by the Head Constable at the scene of the arrest and that Soba Singh who had no first hand connection with the occurrence should have been allowed to interfere.

[His Lordship after discussing the prosecution evidence as to identification and holding that it was worthless proceeded as follows]:—

On the view that I take of the case it is unnecessary to discuss the evidence of defence in detail. Like the rest of this case it is not satisfactory but as it lies on the prosecution to prove the case against the accused, and this has not been done, it would not be legitimate to draw any inference against the accused based on a criticism of the defence.

The learned Counsel for the prosecution, who frankly admits that the whole investigation of this case is very unsatisfactory, has, nevertheless, urged on this Court that the Sessions Judge would have been well-advised to accept the verdict of the Jury. As I understand his argument, it is that there is some special sanctity attaching to the verdict of the Jury, both when the verdict is unanimous and when it is that

of a majority, but this is clearly not the law as the unequivocal wording of the sections of the Code of Criminal Procedure which deal with the matter shows. Section 306 (1) provides that "when in a case tried before the Court of Sessions, the Judge does not think it necessary to express disagreement with the verdict of the Jurors or a majority of the Jurors, he shall give judgment accordingly" and s. 307 (1) provides that "if in any such case, the Judge disagrees with the verdict of the Jurors or of a majority of the Jurors on all or any of the charges on which any accused person has been tried and is clearly of opinion that it is necessary for the ends of justice to submit the case in respect of such accused person to the High Court, he shall submit the case accordingly, recording the grounds of his opinion." The mandatory nature of both sections should be noted. A duty is cast on the Judge of considering the verdict. He is not like a Judge in an English Court, an instrument for passing a sentence or directing release once a verdict is given. He must make up his mind whether he agrees or disagrees with the verdict and in the latter case form an opinion on the necessity for the ends of justice of submitting the case to the High Court. There is a note at page 727 of Sohoni's Code of Criminal Procedure which appears to support the contention of the learned Counsel: the heading of this note commences "Reference should be made only when the verdict of the Jury is manifestly wrong". This statement read alone is, in my opinion, misleading and in its literal sense unwarranted by the words of the Code. Read with qualifications, it could no doubt be justified; and if the remainder of the heading referred to is given full weight, it appears that the words "manifestly wrong" are, in effect, qualified; the heading continues "and not in every case of doubt nor in every case in which a view different from that of the Jury can be entertained." This heading is quoted from the judgment in *Ramdas Rai* v. *Emperor* (1) which is cited in the following note. The note states that in this case the Jury acquitted the accused and that the Sessions Judge disagreeing with the verdict referred the case to the High Court. A perusal of the case itself shows that what actually happened was that the accused were convicted and the Sessions Judge sentenced each of them to nine years' imprisonment, remarking that while he disagreed with the verdict, it was a reasonable one and he accepted it without hesitation. There was accordingly no reference to the High Court under s. 307 (1) but an appeal by the accused against his conviction on the ground (*inter alia*) that the Judge could not convict the accused because of the provisions of s. 306 (1). It, therefore, appears that the comments on the effect of s. 307 (1) were *obiter:* the condition that the Judge should be clearly of opinion that for the ends of justice a reference was necessary was not fulfilled.

In the present case the Sessions Judge not only disagrees with the verdict of the Jury, but after an examination of all the evidence finds that the prisoner has not been proved to have committed any of the three offences with which he has been charged. It is not in accordance with general principles of the Criminal Law, much less is it consonant with the ends of justice that a person against whom an offence has not been proved should be convicted and punished for it. In my opinion, the Sessions Judge forming the view that he did, had no option but to refer this case under s. 307 (1).

The case having been referred it is the duty of this Court after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury to acquit or convict the accused. In the *Emperor* v. *Lyall* (2), it was contended on the authority of several reported cases that the High Court was bound to act in accordance with the unanimous verdict of the Jury, unless it was shown to be perverse or clearly or manifestly wrong. The learned Judges pointed out that since these decisions had been given the terms of s. 307 had been altered to their present form. We have here a probable source for the *obiter dictum* in *Ramdas Rai* v. *Emperor* (1), but, be that as it may, Prinsep and Stephen, JJ., laid down that in the case of an acquittal it is not necessary for the prosecution to show that the opinions of the Jury are perverse or clearly and manifestly wrong as was held in the cases cited to them which were decided before the law was amended in 1896 and expressed as it now stands. In *Emperor* v. *Annada Charan Thakur* (3) Casperez, J., said "it would have been an obvious disregard of duty to have thrown out this reference

(1) 117 Ind. Cas. 173; 8 Pat. 344; 10 P. L. T. 409; 30 Cr. L. J. 721; A. I. R. 1929 Pat. 313.

(2) 29 C. 128; 6 C. W. N. 253.

(3) 2 Ind. Cas. 497; 36 C. 629; 13 C. W. N. 757; 9 C. L. J. 638; 10 Cr. L. J. 32.

merely because it might be argued upon the face of the charge to the Jury that the verdict was not altogether an unreasonable one". If s. 307 requires a commentary, it may be found in these cases, with which the *dictum* in *Ramdas Rai* v. *Emperor* (1) is not consistent.

I have considered the entire evidence and I have endeavoured to give due weight to the opinions of the Sessions Judge and the Jury. For the reasons already given I find that the case is not proved and I would acquit the accused.

Shadi Lal, C. J.—I concur.

A. *Accused acquitted.*

LAHORE HIGH COURT.

Criminal Miscellaneous Petition No. 231 of 1931

January 8, 1932.

TEK CHAND, J

BRAHMU DUTT—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 526—Magistrate handing over judicial record to person to be examined as witness—Impropriety—Ground for transfer.

It is highly improper for a Magistrate or his officials to allow the judicial record of a pending case to be removed from the Court and handed over to a person who is to be examined as a witness in the case. [p. 9, col 2; p. 10, col. 1.]

An incident like this is such as to raise a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial and is a sufficient ground for transfer. [*ibid.*]

Petition for transfer of the case from the Court of the Magistrate, First Class, Sialkot.

Mr. *Chiranjiva Lal*, for the Petitioner.

Order.—This is an application for transfer of a case under s. 108 of the Criminal Procedure Code, pending against the petitioner in the Court of Syad Nisar Qutab, Magistrate First Class, Sialkot, to a Court of competent jurisdiction in another district.

Various allegations were made in the application and the adffidavit filed in support thereof, but the only one which requires consideration is that contained in para. 7. It appears that the main defence of the petitioner was that the case was a false one and had been started against him at the instance of the Superintendent of Police of Sialkot District, whose displeasure the petitioner had incurred, by reason of his failure to comply with the Superintendent s wishes not to hold a certain meeting. For the defence a number of witnesses, including the Superintendent of Police were called. Most of the defence witnesses had been examined on the 6th of October, 1931, and the case adjoured to the 23rd, when the Superintendent of Police and the remaining witnesses for the defence were to be examined. It is alleged in the affidavit that on that date when the case was called at about 11 A. M. the judicial record was not forthcoming in the Court. The Reader stated that the record had been sent for by the Superintendent of Police and that it had not been returned to him. "At this", it is alleged. In the affidavit "the petitioner's Counsel protested against the sending of the record to the Superintendent of Police and asked under whose authority the judicial record had been sent to a witness before his examination in Court. To this objection of the petitioner's Counsel the learned Magistrate made no reply. After waiting for about half an hour the Naib Court brought the record and handed it over to the Magistrate. The Naib Court admitted in Court that the file had been sent for by the Superintendent of Police as he wanted to examine the depositions of the defence witnesses that had been recorded at the previous hearing of the case." A copy of this paragraph was sent to the Magistrate for remarks and in reply he has not denied the allegations in the affidavit as to what actually happened in Court on the 23rd of October, 1931. The Magistrate states that the file had been taken away by the Naib Court before he came to the Court and that on enquiry it was stated that the "Naib Court had taken it away for the Superintendent of Police." The Magistrate further states that "he made enquiry from the Reader and he told me that when he demanded the file of this case from the *Ahlmad*, the latter stated that it had been taken away by the Naib Court for the Superintendent of Police."

From what has been stated above, it is clear that the main allegation made in para. 7 of the application is correct. It is hardly necessary to point out that it was highly improper for the Magistrate or his officials to allow the judicial record of a pending case to be removed from the Court and handed over to a person, who was to be examined as a witness in the case. It is possible that this was done without a proper appreciation of the consequences and any intention to prejudice the defence. But, at the same time, there can be no manner of doubt, that the incident is such as to raise

a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial in his Court. I must, therefore, in the interest of justice, withdraw the case from the file of the learned Magistrate.

I can, however, find no adequate ground for transferring the case from the District. I have no reason to believe that there is no Magistrate in the Sialkot District, who will not deal with this case fairly and properly simply because the 'Superintendent of Police is taking a keen interest" in it or that he has been cited as a witness. At the same time, I think the case should be tried by a Senior Magistrate and, in my opinion, the proper person to try it is the District Magistrate himself. If, however, he cannot find time for the case in view of his other duties, or if he has held any consultations about the facts of the case with the Superintendent of Police in his executive capacity or has otherwise dealt with it extra-judicially, he will, in that event, send it to the file of Lala Daulat Ram Budhwar Additional District Magistrate.

The petition is partially accepted and the case transferred to the Court of the District Magistrate, Sialkot, for disposal in accordance with the directions give above.

Petition partially accepted.

A. *Case transferred.*

LAHORE HIGH COURT.

First Civil Appeal No. 1234 of 1931.

October 23, 1931.

JAI LAL, J.

HAKIM SINGH AND OTHERS—APPELLANTS

versus

COLLECTOR, GURDASPUR AND ANOTHER—RESPONDENTS.

Land Acquisition Act (I of 1894)—Compensation—Landlord and tenant — Apportioning of compensation.

In apportioning compensation between the landlord and the tenant the Court ought to proceed on the principle of ascertaining what is the value of the interest of landlord on the one hand with which he has parted and that of the tenant on the other and to apportion the compensation money between them in accordance with those values. *Dinendra Narain Roy* v. *Tituram Mukerjee* (1), followed. [p. 11, col. 1.]

First Appeal against an order of the District Judge, Gurdaspur, dated the 13th July, 1931.

Mr. *Satin Das*, for the Appellants.

Mr. *S. L. Puri*, for the Respondents.

Judgment.—This is an appeal against a decision of the District Judge of Gurdaspur made under the Land Acquisition Act, apportioning compensation awarded for compulsory acquisition of land. The appellants are the lessees and the dispute is as to the proportion in which the compensation should be divided between them and the lessor. The total compensation awarded for the land was Rs. 1,115 out of which the appellants have been given Rs. 250, the remaining Rs. 865 having been given to the respondent.

It appears that Ganesha, respondent, by means of a registered lease dated 21st December, 1915, leased in perpetuity 109 *kanals* 9 *marlas* of land to the appellants on a fixed annual rental of Rs. 130. The lease expressly says that the tenancy has been created for cultivation in perpetuity. The rent is fixed and is not capable of enhancement. The only right of the lessor is to receive the rent fixed and on failure of payment thereof to eject the lessees. The District Judge has held that the tenancy is to exist only during the lifetime of the lessor. There is, in my opinion, no justification for the assumption which, as I have already stated, is opposed to the express conditions of the registered lease. It is true that subsequent to the registration there have been some disputes between the lessor and the lessees but it has not yet been held by any competent Court that the lease is not binding on the lessor and nothing has been urged before me on the question.

With regard to a statement alleged to have been made by Hakim Singh, one of the appellants, before the Collector that the lease was for the lifetime of Ganesha it must be remembered that the statement was followed by a claim for the whole of the compensation. The statement of Hakim Singh should in my opinion be construed to mean that Ganesha had no interest in the land and it did not amount to an admission that on the death of Ganesha the lease would terminate. An allegation was made before me that a suit had been brought by the alleged son of Ganesha to set aside the lease. If such a suit is pending then it is obvious that whatever decision is given in this appeal must not affect the rights of the plaintiff in that case. It may be mentioned that the appellants are the reversioners of Ganesha and in the absence of the alleged son would inherit the proprietary rights in the land on his death. The District Judge

has found that the annual proportionate rent of the land acquired comes to about Rs. 2-8-0 and that the interest of the appellants, the lessees, is about Rs. 10 per annum. This is how he describes the situation:

"the money value of the usufruct of the land by the lessees would not ordinarily be more than Rs. 10 per annum."

This being so the question is what is the correct proportion in which compensation should be divided between the two parties. The District Judge has held that

"assuming that Ganesha would live for about 25 years more the loss of the usufruct to the lessees would not exceed Rs. 250,"

and has, therefore, granted the lessees R. 250. This, in my opinion, is not the correct way of looking at the case considering, as I have found above, that the lease must be treated as a permanent lease on a fixed rent. In *Dinendra Narain Roy* v. *Tituram Mukerjee* (1), the learned Judge of the Calcutta High Court after reviewing the previous cases of that Court on the subject remarked as follows:

"I think the Court ought to proceed on the principle of ascertaining what is the value of the interest of the *zamindar* on the one hand with which he has parted, and that of the tenant on the other and to apportion the compensation money between them in accordance with those values."

I venture to say that this is the correct method of deciding a case like the present.

The District Judge has found that the value of the usufruct of the land acquired to the appellants is Rs. 10 a year out of which the respondent Ganesha is paid Rs. 2-8-0. On this calculation the sum of Rs. 1,115 should be awarded as follows:

The appellants Rs. 836-4-0 and the respondent Rs. 278-12-0. A provision must however further be made that the amount awarded to the appellants shall not be paid to them unless they give security to the satisfaction of the District Judge that in case the lease in their favour is held to be invalid on the suit of any reversioner including the alleged son of Ganesha, then they would refund the amount paid to them to the reversioners entitled to succeed to Ganesha's estate on the latter's death. The parties shall bear their own costs in this Court.

B. L. *Order accordingly.*

(1) 30 C. 801; 7 C. W. N. 810.

LAHORE HIGH COURT.

First Civil Appeal No. 960 of 1928.

December 22, 1931.

SHADI LAL, C. J., AND MONROE, J.

FIRM RALA RAM-WALAITI RAM —DEFENDANTS—APPELLANTS

versus

FIRM BANSI LAL-JAGGAN NATH —PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch II, para. 15 (1) (c), para. 16 (2)—Decree in terms of award—Objection as to validity of reference—Appeal, competency of—Intention of Legislature—Interpretation of Statutes—Ejusdem generis—*Limits of the rule.*

No appeal is competent against a decree which is in accordance with an award even when the validity of the reference itself is impugned. *Balkishen* v. *Sohan Singh* (1), *Miran Wali* v. *Hira Nand* (2), *Muhamad Valli Asmal* v. *Valli Asmal* (6), *Nidamurthi Krishnamurthy* v. *Gargiparthi Ganapathilingam* (7), *Lutawan* v. *Lachya* (8), *Hari Shankar* v. *Ram Piari* (9) and *Suraj Singh* v. *Phul Kumari* (10), followed. *Tej Singh* v. *Ghasi Ram* (11) and *Mahadeo Prasad* v. *Badri Das-Ram Sarup* (12), distinguished. *Durga Charan Debnath* v. *Ganga Dhar Debnath* (3), dissented from. *Ghulam Khan* v. *Mohamad Hasan* (5), referred to. [p. 12, cols. 1 & 2.]

The intention of the Legislature is to give finality to the decision of the trial Court on all objections to the award, and to restrict the appeal to the solitary case in which the decree is at variance, or not in accordance with the award, and, even, then to confine its scope to that part of the decree which differs from the award. [p. 13, col. 2.]

The doctrine of *ejusdem generis* is used only for the purpose of ascertaining the intention of the Legislature and if it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow a particular word, are nevertheless to be construed generally, effect must be given to the intention as gathered from a larger survey. [p. 12, cols. 1 & 2.]

First Appeal from a decree of the Senior Subordinate Judge, Ludhiana, dated the 31st of December, 1927.

Messrs. *Mehr Chand Mahajan, Mukand Lal Puri* and *Shamboo Lal Puri*, for the Appellants

Messrs. *Faqir Chand, Chandra Gupta* and *Muhammad Amin*, for the Respondents.

Shadi Lal, C. J.—This is an appeal from a decree based upon an award. The award was made in a suit brought for the recovery of a certain sum of money against the firm of Rala Ram-Walaiti Ram According to the allegation in the plaint two persons, namely, Walaiti Ram and his son, Kulwant Rai, were the only partners in the firm, but Kulwant Rai, though served with summons, absented himself from the Court, and the case was defended

by his father, Walaiti Ram, who described himself as the "managing proprietor of the firm known as Rala Ram Walaiti Ram". After several adjournments, the plaintiffs, and Walaiti Ram purporting to act as the "proprietor of the firm known as Rala Ram-Walaiti Ram", entered into an agreement to refer the case to arbitration, and applied to the trial Court for an order of reference. Thereupon, the Court made an order to refer the dispute to the arbitrator nominated by the parties, and the latter, after receiving all the evidence produced before him, pronounced his award directing the defendants to pay Rs. 5,621-9 to the plaintiffs.

Two applications were made to set aside the award, one by Walaiti Ram, and the other by his son who, after absenting himself for more than a year, came forward to raise the objection that, as he was not a party to the agreement to refer the dispute to arbitration, the order of reference as well as the award was invalid. To avoid delay in the disposal of the case, the plaintiffs decided not to proceed against Kulwant Rai, with the result that his name was removed from the list of the defendants. The trial Judge then adjudicated upon the objections preferred by Walaiti Ram and after overruling them, dismissed his application. The learned Judge consequently pronounced judgment according to the award, and it is against the decree, which followed upon that judgment, that the present appeal has been brought by the firm through Walaiti Ram.

Now, para. 16, sub-para. (2) of the Second Schedule to the Civil Procedure Code provides in express terms that no appeal shall lie from a decree based upon an award "except in so far as the decree is in excess of, or not in accordance with, the award". It is, however, contended by the learned Advocate for the appellants that the law giving finality to the award pre-supposes a valid reference and does not prohibit an appeal in a case in which the award proceeds upon an order of reference which in itself is invalid. He challenges the validity of reference on the ground that Kulwant Rai was a party interested in the suit and, as he did not sign the agreement to refer it to arbitration the order of reference should be held to be invalid. It is conceded that there are several judgments of this Court which enunciate the proposition that no appeal is competent against a decree which is in accordance with an award, and that the fact that the validity of reference is impeached does not take the case out of the ambit of this rule, *vide inter alia*, *Balkishen* v. *Sohan Singh* (1) and *Miran Wali* v. *Hira Nand* (2). The learned Counsel, however, asks us to re-consider the question because the contrary view has been expressed by the Calcutta High Court and also by a learned Judge of the Allahabad High Court. The judgment in *Durga Charan Debnath* v. *Ganga Dhar Debnath* (3), by Graham and Mitter, JJ., is no doubt, an authority for the rule that an appeal lies where there is no valid reference to arbitration. The question was thereafter examined by the Calcutta High Court in *Golnur Bibi* v. *Abdus Samad* (4) in which, while Mitter, J., adhered to his previous opinion, his colleague, Mukerji, J., dissented from him and adopted the rule laid down by this Court.

It is to be observed that, prior to the enactment of the Civil Procedure Code, 1908, there was a divergence of judicial opinion on the question of whether an appeal would lie from a decree based upon an award, when the award itself is invalid. This controvers was, however, set at rest by the Code of 1908 which enlarged the scope of the grounds for setting aside the award by inserting the words "or being otherwise invalid" in para. 15, sub-para. (1), cl. (c) of the Second Schedule to the Civil Procedure Code. The award can now be challenged, not only on account of irregularities in the procedure of the arbitrator, but also on the ground that it was made by a person who had not been properly appointed to act as arbitrator. This amendment of the law shows that the Legislature intended that all objections to the award should be determined by the Court which made the reference, and that if that Court overrules the objections, including the one impeaching its validity, the decree based upon such award should not be open to an appeal. The learned Judges of the Calcutta High Court, however, restrict the scope of the words "being otherwise invalid" by applying the doctrine of *ejusdem generis* and hold that the invalidity of a reference is not an objection *ejusdem generis* with those specifically men-

(1) 116 Ind. Cas. 559; 10 Lah. 871; A. I. R 1929 Lah. 476.

(2) 131 Ind. Cas 348; 12 Lah. 408; A. I. R. 1931 Lah. 126; 32 P. L. R. 44.

(3) 130 Ind. Cas. 137; 34 C. W. N 813; A. I. R. 1931 Cal. 109; Ind. Rul. (1931) Lah 32?.

(4) 130 Ind. Cas. 209; 58 C. 628; 52 C. L. J. 298; A. I. R. 1931 Cal. 211; 35 C. W. N. 238.

tioned in cl. (c) and cannot, therefore, be made a ground of attack under that clause. It is evidently assumed that the invalidity of reference can be raised independently of any provision in the Schedule, and that the decision of the Court upon it can be attacked on appeal.

It must be remembered that their Lordships of the Privy Council made it clear in their judgment in *Ghulam Khan* v. *Mohamad Hassan* (5), that no appeal lay against a decree passed in accordance with an award made in the course of litigation, and they emphasized the principle of finality attaching to such decree. It was after that pronouncement that the Civil Procedure Code of 1908 was enacted, and the addition made to para. 15, sub-para. (1), cl. (c), was intended to give finality to a decree based upon an award, irrespective of the nature of the objections advanced against the award. It was accordingly provided that all objections should be urged before the Court dealing with the award, and that its decision thereupon should not be challenged in appeal. An objection to the validity of an award includes an objection impeaching the reference upon which the award is founded, and the latter objection comes within the purview of cl. (c). There is no cogent reason for distinguishing the one from the other, for the purpose of finality attaching to the decision of the Court upon the objections.

The doctrine of *ejusdem generis* cannot, in my opinion, be invoked to restrict the full and natural meaning of the phrase "or being otherwise invalid." Ordinarily, a general word receives its natural meaning but, a general word, which follows particular and specific words of the same nature as itself, may take its meaning from them and may be presumed to be restricted to the same genus as these words. It is, however, clear that this rule of construction is used only for the purpose of ascertaining the intention of the Legislature, and, as observed by Maxwell in his book on the Interpretation of Statutes, 7th Edition at page 288, "the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the Legislature as gathered from the larger survey." Now, the history of the law on the subject of appeal in cases of arbitration under the supervision of the Court points to the conclusion that the Legislature intended to give finality to the decision of the trial Court on all objections to the award, and to restrict the appeal to the solitary case in which the decree is at variance, or not in accordance, with the award, and, even then to confine its scope to that part of the decree which differs from the award.

The rule laid down by this Court that no appeal is competent even when the validity of the reference is impugned coincides with the view expressed by the Bombay High Court in *Muhamad Valli Asmal* v. *Valli Asmal* (6), and by the Madras High Court in 25 Ind. Cas. 583 [*Nidamurthi Krishnamurthy* v. *Gargiparthi Ganapathilingam* (7).] The same view was adopted by a Full Bench of the Allahabad High Court in *Lutawan* v. *Lachya* (8) and was affirmed in *Hari Shanker* v. *Ram Piari* (9) and *Suraj Singh* v. *Phul Kumari* (10). Our attention has been invited to the judgment in *Tej Singh* v. *Ghasi Ram* (11) where a reference to arbitration was made on the application of only some of the parties to the suit, and the question arose whether a person, who did not join in submitting the dispute to arbitration, was entitled to prefer an appeal against the decree of the trial Court made in accordance with the award, Ashworth, J. answered the question in the negative and held that the High Court could deal with the matter in revision. His colleague, Mukerji, J. was, however, inclined to favour the right of appeal but preferred, "not to decide whether an appeal would lie", because he agreed with Ashworth, J. that the High Court had jurisdiction to take up the matter in revision. It is not clear how the High Court could entertain an application for revision, if an appeal lay in the case. As expressly provided by s. 115, Civil Pro-

(5) 29 O. 167.

(6) 79 Ind. Cas. 723; 26 Bom. L. R. 171; A I. R. 1924 Bom. 324.

(7) 25 Ind Cas. 583; (1914) M. W. N. 865.

(8) 21 Ind. Cas. 989; 36 A. 69; 12 A. L. J. 57.

(9) 74 Ind. Cas. 834; 45 A. 441; 24 A. L. J. 326; A. I. R. 1923 All. 502.

(10) 90 Ind. Cas. 904; 48 A. 226; 23 A. L. J. 997; A. I. R. 1926 All. 202.

(11) 102 Ind. Cas. 236; 49 A. 812; 25 A. L. J. 606; A. I. R. 1927 All. 563.

cedure Code, the revisional jurisdiction of the High Court can be exercised only in a case in which "no appeal lies thereto". Reliance is placed also on the judgment in *Mahadeo Prasad* v. *Badri Das-Ram Sarup* (12) where Mukerji, J. expressed the opinion that the phrase "or being otherwise invalid" does not include the question whether there was or was not, a valid reference to arbitration, and that an application for revision would lie on the ground of the invalidity of the reference. This judgment cannot, however, be claimed as an authority for allowing an appeal in a case in which the validity of the reference is challenged.

The above survey of the case-law leaves no doubt that the preponderence of judicial authority is clearly in favour of the view that no appeal lies from a decree made in accordance with an award, and that it is immaterial whether the validity of the award is challenged on the ground of the illegality of the procedure of the arbitrator or on account of the invalidity of the reference which constitutes the foundation of his authority. This view receives support from the history of the legislation on the subject and from the rule attaching finality to a decision based on an award made under the supervision of the Court.

Mr. Mehr Chand Mahajan for the appellant, however, argued that an appeal lies in this case because the decree granted by the trial Court is at variance with the award. The only variation mentioned by the learned Counsel is that while the award makes the "defendants" liable for money, the decree is against the "firm Rala Ram-Walaiti Ram through Walaiti Ram". The award, when examined as a whole, however, shows that the expression "defendants" was intended to apply to the aforesaid firm, and there is, therefore, no divergence between the two documents. Nor can the appellant Walaiti Ram, who claimed to be the sole proprietor of the firm, consider himself aggrieved by the alleged variation, which according to him, had only the effect of exempting his son from liability.

The result of the above discussion is that no appeal lies from the decree of the Subordinate Judge, nor is there any valid ground which would justify the exercise of the revisional jurisdiction of the High Court.

(12) 110 Ind. Cas. 881; 50 A. 955; 26 A. L. J. 1009; A. I. R. 1928 All. 740.

I would accordingly dismiss the appeal with costs.

Monroe, J.—I agree.

A. *Appeal dismissed.*

LAHORE HIGH COURT.

Second Civil Appeal No. 1482 of 1928.

June 25, 1931.

COLDSTREAM AND JOHNSTONE, JJ.

Rai Sahib RADHA KISHAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

HUKAM CHAND AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (b)—'Declare', meaning of—Document acknowledging existence of previous mortgage—Registration, necessity of.

The word 'declare' in s. 17 (1) (*b*), Registration Act, indicates something more than a mere statement of existing facts and implies a declaration of will to cause a change of legal relationship in respect of the property concerned. Therefore, a document which merely acknowledges that a previous mortgage exists unredeemed cannot be said to declare a charge on the land mortgaged and as such is not compulsorily registrable.

(Case-law discussed.)

Second Appeal from a decree of the District Judge, Shahpur, at Sargoda, dated the 22nd February, 1928.

Messrs. *M. L. Puri* and *Balwant Rai*, for the Appellants.

Mr. *Mehr Chand Mahajan*, for the Respondents.

Coldstream, J.—On 18th March, 1911, Hukam Chand, the first defendant in the suit from which this appeal arises, mortgaged some land to Radha Kishan Singh, Ram Kishan Singh and Harkishan Singh by registered deed for Rs. 1,000, the principal to be repaid with interest after two years. On the 14th March, 1925, four days before the period of limitation for a suit to recover the debt by sale of the land would have expired, the mortgagor and mortgagees agreed to execute a document that would extend limitation. In pursuance of this agreement the mortgagor Hukam Chand wrote out a statement drafted by a lawyer Pandit Moti Ram to the effect that the land concerned was under mortgage by deed dated 18th March, 1911, that Rs. 1-8 0 on account of pricipal and the same amount on account of interest had been paid by Hukam Chand to the mortgagees and that the property would remain under mortgage for the unpaid balance of the debt. The document which is Ex.

P. 3 in the case was signed by Hukam Chand but was not registered.

In August, 1926, Radha Kishan Singh instituted a suit to recover Rs. 2,295 6-0 upon the mortgage deed, impleading the two other mortgagees as defendants (one of these, Ram Kishen Singh, subsequently became a plaintiff in the suit). The plaintiff contended that the payment of Rs. 3 recorded in P. 3 and the acknowledgment made in that document by Hukam Chand saved limitation under the provisions of ss. 19 and 20 of the Limitation Act.

The suit was resisted by Hukam Chand who claimed a set-off arising out of a transaction recorded in an unstamped unregistered deed which had been lost. He also pleaded that the suit was barred by limitation. He denied the actual payment of Rs. 3 recorded in P. 3 and contended that this document could not be used for the purpose of extending limitation because it had not been registered as required by s. 17 (1) (*b*) of the Registration Act.

The trial Court dismissed Hukam Chand's counter-claim on the ground that the transaction alleged could not be proved by oral evidence. On the point of limitation it found that no money had passed on the 14th March, 1925, the record in P. 3 for this payment, being fictitious, and that therefore, the plaintiffs could not rely upon s. 20 of the Limitation Act. At the same time it held that the document, P. 3, though not registered, was admissible for the purpose of extending limitation and that the acknowledgment, of the debt made in it brought the suit within time so far as the plaintiffs sought relief from the mortgaged property. The plaintiffs were granted a preliminary decree accordingly.

On appeal the District Judge, in whose Court the only point disputed was that of limitation, agreed with the first Court's finding that the payment recorded in P. 3 was fictitious but differed from the trial Court regarding the admissibility of the document, holding that this was an instrument which operated to declare an interest in land of the value of more than Rs. 100 and, therefore being unregistered could not affect the property mortgaged.

The suit having been thus dismissed on the ground of limitation the mortgagees, Radha Kishan Singh and Ram Kishan Singh, preferred the present appeal.

The finding that no money was paid as stated in the document P. 3 is final and cannot be attacked in second appeal

It is not disputed that the claim of the plantiffs to recover their loan from the person of the mortgagor and his property not covered by the mortgage is barred by limitation. The only point on which issue is joined before us is whether the ackowledgment in writing of the 14th March, 1925, can be used to extend limitation under s. 19 of the Limitation Act for a suit to recover the charge from the mortgaged property.

Mr. Puri for the appellants argues that the document does no more than admit the existing fact of the mortgage, and as it creates no definite change of legal relation to the property, it does not fall within the scope of s. 17 (1) (*b*) of the Registration Act and is, therefore, available for the purpose of extending limitation although unregistered. In support of his argument he relies strongly on the Privy Council judgment *Soni Ram* v. *Kanhaiya Lal* (1) where at page 236* it was remarked that their Lordships agreed with the Allahabad High Court that "an acknowledgment of liability only extends period of limitation within which a suit must be brought and doesnot confer title and it is not a thing done within the meaning of s. 6 of the General Clauses Act." In this connection he has cited also *Ranganayaki Ammal* v. *Virupakshee Rao Naidu* (2) and *Sakha Ram Krishnaji* v. *Madan Krishnaji* (3). He has also drawn our attention to a number of rulings in which admissions in subsequent deeds that mortgages existed have been held to extend limitation, such as *Nando Kishore Lal* v. *Ramsookhee Kooer* (4), *Khushalo* v. *Behari Lall* (5), *Mugni Ram* v. *Gurmukh Roy* (6), *Jageshar Singh* v. *Bir Ram* (7), *Majmundar Hira Lal* v. *Ichhalal Desai Narsilal Chaturbhuj Das* (8), *Dharma* v. *Balmakund* (9) and *Sanwal Das* v. *Ali Mahdi* (10).

(1) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.)

(2) 72 Ind. Cas. 456; 17 L. W. 588; 32 M. L. T. 312; 45 M. L. J. 100; A. I. R. 1923 Mad. 621.

(3) 5 B. 232.

(4) 5 C. 215.

(5) 3 A. 523; A. W. N. (1881), 19.

(6) 26 C. 334.

(7) 60 Ind. Cas. 189; 7 O. L. J. 451; 23 O. C. 176; 2 U. P. L. R. (O.) 152.

(8) 18 Ind. Cas 909; 37 B. 326; 12 C. W. N. 573; 13 M. L. T. 415; (1913) M. W. N. 428; 11 A. L. J. 432; 17 A. L. J. 474; 15 Bom. L. R. 483; 25 M. L. J. 101; 40 I A. 68 (P. C.)

(9) 18 A. 458; A. W. N. (1896) 147.

(10) 85 Ind. Cas. 330; 22 A. L. J. 1018; L. R. 5 A. 718 Civ.; A. I. R. 1925 All. 174.

* Page of 35 A.—[*Ed.*]

In reply Mr. Mehr Chand contends that in none of these judgments was there any decision on the point now directly in issue, namely, whether an unregistered instrument executed (as this document P. 3 was admittedly executed) for the purpose of extending limitation for a suit to enforce payment of a debt of more than Rs. 100, charged upon land, will affect the mortgaged property in the manner intended, that is to say, extend the period of liability of the property for the debt and so increase the charge of interest upon it. He relies upon the wording itself of s. 19 of the Limitation Act and *Faki* v. *Khotu* (11) upon which judgment the learned District Judge has based his decision.

It is well established by the rulings cited by Mr. Puri as well as many others that an acknowledgment of a simple money debt made in a document such as a compulsorily registrable mortgage-deed may extend limitation for a suit to recover that debt although the deed is not registered and cannot affect the property to which it relates. This is all that is laid down in *Khushalo* v. *Behari Lal* (5). Similarly in *Nundo Kishore Lall* v. *Ramsookhee Kooer* (4), the suit was to recover a money debt subsequently acknowledged in a conveyance. *Mugni Ram* v. *Gurmukh Roy* (6) disposed of a case of the same kind, the debt sued for having been admitted in a subsequent mortgage-deed. The receipts in favour of Government referred to in *Majmundar Hira Lal Ichhalal* v. *Desai Narsilal Chaturbhuj Das* (8) were executed before the Registration Act was passed. In *Sanwal Das* v. *Saiyad Ali Mahdi* (10) the acknowledgment was apparently contained in a list attached to a conveyance deed and it is not shown whether the deed was or was not registered.

The judgment of the Lahore Chief Court, *Muhamad Khan* v. *Jai Sukh* (12), relied upon by the trial Court dealt with a case in which the acknowledgment pleaded was of a simple money debt, while *Chunder* v. *Wazira* (13), also referred to by the trial Court, gave no decision with reference to s. 19 of the Limitation Act, the suit being dismissed because the mortgage-bond on which it was based was unregistered. In *Jageshar Singh* v. *Bir Ram* (7) a Single Bench judgment of the Oudh Court dealing with a mortgage for Rs. 75 only the question of the necessity of registration was not before the Court and the judgment does not show whether any of the acknowledgments relied upon related to a charge of more than Rs. 100. Presumbly the conveyance of 22nd April, 1913, referred to in the judgment was a registered instrument. Nor does *Dharma* v. *Balmakund* (9) help the appellants. The admission relied on was found to be ineffective to extend limitation. It was an entry in a Settlement *Khewat* and as such would in any case be exempted from registration under s. 19 of the Registration Act, a fact apparently overlooked in Mr. Rustomji's Commentary on s. 19 of the Limitation Act to which Mr. Puri has referred us.

The only ruling cited by Mr. Puri in which an acknowledgment of a charge of more than Rs. 100 on immovable property, made in a unregistered document, was held to save limitation under s. 19 of the Limitation Act is *Anant Ram* v. *Inayat Ali Khan* (14). We have examined the record of this case (Civil Appeal No. 2517 of 1915) and found that the charge sought to be enforced was Rs. 800. But in that case the question now under consideration was not raised and the fact that the bond containing the acknowledgment was unregistered was not noticed.

Lastly, as regards the words quoted by Mr Puri from *Soni Ram* v. *Kanhaiya Lal* (1) it need only be remarked that they must be read as applying to the facts of that particular case. The acknowledgment put forward in that case was held ineffective for reasons not connected with the Registration Act and the remark on which Mr. Puri relies related to the effect of s. 6 of the General Clauses Act.

It must be conceded that Mr. Mehr Chand is correct in his contention that none of these rulings decides the exact point before us.

It cannot now be disputed, that the word "declare" in s. 17 (1) (*b*) of the Registration Act must be read to indicate something more than a mere statement of existing facts, and to imply a declaration of will to cause a change of legal relationship in respect of the property concerned, a proposition for which the two judgments, *Sakha Ram Krishnaji* v. *Madan Krishnaji* (3) and *Ranganayaki Ammal* v. *Virupakshee Rao Naidu* (2) relied on by Mr. Puri are not the only authorities.

We have to see whether the document P. 3 purports or operates to make such a declaration. I do not think that it does.

(11) 4 B. 590.
(12) 88 P. R. 1880.
(13) 17 P. R. 1881.
(14) 2 Lah. L. J. 549.

This view is consistent with that taken in *Sakha Ram Krishnaji* v. *Madan Krishnaji* (3) where it was pointed out that an acknowledgment of liability in a form other than a receipt does not require registration and that cl. (*b*) of s. 17 (1) of the Registration Act does not comprise an acknowledgment. The Limitation Act does not extinguish rights and titles but prevents their enforcements by legal process. The document P. 3 made no change in the legal relation to the property charged. It merely admitted that the mortgage of 1911 existed unredeemed. Such an acknowledgment of debt cannot, I think, be said to purport or operate to bring into operation a charge upon the mortgaged land which had not been created by the mortgage-deed itself.

The Bombay ruling of *Faki* v. *Khotu* (11) was upon facts not on all fours with those of the present case. The instrument under consideration there was being used, in the opinion of Melvill, J., as evidence of title and the document itself appears to have been one which did as a fact express a will to alter title and to make a change in the nature of the executant's possession. I do not think that the judgment intended to lay down broadly that an admission extending limitation must be registered if the liability admitted is of a value of more than Rs 100 and is a charge on immoveable property. If it had this intention I am not prepared, in view of the principles stated above, to follow it here.

Mr. Mehr Chand has attempted to find support for the lower Court's decision in the discussion at pages 1058 and 1059* of *Mani Ram Seth* v. *Rupchand* (15) and in a number of decisions of this Court purporting to be based upon the conclusions laid down in that judgment. His argument is that the instrument P. 3 interpreted in the light of the remarks made there by the Privy Council must be held to imply a promise to pay and, therefore, in itself to create a charge. But the question before their Lordships in that case was merely whether the particular form of acknowledgment which they were considering satisfied the requirements of s. 19 of the Limitation Act and what was laid down by them ultimately was simply this that s. 19 requires only a definite admission of liability and says nothing about a promise to pay. In the present case it is not disputed that the instrument P. 3, if admissible, although not registered contains an admission which will extend limitation.

For all these reasons I am of opinion that the document P. 3, did not require registration and I would, accordingly, accept the appeal and setting aside the judgment appealed against, restore the decree of the trial Court with costs throughout.

Johnstone, J.—I agree.

R. L. *Appeal accepted.*

(15) 33 C. 1047.

*Pages of 33 C.—[*Ed*].

LAHORE HIGH COURT.

First Civil Appeal No 219 of 1926.

October 13, 1931.

BROADWAY, OFFG. C. J.,

AND BRIDE, J.

NIHAL CHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

DAL SINGH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 21, O. XLI, rr. 27, 28—Jurisdiction—Trial of case by Court not having local jurisdiction—Interference in appeal—Appeal—Additional evidence—Remand—Contract Act (IX of 1872), ss. 23, 25—Consideration—Promise to pay debt of his deceased brother.

Where a case has been decided by a Court having no territorial jurisdiction, its decision will not be set aside on that score unless it is shown that a failure of justice has resulted from the trial of the case at the wrong place. [p. 18, col. 1.]

Where a party had a free hand in summoning of witnesses in the Court of first instance, the case cannot be remanded in appeal for giving him a further opportunity to produce evidence simply because his Counsel in appeal considers the evidence of certain witnesses to be essential. [p. 18, col. 2.]

One G. M. died issueless and was succeeded by N. C. his brother and S. his widow. The deceased owed some money to the plaintiff. N. C. after going into the accounts of the deceased with the plaintiff struck a balance containing a stipulation to pay interest. Plaintiff sued N. C. for recovery of his debt and the latter pleaded want of consideration:

Held, that the burden of proving absence of consideration lay on N. C. which he had failed to discharge. [*ibid.*]

Held, further, that the plaintiff by accepting the signature of N. C. and his undertaking to pay the amount due on the accounts discharged G. M's estate from liability and that was a sufficient consideration to sustain an action against N. C. [*ibid.*]

First Appeal from a decree of the Subordinate Judge, First Class, Ferozepore, dated the 28th October, 1925.

Messrs. *N. C. Pandit* and *M. C. Sud*, for the Appellant.

Lala *Badri Das*, R. B. and Lala *Ajit Parshad*, for the Respondent.

Broadway, Offg. C. J.—This appeal has arisen out of a suit brought by one Dal Singh a *jat* of Singhewala in the Ferozepore District against Nihal Chand, son of Daulat Ram, a Bhabra, and

Musammat Saman widow of Gopi Mal, for the recovery of Rs. 17,392-9 3 being the principal and interest due on *bahi* accounts, the accounts having been started by Gopi Mal, the deceased brother of Nihal Chand and husband of *Musammat* Saman. It is alleged that after death of Gopi Mal without issue Nihal Chand and *Musammat* Saman came into possession of Gopi Mal's estate as his heirs and that Nihal Chand had himself on two separate occasions after the death of Gopi Mal gone into Gopi Mal's accounts, acknowledged their correctness and struck balances undertaking at the same time to pay interest. Nihal Chand while admitting his relationship and the fact that he had signed the acknowledgments in the account books, as alleged, pleaded (1) want of jurisdiction in the Ferozepore Courts, (2) want of consideration and further denied that he had undertaken to pay the interest.

As a result of the statement made by the plaintiff the suit against *Musammat* Saman was withdrawn or dismissed and the case proceeded against Nihal Chand who stoutly contested it. In the end the learned Subordinate Judge decreed the plaintiff's claim in the full with costs. It is against this decree that Nihal Chand has preferred this appeal through Mr. Nanak Chand Pandit who has taken us through the record.

On the question of jurisdiction Mr. Badri Das for the respondent drew attention to s. 21 of the Civil Procedure Code and pointed out that even assuming that the Courts at Ferozepore had no jurisdiction to try the case, it had not been shown that any failure of justice had occurred in consequence of the trial in that District. On being asked to explain in what way there had been any failure of justice Mr. Pandit was unable to say more than that the case had not been properly enquired into. Now a reference to the record shows that all the witnesses that the defendant-appellant sought to produce were produced and examined. The trial Court obviously allowed the appellant every latitude and it was only when the defendant and his Counsel had completed the defendant's case that a statement was recorded to the effect that the defendant's case was closed. In these circumstances it seems to me clear that there has been no failure of justice in consequence of the trial having been held at Ferozepore. Further on the record itself it seems to me that the Ferozepore Courts had jurisdiction. Gopi Mal undoubtedly lived in the same village as the plaintiff. The defendant Nihal Chand owned property in that village and as the heir to Gopi Mal will succeed to the property which is situated in that village. The Dabwali Mandi where they carried on business is only about three or four miles away and I see no reason to doubt the statements of the witnesses led by the plaintiff-respondent who say that Nihal Chand has a residence both in the village of Singhewala and Dabwali Mandi.

Mr. Pandit then urged that certain witnesses who might have been examined were not examined and asked for a remand for their examination. At this stage this prayer cannot be granted. The defendant Nihal Chand had a free hand in the summoning of witnesses and his not having considered it necessary either to go into the witness-box himself or summon witnesses which appear to Mr. Pandit to be necessary is no reason for giving him a further opportunity to produce evidence.

It was next urged that there was no consideration so far as Nihal Chand was concerned. There can be no doubt that the onus of proving that there was no consideration rested on the defendant-appellant and it is clear that he has failed to discharge that onus. The plaintiff had a claim against Gopi Mal's estate which apparently was under the control of Nihal Chand and *Musammat* Saman. By accepting Nihal Chand's signature and undertaking to pay off the amount due on the accounts, the estate of Gopi Mal was discharged from liability which was doubtless the reason why his widow's name was struck off the list of defendants as soon as Nihal Chand appellant had admitted having struck the balances. Finally, it was urged that Nihal Chand was not liable to pay interest. Here again the entries which were admittedly made by Nihal Chand contained an undertaking to pay the interest, the interest then being annas twelve instead of rupee one per cent.

In my judgment the appeal fails and I would, therefore, dismiss it with costs.

Bhide, J.—I agree.

R L. *Appeal dismissed.*

LAHORE HIGH COURT.

Criminal Appeal No 1087 of 1931.
January 28, 1932.
HARRISON AND DALIP SINGH, JJ.

RANBIR SINGH AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 114 illus., 133—Approver's evidence—Necessity of corroboration—Nature of corroboration required—Evidence of association, value of—Criminal Procedure Code (Act V of 1898), ss, 164, 533—Mode of recording confession—Necessity of observing prescribed rules—Omission to question accused and to record questions and answers, effect of.

Persons accused of an offence cannot be convicted upon the evidence of an approver unless the connection of each of the accused with the crime is proved by independent corroborative evidence. [p. 24, col. 2]

Evidence of an isolated instance of association, by itself, is not of much corroborative value unless it is combined with other evidence of the same nature or of a nature showing an even more intimate connection between the accused. [p. 25, col. 1.]

There is much difference between association at a suspicious place which in itself points to two persons having met for some sinister purpose and natural association which in itself raises no suspicions by itself. [p. 25, col. 1.]

It is not proper to record a confession in a Police Station or during the night. If the matter is urgent and the surroundings have to be accepted as unavoidable, exceptional care should be taken to observe very strictly the directions prescribed by the rules for recording confessions. [p. 26, col. 1.]

Failure of the Magistrate recording a confession to question the accused in order to satisfy himself that the accused was making the confession voluntarily is a radical and fatal defect which cannot be cured by s. 533, Criminal Procedure Code. [*ibid*]

The fact that the Magistrate was satisfied from observation that the accused was making the confession voluntarily does not dispense with the necessity of questioning the accused. *Farid* v. *Emperor* (1), followed. [*ibid.*]

Provided the Magistrate satisfies himself by putting questions and hearing answers, that the prisoner before him is making a voluntary confession, it is unnecessary for him to record the questions and answers; it is sufficient if he complies with the letter of the law. *Abdul Ghani* v. *Emperor* (3), followed. *Emperor* v. *Panchkari Dutt* (2), not followed. [p. 26, col. 2.]

Criminal Appeal from an order of the Sessions Judge, Lahore, dated the 9th September, 1931.

Messrs. *C. Bevan Petman, B. R. Puri, J. N. Aggarwal, Mehr Chand Mahajan, Amin Chand* and *Partap Singh*, for the Appellants.

Mr. *C. H. Carden Noad*, The Government Advocate and Messrs. *Qalandar Ali Khan* and *J. W. Fairlie*, for the Government Advocate, for the Respondent.

Judgment.—On the 23rd December, 1930, an attempt was made by one Hari Kishen to shoot His Excellency the Governor of the Punjab at the Lahore University Convocation. The Governor was wounded and one of the shots fired killed Sub-Inspector Chanan Singh, who was in attendance Hari Kishen was captured on the spot, tried and sentenced to death. Three men Durga Das, Chaman Lal and Ranbir Singh have been committed to the Sessions, tried and sentenced to death for conspiracy with Hari Kishen and one Wasanda Ram, who has turned approver, to murder His Excellency and for murdering Chanan Singh in pursuance of the conspiracy. In his judgment the learned Sessions Judge has described the death of Chanan Singh as being in consequence of that conspiracy and not "in pursuance thereof". Great stress has been laid on the difference in the wording. In our opinion the difference merely amounts to laying stress on the objective as opposed to the subjective aspect of the crime.

The question to be decided is whether there was such a conspiracy, and, if so whether the three appellants before us took part in it.

The evidence consists of:—(1) The statement of the approver. (2) The general corroboration of that statement consisting of witnesses produced to show that he remembers what happened and tells the story straightforwardly and truthfully. (3) Corroboration against each individual as supplied by witnesses who connect the particular individual with the commission of the offence.

We take the approver's story first and then proceed to examine the corroborative evidence under both heads. Wasanda Ram, who is 19 years of age, was a student of the Sanatan Dharam College in the year 1929 He describes himself as politically minded and in December, 1929, he attended a meeting of the Indian National Congress on the bank of the Ravi and there discovered the existence of a Students' Union. He took preliminary steps to join this body but never completed the necessary formalities. In spite of this he attended some meetings at one of which he met a man Durga Das who gave his name as Mr. Khanna of the D. A. V. College. Later, this man gave him a list of books which he advised him to read. In March he met this man again and noticed that he was with a person whom he subsequently learnt to be Ranbir Singh. At the end of the summer term he went to his home in the Lyallpur District and says that one day in August he came to Lahore in consequence of his having seen an advertise-

ment in the Tribune calling for candidates for a clerkship which had been inserted by one Bhagwan Singh Contractor. In the afternoon of this day he happened to meet this man Durga Das near the Museum and on this occasion Durga Das revealed to him the existence of an organisation of revolutionaries, to which he himself belonged, and described to him how the members belonged to three different groups differentiated by their duties and activities. This meeting, therefore, was a crucial incident and formed the starting point of Wasanda Ram's connection with the alleged conspiracy. On returning to Lahore in September he first lived in the College Hostel and in October moved out and went to the Pawitar Hotel and shared a room with one Attar Chand. A few days later he met Durga Das again by accident and told him that he had left the hostel and was living in the hotel and Durga Das then paid him a visit. At the time of this visit Durga Das explained to him that he would like him to live in a more secluded place and accordingly he and a friend Mul Raj went to Muhalla Ram Nagar near Raj Garh, a suburb of Lahore, and took two rooms and paid a month's rent. After staying there 15 or 16 days they moved and went to Rama Cottage. They took rooms from Ram Nath, the son of Ram Lal, landlord, and did not pay rent in advance. Mul Raj fell sick and left on the 10th of December and on the 19th Wasanda Ram met Durga Das again and took him to this house. Durga Das presented him with a Rs. 10 note, told him to pay the rent out of it and that he wanted to leave a bomb, a revolver and cartridges with him and that very evening came to the house and left these articles. He then told him that he would bring a man to him the next day and wished him to stay at home to receive him. While this conversation was in progress the landlord Ram Lal passed by and the approver thought it a good opportunity to pay him his rent. He took Rs. 8 out of a box, in which he kept his money, and paid the landlord Ram Lal in the presence of Durga Das. This box was in the inner of his two rooms. The following afternoon Durga Das brought a man whom he called Ram Lal and actually was Hari Kishen and told Wasanda Ram to look after him and make all the necessary arrangements for his food. Next morning, the 21st of December, and this is the point where the conspiracy was first revealed in its entirety to Wasanda Ram, Durga Das and Ranbir Singh came to the house, greeted Hari Kishen affectionately and told Wasanda Ram that it had been decided to attempt the life of the Governor at the Convocation, which would take place on the 23rd. That afternoon Durga Das returned, showed great nervousness at having seen a man Shanti Parkash, who also lived in Rama Cottage and was reassured by Wasanda Ram. Again that night Durga Das came alone to Rama Cottage and handed over to Hari Kishen the revolver, with which the murder was actually committed, and some cartridges He told Wasanda Ram to buy clothes for Hari Kishen and gave him some money. He also told him to take Hari Kishen in the morning to the gun outside the Museum and to hand him over to Ranbir Singh, who would be there. At 7 o'clock the next morning Wasanda Ram took Hari Kishen to the gun, met Ranbir Singh and was told by him that his duty was done and he would go away. As a matter of fact he still had to buy clothes for Hari Kishen and this he proceeded to do and ordered a coat, a shirt and a *pagri* to be made for him. The tailor, who made these articles and procured the cloth for them was one Bansi Lal who has been produced and bears out the main incidents in the story. Wasanda Ram then returned home and was joined by Hari Kishen at 11 or 12 o'clock. That afternoon, while they were sitting in Rama Cottage, Ranbir Singh arrived with a camera. The landlord Ram Lal was on the spot sitting outside the house with some friends named Barkat and Hakim, who had come to pay him a visit. Shanti Parkash, the lodger, was also at home. Ranbir Singh took several photographs of Hari Kishen and there was some conversation between him and the landlord about a chair and a tea-poy, which were required for the camera to stand on. A further incident is described consisting of the landlord having gone into his room and brought out a photograph of a family group of his own and shown it to them. On the following morning Wasanda Ram fetched the clothes and to complete his dress he gave Hari Kishen a *salwar* of his own after cutting out the *Dhobi* mark. While Hari Kishen was present Durga Das came and produced an invitation card for the convocation and told the approver to write the name of Mr. Mohammad Yusaf upon it, which he did. Durga Das then gave Hari Kishen his instructions, told him to leave

the house at half past ten and go to University Hall by a round about way and gave him some small change in case he should want it to pay for a tonga. He told Wasanda Ram to make a bundle of the clothes and of the revolver, the bomb and the cartridges which had been given him before and to take them to the "Milap" Office that day. This Wasanda Ram did. The bundle was taken over by Ranbir Singh. Wasanda Ram then packed his trunk and went to the Railway Station and so on to his home in the Lyallpur District. On the 28th the Police arrived and on the 6th and 7th January he made his confession before a Magistrate which forms the basis of this case.

The learned Sessions Judge has attached exceptional value to the statement of this approver. He was much impressed by the manner in which he gave his evidence. He believes him to be a truthful and conscientious witness but realises that this does not dispense with the necessity of corroboration. He thinks him a misguided youth who was led astray by the glamour of martyrdom. He finds that on realising his mistakes he honestly tried to atone for his folly and to tell a candid and truthful story of all that he knew. We may say at once that we have not been very favourably impressed by this man's evidence. In view of the corroboration, which will be examined later, we do find that he took part in the conspiracy, that the story is on the whole true, that he did afford an asylum for Hari Kishen and,more especially that the story about the purchase of clothes is true and that he did write the name of Mr. Mohammad Yusaf which now appears on the invitation card used by Hari Kishen. It is unnecessary to examine or to refer to the corroboration of details of the story by evidence regarding such incidents as the purchase of sweets by Wasanda Ram and the contradiction, which exists, as to whether he ate them all himself or took some back to his guest. Nor do we propose to examine the contradictions as to the number of meals eaten by him and Hari Kishen and the place where they ate them and whether in company or alone. We are satisfied that the approver did arrange for the necessary meals and his statement is borne out by the Hostel Cook and the scullion. We find that the approver was one of the most important members of the conspiracy though he was only told of it in its entirety or indeed of its main features at a very late stage. He provided the lodging and food for the principal active agent. He bought his clothes and arranged for his food.

The corroboration falls under two heads:—

(1) General Corrobration.

(2) Special corroboration connecting each of the accused with the conspiracy.

The first shows or is meant to show that the man is truthful and has a good memory. Holding it proved that this approver was an active conspirator, we may, I think, confine ourselves to five portions of branches of the corroboration under this head. These are the details of the visit to Lahore in August, 1930, the movements of the approver in October, November, and December and his change of lodgings, the clothes incident, the card incident, and the camera incident. The first affords a test of very peculiar value because there can be no question of the approver being mistaken or having forgotten about it. It formed according to him, an interlude which broke the monotony of the long vacation and, further, it was the point at which his true initiation began and was followed by the uneventful remainder of the vacation. The story is that some time in August he came for a day to Lahore from his home in the Lyallpur District, stayed there the whole of the day and returned at night. He says that he came in answer to an advertisement, which had appeared in the Tribune and in the hope of getting employment. After doing or rather failing to do his business, at about 4 P. M. he met Durga Das outside the Museum and had a conversation with him at which he was told of the revolutionary organisation to which he, Durga Das, belonged himself and how the members were of three categories. He had read an advertisement in the Tribune inserted by one Bhagwan Singh offering employment to a clerk on Rs. 50 a month and saying that the successful candidate would have to deposit Rs. 600 security. No name was given but only a number. He says that he discussed the matter with his father and his family and received no encouragement. Later he changes this detail and says that he only consulted them later as to the advisability of seeking such employment. The advertisement called for applications to a certain number 2617. He answered the advertisement but not to the number advertised and received a reply from one Bhagwan Singh of *Muhalla*

Sathan. He then waited until his father was away from home, took Rs. 200 from what he calls the family funds and went to Lahore. Bhagwan Singh, who appeared as a witness, says that he never received any application for the post and this is borne out by the evidence of the clerk from the Tribune Office who says no letter arrived which necessitated the checking of the name and address of the inserter of the advertisement. On reaching Lahore Wasanda Ram set out to find Bhagwan Singh's house, went to the *Muhalla* and made enquiries. He could not have done so had he not received an answer to the letter not addressed to the advertisement number. Eventually he reached the street in which Bhagwan Singh lives, did not go right up to the house but entered into conversation with a man sitting in a shop next door, questioned him, and was told that one Bhagwan Singh who lived in the house was in the habit of inserting advertisements in the papers. The shop was that of a petition-writer. This information so discouraged him especially when combined with the fact that the appearance of the house, which he did not attempt to enter, was mean and poor, that he went away and dropped the matter. A most improbable story-not impossible but improbable If it was worth his while to come all the way to Lahore in search of his employment and to take Rs. 200 without his father's knowledge, one would expect him to have followed the matter up a little further. And why Rs. 200? Granted there was no more available, why take more than sufficient for his expenses if he would not get the Rs. 600-? and why should the fact that the house only had two stories frighten him? The detail as to the frequency of Bhagwan Singh's advertisement is somewhat shaken by the evidence of a clerk in the Tribune Office, who says this was the only advertisement ever inserted by Bhagwan Singh. He says that he did not write to the given number. How then did he address his letter for at the time he admittedly did not know the name Bhagwan Singh. Both Bhagwan Singh and the clerk of the Tribune Office say that no reply was received to the advertisement and the clerk should remember as the address, if intelligible at all, would have required the cheking of the particulars of No. 2617. This is only the beginning of the trouble.

The Sessions Judge followed up this part of the story by sending the approver with a Magistrate down to the City to see if he could point out the house. There is a flat contradiction between the Magistrate's evidence and that of the approver as to whether he pointed out the shop, at which he had made enquiries, or identified the man, who was sitting in the shop as the person from whom he enquired. The Magistrate is quite clear that all that he did was to point out the shop and is supported by his note made at the time. Now the tenant of the shop has been produced as a witness, being one Faqir Chand and it is disclosed in his evidence that he only took it four months before giving evidence and several months after the incident of August, 1930. Before he took the shop it was occupied by a grocer. It is true that he had another shop in August, 1930, four or five shops further down the street and not next door to the house of the advertising contractor. Before he was sent to the City with the Magistrate the approver positively stated that the house pointed out to him as being that of Bhagwan Singh bore the number 2617. As a matter of fact the number of the house in the Municipal Registers is 1655 and it is not shown that this number is any where exposed to view. The mistake might have been unimportant, were it not that 2617 is the number given in the advertisement in the Tribune by Bhagwan Singh. Then the approver was questioned in Court by the Sessions Judge; he was shown the advertisement but the number had been covered so that he could not see it. On the following day he made this positive assertion, thus showing that he had remembered or discovered in the interval what was the number given in the advertisement and, believing quite wrongly that this was the real number of the house and not realising that it was merely the advertisement number, he deliberately manufactured the detail of there being a number on the house and described how he had seen what did not exist. On every single point, therefore, on which there could be a contradiction, there is one, and the only grain of truth appears to be that Bhagwan Singh inserted the advertisement in the Tribune. The approver has avoided giving details, which could be checked regarding the appearance of the house as when he says that it may have had one or two stories. If it impressed him so unfavourably as to make him return without going any further in his enquiries, he would remember more Any doubt that might remain as to the truth of this story is set at rest by a later statement of the approver

himself on page 56 of the record when he says: "I remember I went to my village, as quickly as I could, as soon as the summer holidays of 1930 opened. I cannot now say whether in those summer holidays, there was any occasion or any other business that brought me to Lahore. I returned to Lahore at the end of the holidays for the term (*i. e.* the 17th September). Nothing could be clearer than this and the explanation obviously is that at the time he made this statement he was trying to explain away an accidental mistake regarding a certain poster. He said that he had seen it at his village before coming to Lahore in September. This he could not have done as the poster was not printed until the 10th of October. Being constitutionally incapable of saying that he had made a mistake, as so many witnesses are, he was struggling from the terrible position and blundered by telling the truth on the infinitely more important point of whether he had come to Lahore at all during the vacation. His mind being distracted at the moment from the consequences of the admission he was making and being centered upon the importance of avoiding the admission of having forgotten or mistaken the wholly unimportant detail as to where he first saw the poster he told the truth, which was that he did not come to Lahore between the dates of leaving at the beginning of the vacation and returning to it at the end. The various improbabilities taken together amount to the improbability of the story of the search for Bhagwan Singh's house being truth and this statement further establishes that regarding this incident the approver is deliberately lying and also establishes that it was not in August that he was initiated and that he did not then meet Durga Das. The Government-Advocate would have us hold that the statement about not coming to Lahore must be a mistake because the approver's attention was not drawn to the consequences of his reply It is just because his mind was distracted by the poster incident and he failed to realise the consequences of his reply that we attach such peculiar value to it. We have elaborated this incident as we consider it of immense importance and that it proves that the approver is not to say the least of it a very truthful man. We believe that he did see the advertisement, that it was fixed in his memory by the fact that he discussed its attractions with his father. The rest is a clumsy fabrication.

The next point is that of the movements of the approver in October, November and December, and how and why he changed his quarters. The story is that, after living in the hostel in September, the approver moved first to Pawitar Hotel. This is uncorroborated. From Pawitar Hotel he went to Ram Nagar Muhalla and together with his friend Mul Raj rented two rooms from a Sikh clerk from the 2nd or 3rd November and paid a month's rent in advance. Durga Das came to see these lodgings and desired him to find a more secluded place. He moved accordingly on the 19th or 20th of November to Rama Cottage. The Sikh clerk, Jagdev Singh has been produced and does not bear out the story in its entirety, in fact contradicts it on the important detail of the duration of the stay. This man says the two men came, took two rooms, paid the money in advance, and so far as he remembers they stayed a month. He was not questioned as to whether he had refunded anything as due to them when they left, but he does say that they paid one month's rent and no more. The evidence in support of the approver's version of this intermediate incident does not rebut the criticism which has been launched against the details of the stay at Rama Cottage, the story being that the approver and his friend went on the 19th of November, and the friend Mul Raj fell sick and left on the 10th of December. On the 19th of December when exactly a month's rent was due, nothing having been paid in advance, Wasanda Ram paid Rs. 8 to Ram Lal landlord and Durga Das was present when the money was paid. This story is attacked by pointing out many contradictions as between the story told by the approver and the story of Ram Lal, which latter story is further contradicted by the internal evidence of a note book produced to support it. This man Ram Lal is perhaps the most unsatisfactory witness in the whole case, which is very unfortunate, as his evidence is of considerable importance. He has not only contradicted himself but contradicted the approver on almost every possible detail, as for instance where the box was stored out of which the money was brought, who his tenants were—and this is the point on which he must have known the truth—whether the house was empty when Wasanda Ram and his friend came, when Jawahar Lal, another tenant, left and what he was paid for rent and for electric light. He gives evidence regarding this stay of the approver and his friends in Rama

Cottage and he also gives evidence of what is described as the camera incident, and the story told about the camera and the visit of Ranbir Singh is as unsatisfactory as that about the tenants and the rent. It is not proved, apart from the approver's story, that Wasanda Ram went to Rama Cottage on the 19th of November as opposed to the 10th December. The evidence led in support of the details of the portion of the approver's story is wholly unreliable and proves nothing whatsoever. It has, therefore, been correctly claimed by Counsel for the appellants that the story of Wasanda Ram's wanderings and the details of his arriving and staying in Rama Cottage are in no way borne out. They may be true or they may not but they are not corroborated. He did stay in Rama Cottage and was there in December. More cannot be said with certainty.

This leaves the incidents connected with the purchase of clothes, the preparation of the invitation card and the camera incident. It is established that the name of "Mr. Mohammad Yusaf," which appears on the card, was written by Wasanda Ram and this does certainly establish the truth of his story on this point and the fact that at this stage of the proceedings, the 23rd morning, the approver was taking a very important part in this conspiracy. It is proved that acting on information received the Police set about checking invitation cards which had been collected after they had been handed in by persons attending the Convocation on the 23rd and discovered this particular card bearing the name "Mr. Mohammad Yusaf", which they had reason to believe had been handed in by Hari Kishen. The fact of the preparation of this card and its being handed over to Hari Kishen was subsequently established by the statement of the approver and the evidence as to his handwriting.

As stated above it is established beyond any doubt that Wasanda Ram did purchase clothes for Hari Kishen He says that he did so on instructions from Durga Das. There is a curious detail about these clothes which has not been brought out. The *salwar*, which Hari Kishen was wearing, had been given him, so the approver says, by himself, it being one of his own. The *dhobi* mark had been cut off. At a search of his room, not the first search, a *salwar* was discovered. It was produced as Ex. P-9 but no evidence was led to show that it was of similar texture, make or cut, to the *salwar* worn by Hari Kishen on the 23rd of December. This was perhaps due to an oversight and is immaterial, as no further evidence was required to establish that Wasanda Ram did take an active part in the last stage of this conspiracy

The evidence as to the camera incident is most unsatisfactory and nothing is proved least of all the identity of Ranbir Singh as a man who came carrying the camera. Four witnesses have all failed to identify him. In addition, there are contradictions on every detail as to whether Ram Lal was present when the photograph was being taken, as to the borrowing of a chair and tea-poy and as to the handing round of a photograph of a group of Ram Lal's family. Ram Lal says himself that he did not see any photographs being taken. As to the story of the production of the family group and its being handed round for inspection, the story of the borrowing of the tea-poy and the chair the witnesses may have forgotten the details but the fact remains that they contradict each other throughout, that the stories told are not consistent and none of them is established.

The corroboration, therefore, of the approver's story as a whole rests on the incident of the purchase of the cloth and the incident of the preparation of the card P. B. These both show that he played his part in the conspiracy, but it is certainly not established that he deserved to be described as an exceptionally truthful and reliable witness, nor is it shown that the usual corroboration, which is required in a case of this nature, can be whittled down or dispensed with. On his own showing the approver was far from frank in the matter of disclosing the real name of Mr. Khanna which he says he knew perfectly well but concealed as long as possible.

We now come to the cases of the individual accused and, as against them, it is settled law that additional corroboration is required connecting them individually with the actual commission of the offence. It is unnecessary to quote any authority on this point. Prudence requires that the connection of each individual with the crime should be proved and corroborated by independent evidence, the real point being that precautions must be taken against the possibility of substitution. A story may be meticulously true in every detail with the all important exception that the name of A has been inserted instead of the name of B. The

correctness of the story is not affected by the all-important change.

Against Durga Das the prosecution relies on two witnesses Ram Lal and Shanti Parkash and these have been produced to show that Durga Das met Wasanda Ram, the approver, at Rama Cottage and further that he met him on another occasion at the same place. Ram Lal states that on the 19th of December, he saw Durga Das in Wasanda Ram's room when Wasanda Ram paid him the rent. We have already explained that it is not established by the independent evidence led for the purpose that a month's rent was due at the time and the note book produced by Ram Lal far from supporting him throws further doubt on the matter. There are several contradictions in the stories told by the approver and Ram Lal as to the details of this incident such as the place from which the money was taken. We can place no reliance on Ram Lal's evidence and we find this incident unproved. Shanti Parkash deposes that he saw Durga Das on a bicycle near a *charpoy* on which the approver was seated on the 21st, outside Rama Cottage This incident is not mentioned by the approver and at best can only prove that on the 21st Durga Das met Wasanda Ram. It is contended with great force that even if both the incidents were established by unassailable evidence, they would prove nothing more than association on two occasions when Durga Das was seen at Rama Cottage in the company of Wasanda Ram, Rama Cottage not being, in any sense of the word, a secret meeting place but the house in which Wasanda Ram had his lodgings. Shanti Parkash himself says that others used to come to visit Wasanda Ram and before the Committing Magistrate he picked out another man Surindra Kumar as being one of them.

There is all the difference in the world between association at a suspicious place which in itself points to the two persons having met for some sinister purpose, and what may be called natural association which in itself raises no suspicions by itself. It is true that Hari Kishen, the murderer, stayed at Rama Cottage when he came to Lahore. It is true that Wasanda Ram approver was his host, provided him with a room and arranged for his meals. This does not establish that any meeting between Wasanda Ram and *X* or *Y* at Rama Cottage even just before the arrival of Hari Kishen was necessarily connected with the visit of Hari Kishen. It is evidence of association and is of considerable value if combined with other evidence of the same nature or of a nature showing an even more intimate connection between the two men. By itself it amounts to very little and inasmuch as we have rejected the rent incident and the evidence of Ram Lal, it is one isolated instance of association. Without the approver's story Durga Das is merely *X* or *Y* as described above. The approver's story cannot be invoked to establish the importance of this incident while in its turn this incident is used to establish the truth of the approver's story. There is no corroboration of the nature required as against Durga Das. It would be unsafe to convict him on the uncorroborated story of the approver who is certainly no better than the ordinary run of such men. We accept Durga Das's appeal and acquit him.

Chaman Lal is a school boy, aged 19, and until March, 1930, had been a student of the National High School at Peshawar. He is the son of *Lala* Ganga Bishen and the grandson of *Rai Sahib Lala* Buta Mal, a prominent landlord of Mardan. He is a cousin of Hari Kishen. Acting on information received, the Police arrested him at Mardan on the 24th December the day following the outrage. On the morning of the 25th he was taken before *Khan Bahadur* Abdul Hamid Khan, who granted a remand and the same night at 9 o'clock he made a confession recorded as P. 2. This he retracted on the opening day of the committal proceedings—the 30th of January. The case against him rests on this retracted confession and certain corroboration which, it is said, establishes the truth of the confession. This evidence is led to show that on the 15th of December he left Nowshera, which is the junction for Mardan, by the 3 P. M. train and came to Lahore, that he returned to Nowshera by the Frontier Mail on the 17th, arriving on the 18th; that on the 19th he again left Nowshera in company with Hari Kishen and arrived at Lahore on the 20th and returned from Lahore on the 22nd, the day before the murder. There are also two important letters.

In the first place, Counsel attacks his confession as having been made in an improper place at an improper time, as having been made without the necessary precautions being observed by the Magistrate, as having been recorded as a narrative instead of answers to questions put by the Magistrate, as having been recorded in

English instead of Urdu, and finally as not being corroborated on any material point.

The facts are that a messenger was sent to the Magistrate, who is a retired District Judge, that he went to the *thana* at once, arriving there at 9 at night on Christmas day, that he took the accused into the *thana* compound and recorded his statement in the open, that he warned the accused and explained to him that the statement would be used against him and that he should only say what he wished to say. He did not tell him that he was a Magistrate and he did not satisfy himself by questioning him whether he was making the confession voluntarily, although he states quite definitely that he was satisfied by observation that the man was making a voluntary statement. Counsel has drawn our attention to the rules and orders on the subject and points out that the confession should have been recorded in the day time in Court and that the omission of the Magistrate to point out to the accused that he was a Magistrate and to question him as to the voluntary nature of the confession are fatal defects. The confession had to be recorded at the beginning of the Christmas Holidays and it was, therefore, obviously impossible, unless a Court could be opened for the purpose, to have it done in a Court. At the same time it would certainly have been more prudent and would have rendered the whole proceedings less open to attack, had some other place than the *thana* compound and some time other than nine o'clock on a winter night been selected. If it be granted that the matter was urgent, that the surroundings and the general atmosphere had to be accepted as unavoidable, exceptional care should have been taken by the Magistrate to observe very strictly the prescribed directions. He did not do so for Counsel is right in saying that his failure to question the accused as to his making the confession voluntarily is a radical and fatal defect, which cannot be cured by s. 533 of the Criminal Procedure Code. This has been laid down time and again and more especially in *Farid* v. *Emperor* (1). The Magistrate says that he satisfied himself and it was from observation that he came to the conclusion that the confession was voluntarily made. This is not enough. Counsel would have us go further and accept the view expressed in *Emperor* v. *Panchkari Dutt* (2) to the effect that the questions put and answers elicited in making the preliminary enquiry must be recorded. This we have already declined to do in 133 Ind. Cas. 55 [*Abdul Ghani* v. *Emperor* (3)] and we adhere to the view there expressed and repeat that provided the Magistrate satisfies himself by putting questions and hearing answers, that the prisoner before him is making a voluntary confession, it is unnecessary for him to record the questions and answers, and it is sufficient if he complies with the letter of the law. If he fails to make a note at the time he can subsequently establish when called as a witness that he did so satisfy himself.

The Magistrate says that he noticed when this man was brought to him earlier in the day for a remand that he was likely to make a confession. It is not clear how the Magistrate came to this conclusion as he did not question him, but if he was right, it would have been natural for the man to be questioned there and then. We need not elaborate the crucial point which is explained at length in *Farid* v. *Emperor* (1). Observation and questioning are not the same thing. The law is absolutely imperative. It is by questions that the Magistrate must reach his conclusion. He did not do so. This is a fatal and incurable defect.

Apart from this defect, the confession has been attacked on the ground that, as opposed to raising suspicion—and very grave suspicion—it proved nothing conclusively, and the corroboration is challenged as not establishing as it purports to do, the correctness of the dates given. Four witnesses have been produced, of whom Jai Dial has been specially relied on and accepted as trustworthy. He gives evidence to the effect that they saw Chaman Lal in Lahore on the 20th morning. There is also evidence as to the departure of Chaman Lal and Hari Kishen from Hari Kishen's village and from Nowshera junction.

Great reliance has been placed upon P. 27, a letter admittedly written by Chaman Lal to his father and found in his father's house. Counsel contends that this may be a suspicious document, which it certainly is, but says that it corroborates no portion of the confession and that it is

(1) 65 Ind Cas. 613; 2 Lah. 325; 5 P. W. R. 1922 Cr.; 23 Cr. L. J. 149; 4 U. P. L. R. Lah. 33; A. I. R. 1922 Lah. 237.

(2) 86 Ind. Cas. 414; 52 C. 67; 29 C. W. N. 300; A. I. R. 1925 Cal. 587; 26 Cr. L. J. 782.

(3) 133 Ind. Cas. 55; Ind. Rul. (1931) Lah. 727; 32 Cr. L. J. 985; A. I. R. 1931 Lah. 763; (1931) Cr. Cas. 1067.

not shown by the prosecution when it was written though it is argued that the contents lead to an inference that it must have been written in December, 1930. Further there is a letter written by Ranbir Singh's father to Chaman Lal's father. This corroboration, if accepted in its entirety, does not prove the guilt of Chaman Lal and merely raises a grave suspicion against him. We are, therefore, of opinion that on account of the redical defect in the method of recording the confession, the guilt of Chaman Lal is not established and we accept his appeal and acquit him.

This brings us to the case of Ranbir Singh. Against him the evidence consists of the retracted confession of Chaman Lal, the statement of the approver and the corroboration afforded by the evidence of Ram Lal, Barkat and Hakim as to the camera incident. It is shown, and it is not denied, that this young man was a friend and relation of Chaman Lal and that they knew each other and their parents corresponded. As we have found the confession of Chaman Lal to be inadmissible, it follows that no use whatever can be made of it against Ranbir Singh. The evidence, therefore, is reduced to the statement of the approver and the corroboration of the witnesses of the camera incident.

This incident, if established, is of great value as proving a meeting between the three men, the approver, Ranbir Singh and Hari Kishen. There are three witnesses of whom two - Hakim and Barkat—have been been rejected by the Sessions Judge as they failed to identify Ranbir Singh in the identification parade and in the Committing Magistrate's Court and we agree with the view taken by the Sessions Judge. There remains Ram Lal. We have explained above that he is a most unsatisfactory and unreliable witness, that he contradicts himself on almost every detail to which he testifies and that he and the approver further contradict each other He further successfully identified Ranbir Singh at the identification parade but failed to identify before the Committing Magistrate and he did identify him before the Sessions Judge. At the identification parade it is shown that Ranbir Singh was the only person wearing glasses. Before the Committing Magistrate he had removed his galsses and Ram Lal failed to pick him out and he did pick out one Amba Parshad as being Ranbir Singh. The identification before the Sessions Judge is of no value as he admits that he had seen him outside before entering the Court. The evidence, therefore of Ram Lal against Ranbir Singh is of no practical value except in so far as it corroborates the approver vaguely as to the general story that a man came and took a photograph of Hari Kishen. It is not shown who that man was. This fact in itself unsupported by further evidence from any reliable witness is not of any practical value. The approver's story remains uncorroborated in any detail which connects Ranbir Singh with the commission of the offence and he must, therefore, be acquitted.

We accept the appeals of all these men, Durga Das, Chaman Lal and Ranbir Singh and acquit them.

A. *Appeal accepted.*

LAHORE HIGH COURT.

Criminal Appeal No. 473 of 1931.

December 9, 1931.

Harrison, J.

SURJAN SINGH—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 30—Retracted confession of co-accused—Admissibility and weight—Necessity of corroboration—Penal Code (Act XLV of 1860), ss. 401, 457, separate sentences under—Legality of—Criminal trial—Gang cases—Duty of Police.

The retracted confession of an accused person is admissible against a co-accused but is practically of no value unless there be independent corroboration. The corroboration must connect the accused with the commission of the offence and the tainted evidence of an approver is not sufficient corroboration. *Karam Singh* v. *Emperor* (5), *Yasin* v *Emperor* (7), and other cases followed. *Partab Singh* v. *Emperor* (1), explained. [p. 29, col.2.]

Though technically the offence of being member of a gang associated for the purpose of committing burglaries is different from that of actually taking part in them, yet where the main evidence to establish membership consists of the fact that the accused took part or received some of the proceeds of the burglaries it is not equitable to give separate sentences under ss. 401 and 457, Penal Code. [p. 30, col. 2.]

Dictum :—There seems to be a fatal attraction about conspiracy and gang cases but it is difficult to prove them and speaking generally the Police would usually be well advised to proceed with the substantive cases and to leave the gang case alone. [p. 31, col. 1.]

Criminal Appeal from an order of the Sessions Judge, Jullundur, dated the 18th February, 1931.

Mr. *Sundar Das*, for the Government-Advocate, for the Crown.

Judgment.—Four men, Jamala, Feroz, Surjan Singh and Mehr Khan have been convicted under s. 401, Indian Penal Code, of being members of a gang associated for the purpose of habitually committing thefts and have been sentenced to various terms of imprisonment, Jamala to four years, Feroz his brother to two years, Surjan Singh to five years and Mehr Khan to four years. They have, in addition, been tried separately for having taken part in the commission of various crimes as members of the gang, such crimes constituting the activities for which the gang was formed. Jamala has been convicted of committing two offences under s. 411, Indian Penal Code, and one under s. 457; Feroz of committing two offences under s. 457 and Mehr Khan of committing one offence under s. 411.

All have appealed and the first point to be decided is whether it is established that there was such a gang in existence associated for the purpose of habitually committing offences, or, to be more precise, burglaries and operating in the area known as the *Doaba* of Jullundur. Six men were sent up for trial altogether of whom two have been acquitted. The gang is said to have consisted of these four and the approver Nabi Bakhsh. Two men Surjan Singh and Nabi Bakhsh approver are residents of the neighbouring District of Amritsar, the other three Jamala, his brother Feroz and Mehr Khan are residents of Jullundur. Between November, 1929, and April, 1930, sixteen burglaries are said to have been committed or attempted in this area near the village of Nawanpind where the three Jullundur men lived. Out of these, nine were reported and seven were merely attempts where no serious damage was done. Regarding three, all committed in the village of Alawalpur at the end of December, in March, 1930, and on 4th April, 1930, property stolen was actually recovered and it has been found as regards the four appellants, that Jamala was in possession of property stolen on three occasions, Feroz his brother of property stolen on two, Surjan Singh of property stolen on two and Mehr Khan of property stolen on one.

I have been taken through the record and have heard Mr. Mohsin Shah on the point of whether the evidence establishes the requirements of the section and proves that there was a gang associated for this purpose. At first the Police were unable to discover any clue but eventually Surjan Singh, who was arrested in the Amritsar District in connection with another case, gave them the clue which led them to unravel the whole case. The approver confessed first on the 14th September and was followed by Jamala on the 13th October, Mehr Khan on the 18th and Surjan Singh on the 27th. It appears, however, that the approver had made a statement earlier though it was not recorded as a full confession, which led to many other discoveries and the arrest of his companions.

Out of the sixteen burglaries said by the approver to have been committed by the gang, nine were reported to the Police. In the first two, Jamala was the only companion of the approver, and a question arises of whether it can be said that the gang reached its true existence at this stage. From then onwards sometimes three, sometimes four including the approver, are shown to have taken part in the burglaries; and that these burglaries were actually committed is supported by the evidence of the owners of the houses, whether they actually made a report or not. The activities fall roughly in two halves between the middle of December, 1929, and the end of December, after which there appears to have been a lull, and then again from the middle of February to the beginning of April. The accused appear to have been inspired by the hope of obtaining a pardon and their confessions are certainly admissible, and valuable evidence, although retracted against themselves, whatever their value may be considered to be as against the other accused.

Taking the first group which includes the greater number of the burglaries reported, Jamala, Mehr Khan and Surjan Singh all corroborate the approver's statement as against themselves and describe the burglaries. Taking the second group, namely, the burglary at Jalla Singh and three attempts at Mangal Manaur, that at Jalla Singh is not mentioned by any of the accused and there is no corroboration of the approver's story. Surjan Singh and Mehr Khan have mentioned two attempts at Mangal Manaur and Jamala one only. There is further corroboration of the three main burglaries at Alawalpur reported on the 26th December, 1929, 29th March, 1930, and 4th April, 1930, which is supplied by the recoveries of part of the stolen property from the houses of these three men, Jamala, Mehr Khan and Surjan Singh. Taking all this evidence together I think it

is established that a gang was in existence of which the more prominent members were Jamala and the approver Nabi Bakhsh, that it operated in this area of the Jullundur *Doaba* and that its members were associated for the purpose of committing burglaries and in pursuit of their common object they did commit some nine burglaries and attempted to commit seven more between November, 1929, and the beginning of April.

The next question is whether it is proved conclusively that the four appellants were the members of this gang. So far as Jamala, Mehr Khan and Surjan Singh are concerned, it is, I think, conclusively proved by the evidence of the approver, corroborated as it is throughout by various incidents and various details and the independent evidence of the owners of the houses in which the burglaries were committed or attempted, by the retracted confession of Jamala and the recovery of stolen property, that Jamala took a most prominent part in the activities of this gang. He was not actually present in person in the dacoity at the house of Mathra Das on the 29th March, 1930, but he was found in possession of part of stolen property. His confession corroborates the story told by the approver, property was recovered from his house which had been stolen in each of the three Alawalpur burglaries and he has, I think, been rightly convicted under s. 401. The same applies to Surjan Singh. His own confession corroborates that of the approver, property was recovered from his house which had been stolen in two of the Alawalpur burglaries and has rightly been convicted under s. 401. The same again applies to Mehr Khan. He is shown by the approvers' statement and his own confession to have received part of the stolen property in the first burglary at Alawalpur. He is not shown as having been concerned in any way in the two latter burglaries there; and if it were not for his own retracted confession, it might, I think, be said that while there is sufficient corroboration to establish his guilt under s. 411 as regards one burglary, there is not sufficient evidence to establish his membership of the gang. His own confession, however, though retracted, is of considerable value as against him and I think that taken with the approver's statement which it bears out throughout, it shows that he took part in many attempts and many burglaries during these four months. I think, therefore, that he also has been rightly convicted of being a member of the gang.

The case of Feroz remains. He is the brother of Jamala. He is shown in the judgment of the learned Sessions Judge as having confessed himself. This, however, is not correct All that he did was to admit that he was approached with a view to his joining in some burglaries. He lives with his brother Jamala and there is no doubt that stolen property was recovered from the house in which he lived. The approver says that a double share was given to Jamala for himself and Feroz but this is not corroborated in any way, though Counsel for the Crown contends that the fact of his living jointly with his brother is corroboration He had an *ekka* which he plied. The Sessions Judge has used the confession of the co accused, Jamala and Mehr Khan as against this man Feroz. These confessions have been retracted. There is no doubt that the confession of a co-accused is admissible but it is only in peculiar circumstances that it has any value whatsoever. I have been referred by Counsel for the Crown to *Partab Singh* v. *Emperor* (1). All that this ruling lays down is that the evidence is admissible. In that case the appeal was accepted. Counsel further relies upon *Emperor* v. *Kehri* (2), *Ataya* v. *Emperor* (3). *Jawan* v. *Emperor* (4) and *Karam Singh* v. *Emperor* (5). These rulings lay down the same rule that the evidence of a retracted confession is admissible against a co-accused and also go further and say that it is practically of no value unless there be independent corroboration, the last ruling *Karam Singh* v. *Emperor* (5) explaining that the corroboration must connect the particular accused with the commission of the offence. In other words, it appears to me that the case must be to all intents and purposes complete without the retracted confession of the co-accused before it can be used and that confession may almost be described as superfluous or useless. The same rule has been laid down in *Devendra Bhattacharya* v. *Emperor* (6), *Yasin* v. *Emperor* (7) and

(1) 93 Ind. Cas. 978; 6 Lah. 415; 2 Lah.Cas. 72; 7 Lah. L. J. 482; A.I. R. 1925 Lah. 605; 27 Cr. L. J. 514.

(2) 29 A. 434; 4 A. L. J. 310; A. W. N. (1907) 140; 5 Cr. L. J. 360.

(3) 10 Ind. Cas. 857; 5 P.R. 1911 Cr; 91 P. L. R. 1911; 27 P. W. R. 1911 Cr; 12 Cr. L. J. 276.

(4) 25 Ind. Cas. 634: 30 P. R. 1914 Cr; 264 P. L. R. 1914; 50 P. W. R. 1914 Cr; 15 Cr. L. J. 626.

(5) 34 Ind. Cas. 642; 26 P. R. 1916 Cr; 32 P. W. R. 1916 Cr; 17 Cr. L. J. 226; 153 P. L. R. 1916.

(6) 101 Ind. Cas. 881; 28 Cr. L. J. 497; A. I. R. 1927 Pat. 257; 8 P. L. T. 556.

(7) 28 C. 689; 5 C. W. N. 670.

Moyez Sardar v. *Emperor* (8). The earliest of these rulings *Yasin* v. *Emperor* (7) puts the matter very clearly. It is obvious that a retracted confession should carry practically no weight as against persons other than the maker. It is not made on oath; it is not tested by cross-examination and it is denied by the maker himself, who thus lied on either one or other of the occasions. The very fullest corroboration would be necessary in such a case for more than would be demanded for the sworn testimony of an accomplice on oath. That corroboration, as explained in *Karam Singh* v. *Emperor* (5), must connect the accused with the commission of the offence. In this case as against Feroz all we have is the statement of the approver, the confession of two co-accused and the recovery of property from his brother's house, which can only be held to be tantamount to recovery from his own if the retracted confession of Jamala his brother be accepted as full and sufficient corroboration of the approver's story. Applying the test laid down, the retracted confession of Jamala is for this purpose almost valueless and in its turn it is not corroborated except by the tainted evidence of the approver. I find, therefore, that no case has been established against Feroz and that it is not proved that he was a member of the gang. So far as the retracted confessions as a whole are concerned in this case they are corroborated and are of value as against all the accused other than those making them, excepting always Feroz, but they are quite unecessary and superfluous inasmuch as the approver's statement is fully corroborated by independent evidence and the confessions of each accused in turn when used against himself. As against Feroz they are valueless.

The sentences passed are four years in the case of Jamala, five years in the case of Surjan Singh and four years in the case of Mehr Khan. I uphold the sentence in the case of Jamala. He is shown to have taken a prominent part in the activities of this gang. I also uphold the sentence in the case of Surjan Singh who has two previous convictions under Chap. XVII. I reduce the sentence of Mehr Khan to three years' rigorous imprisonment for he is not as deeply implicated as Jamala. I accept the appeal of Feroz and acquit him.

In addition to the convictions under s. 401 each of the four appellants has been separately tried for separate offences said to have been established by the evidence. Jamala has been convicted and separately sentenced once under s. 457 and twice under s 411 for having taken part in the 3rd burglary at Alawalpur and having received part of the stolen property from the 1st and 2nd Similarly, Surjan Singh has received two separate sentences of two years under s 457 for taking part in the 2nd and 3rd burglary at Alawalpur and Mehr Khan has been convicted separately and sentenced for receiving stolen property of the 2nd burglary at Alawalpur.

Technically the offence of being member of a gang associated for the purpose of committing burglaries is different from that of actually taking part in them, but looked at from a practical point of veiw, however much the gang might wish to commit burglaries and however close the association might be and well organised the arrangements, unless the activities materialise into actual burglaries or attempts at burglaries no one will be any the wiser or take any action, and where the main and all-important corroboration against the accused and the main evidence to establish their membership of the gang consists of the evidence that they took part or received some of the proceeds of these three burglaries, I think, to give them separate sentences comes perilously near to infringing the principle of "*nemo de bet bis vexari*". While, therefore, I think the sentences are strictly legal I do not think they are equitable, running consecutively as they do, and I think the soundest thing will be to make them concurrent. I do so.

Feroz has been convicted twice under s. 457 apart from the conviction in the gang case on the strength of property recovered from the house, which he shared with his brother. I need not repeat what I have said in the gang case but for the reasons there given I accept the appeal of Feroz and acquit him of both charges under s. 457.

I should like to take this opportunity of pointing out that the net result of this long case is that the three men whose convictions are upheld got very much the same sentences as they would have got for the substantive offences and all the time and trouble, not to mention the vast sums expended, have been wasted. In the Sessions Court the gang case took over a month to try and very nearly the same

(8) 84 Ind. Cas. 712; A. I. R. 1925 Cal. 406; 40 C. L. J. 551; 26 Cr. L. J. 360.

length of time to commit. The appeal took three days in this Court. There seems to be a fatal attraction about conspiracy and gang cases, and it is perhaps not always realized how difficult it is to prove them. Speaking generally the Police would usually be well advised to proceed with the substantive cases and to leave the gang case alone.

Appeal partly accepted.

LAHORE HIGH COURT.

First Civil Appeal No. 2423 of 1928.

January 18, 1931.

BROADWAY AND JOHNSTONE, JJ.

SHROMANI GURDWARA PRABANDHAK COMMITTEE AND OTHERS DEFENDANTS—APPELLANTS

versus

Musammat NAND KAUR AND OTHERS—PETITIONERS—RESPONDENTS.

Punjab Sikh Gurdwaras Act (VIII of 1925), ss. 2 (9), 7—Udasis, *whether Sikhs—Sikh Gurdwara—Proof of dedication by Sikhs, necessity of—Civil Procedure Code (Act V of 1908), s. 11—Prior decision in scheme suit, whether operates as* res judicata

Where the Division Bench decided the nature of an institution in a suit under s. 92, Civil Procedure Code, and in a subsequent proceeding under the Sikh Gurdwaras Act the Tribunal had to decide the question as to whether the institution was a Sikh Gurdwara according to the statutory definition to be found in the Sikh Gurdwaras Act, 1925, with which definition the Court was not concerned in the previous suit:

Held, that the previous decision did not operate as *res judicata*. [p. 31, col. 2.]

Where it is not proved that an institution was established by Sikhs for the purpose of public worship it cannot be declared a Sikh Gurdwara in a petition under s. 7, Sikh Gurdwaras Act. [p. 32, col. 1.]

Udasis are not Sikhs within the meaning of that term as defined in the Sikh Gurdwaras Act. *Ram Prasad* v. *Shiromani Gurdwara Prabandhak Committee* (1), followed. [p. 32, col. 2.]

First Appeal against a decree of the Sikh Gurdwaras Tribunal, Lahore, dated the 18th June, 1928.

Messrs. *Sheo Narain* and *Bhagat Singh*, for the Appellants.

Mr. *Har Gopal*, for the Respondents.

Broadway, J.—By a Notification No. 634, dated 1st April, 1926, the Punjab Government published a petition duly made under s. 7, Sikh Gurdwaras Act, 1925, relating to a Gurdwara described as *Dharamsala* Diwan Hukman Singh *alias* Sadhu Ram Wali and asking that it should be declared a Sikh Gurdwara. As a result of this, certain interested persons lodged a petition duly made under s. 8 of the said Act praying that the said *Dharamsala* should be declared not to be a Sikh Gurdwara. This petition was sent to the Gurdwara Tribunal and, after a careful enquiry, it was held by a majority of the members of the said Tribunal that the petition under s. 8 should be granted and a declaration was accordingly given as required by that section. Against this decision the Shromani Gurdwara Parbandhak Committee and the Committee of the Gurdwara Sadhu Ram Wali Dharamsala at Lahore have preferred this appeal.

It appears that the nature of this institution had been decided by a Division Bench of this Court on a suit instituted by certain "*Singhs*" under s. 92, Civil Procedure Code. That decision had been in favour of the respondents before us and a copy of this Court's judgment was attached to the petition under s. 8. It was urged that this decision operated as *res judicata* in the present case. This question was decided unanimously on the 16th November, 1927, by the Tribunal when it was held that that decision did not operate as *res judicata*. The reasons given are to be found at page 8 of the printed book and, whatever may be said as to the first two reasons, in my judgment the third reason is sufficient to render the view taken by the Tribunal justified. There can be no doubt that what the Division Bench had to decide in the former suit is different from what has to be decided in the present proceedings. The question as to what is a Sikh Gurdwara has to be decided by the Tribunal and by ourselves according to the statutory definition to be found in the Sikh Gurdwaras Act, 1925, with which definition this Court was not concerned in the previous suit. I would, therefore, hold that the doctrine of *res judicata* does not apply in the present case.

That this institution is an old one is admitted by both sides. It may also be conceded that in the early days of its existence it was known as Hukman Singh's Dharamsala. It is clear however that in recent years it is really known by the name of Sadhu Ram Wali. It is also clear from the evidence that from its very inception the *Mahants* have been *Udasis* and that succession to the *Mahantship* has been from *Guru* to *Chela*, the appointment being confirmed by the *Udasi Bhek* and the installation ceremonies being performed under its auspices.

For the appellants it was contended that Diwan Hukman Singh was a Sikh known as a *Phatband* and that he had been a

farmer of taxes under Maharajah Ranjit Singh. His family is now represented by his great-grandsons Brij Lal Singh and Nau Nihal Singh. It is clear from the record that this family has never had any concern with the management of this institution or the property attached to it. The *jagir* which the institution holds, was granted by the then ruling power to Santokh Das and has been confirmed to his successors. Charanjit Singh, the father of Nau Nihal Singh, through his mother *Musammat* Malan, brought a suit for partition against Brij Lal Singh, and in the plaint reference was made to a *Dharamsala* in Lahore which was said to be *wakf* and, therefore, not liable to partition. In the plaint it was set out that this *Dharamsala* had been declared *wakf* by Bhagat Singh, father of Charanjit Singh and Brij Lal Singh. Some years later, Charanjit Singh is said to have issued a notice to Jairam Das, then *Mahant*, threatening certain action if the said Jai Ram Das did not furnish accounts and take proper order with the property. The original of this notice is not forthcoming and what purports to be a copy of it has been placed on the record. This is not dated and appears to be in the handwriting of one person Its genuineness has been attacked and it is difficult to say whether such a notice was ever sent. It is clear, however, that Charanjit Singh never followed it up and its value is exceedingly small. It shows, however, that it was addressed to Jairam Das as the *Mahant* and the institution is not referred to by the name of Diwan Hukman Singh, but merely is described as a *Dharamsala* situated in the Sheranwala Gate.

Mr. Sheo Narain for the appellant has contended that the mention of this *Dharamsala* in the partition suit already referred to, and this notice coupled with the statements of Nau Nihal Singh, Brij Lal Singh and *Musammat* Malan, as to what they had been told by their ancestors is sufficient to prove that this institution had been established by Diwan Hukman Singh, a Sikh living in the time of the Sikhs, and that, therefore, it is only reasonable to suppose that the institution was one which falls which the definition in s. 16 (2), *(iii)*, Sikh Gurdwaras Act, and that it should be held that it had been used for public worship and was used for such worship by Sikhs. On the other hand, it has been urged with considerable force that, while it is now sought to show that Diwan Hukman Singh had established this institution such tradition as exists in the family is to the effect that it had been made *wakf* by Hukman Singh's grandson Bhagat Singh, who was to all intents and purposes a Hindu, as admittedly he wore the sacred thread, as did his son Brij Lal Singh. It was further contended that the whole history of this institution clearly showed that from the time of Santokh Das, in whose name the *jagir* was originally granted, to the present time, this institution has been under the control and management of *Udasis* without any interference or assistance on the part of Hukman Singh's family. It was further pointed out that, although the Adhi Granthi was kept on the premises and was paid due reverence to, the main objects of worship were the *Samadhs* of Santokh Das and his successors. Mr. Hargopal, therefore, urged that the view taken by the majority of the members of the Tribunal was correct and that the appeal should be dismissed. As the judgment of the learned President of the Tribunal is a careful and detailed one, I do not think it necessary to discuss all the evidence in detail The evidence, oral and documentary, has been very carefully examined by us, and I agree in holding that the evidence led by the appellants is insufficient to prove that this institution was established by Diwan Hukman Singh. There is evidence on the record to show that some property was acquired by Puran Das and Sadhu Ram for this institution. The management and control has been and is in the hands of the *Udasi Sadhas*. There can be no doubt that the *Samadhs* of the past *Mahants* are the objects of worship and I agree with the majority of the members of the Tribunal in holding that it has not been proved that this institution was established for use by Sikhs for the purpose of public worship.

There remains the question as to whether *Udasis* are Sikhs within the meaning of that term as defined in the Sikh Gurdwaras Act. This question was argued at length before us during the course of the hearing of the Manak appeals : *Ram Prasad* v. *Shiromani Gurdwara Prabandhak Committee* (1), and in this case the same arguments were adopted. We have decided this question against the appellants and it follows, therefore, that this appeal fails and must be dismissed with costs.

Johnstone, J.—I agree.

A. *Appeal dismissed.*

(1) 135 Ind. Cas. 657; A. I. R. 1931 Lah. 161; 12 Lah. 497; 32 P. L. R. 910; Ind. Rul. (1932) Lah. 113.

MADRAS HIGH COURT.

Criminal Reference No. 4 of 1931.

September 18, 1931.

WALLER AND PANDALAI, JJ.

VENKATACHALA GOUNDAN AND OTHERS—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 307—Trial by Jury—Reference by Judge—Power of High Court to interfere, whether unlimited—Interpretation of Statutes—Plain language.

On the assumption that a Sessions Judge will not make a reference under s 307, Criminal Procedure Code, unless he thinks that the verdict is manifestly wrong, the duty of the High Court in dealing with the reference is confined to considering whether the opinion of the Judge is supported by evidence. [p. 33, col. 2; p. 35, col. 2.]

Per Waller, J.—The observations in *Veerappa Goundan* v. *Emperor* (1) should not be construed in such a manner as to limit the discretion of the High Court in disposing of a reference under s. 307. [p. 33, col. 2.]

Per Pandalai, J.—There is nothing in *Veerappa Goundan* v. *Emperor* (1) which does violence to the language of s. 307 nor anything which is either inconvenient or unsuitable to Indian conditions. The discretion of the High Court in disposing of references is by no means unlimited: *Veerappa Goundan* v. *Emperor* (1), commented upon. *Solomon* v. *Bitton* (2), and *Emperor* v. *Ramchandra Roy* (3), referred to. [p. 35, col. 2.]

The proper method of construction of a Statute is to interpret its language as it stands uninfluenced by considerations of what the law may be elsewhere [p. 33, col. 2.]

Criminal Reference made by the Sessions Judge, Trichinopoly, in Case No. 25 of 1931.

Messrs. *V. L. Ethiraj* and *K. Aravamuda Ayyangar*, for the Accused.

The *Public Prosecutor*, for the Crown.

Waller, J.—This is a reference under s. 307, Criminal Procedure Code. Fifteen persons were charged before the Sessions Judge, Trichinopoly with dacoity. The Jury acquitted one of them and convicted the rest. The Judge thought that acceptance of their verdict would involve a grave miscarriage of justice and has recommended that it be set aside. A Full Bench of this Court has in *Veerappa Goundan* v. *Emperor* (1), held that the Jury is primarily the tribunal to find the facts and that it is not for the High Court to interfere with the verdict of a Jury unless it is unreasonable, Mr. Ethiraj has pressed us most urgently not to put too narrow a construction on this ruling It is not, of course, for us to criticize it, but I think it advisable to correct two statements made in the course of the judgment of the learned Chief Justice. The first is that the rule laid down in *Solomon* v. *Bitton* (2)

"is enshrined in an even more definite form in the Indian Statute, so far as appeals are concerned."

It is not. *Solomon* v. *Bitton* (2) was a case of an application for a new trial on the ground that the verdict was against the weight of evidence. In India, there is no appeal on the facts, but only on points of law. The second is that the Calcutta High Court has inclined preponderantly to what may be described as the English view. That is no longer correct. The latest Calcutta case on the point is *Emperor* v. *Ramchandra Roy* (3). Cuming, J., observed that the decisions

"seemed to vary from the extreme view that the High Court should be very reluctant to interfere with a verdict of a Jury to the view that the High Court in dealing with those references is to be guided by the plain words of the Code."

and then went on to say:

"Speaking for myself, I have always thought that I am upon far firmer ground, if I adhere to the strict words of the Code and do not attempt to interpret the Code in the light of the practice in other countries where the law and conditions are different."

That is, of course, the proper method of construction, as their Lordships of the Judicial Committee have pointed out more than once, to interpret the language of the Statute as it stands, uninfluenced by considerations of what the law may be elsewhere.

Now, what is the rule that has been propounded in *Veerappa Goundan* v. *Emperor* (1). It is this. On the assumption (which is, I may remark, entirely justified) that Sessions Judges will not make references unless they think that the verdicts are manifestly wrong, the duty of the High Court, in dealing with such a reference, is confined to considering whether the opinion of the Judge is supported by the evidence. To the rule so stated no exception can be taken, but I venture to express a hope that some of the observations in the judgment will not be construed in such a manner as to limit the discretion of the High Court in disposing of these references. All Judges of *mufassil* experience realize how important it is that the High Court should not allow itself to be influenced by a sort of conventional respect for the verdict of a Jury. The weaknesses and peculiarities of Jurors and assessors are notorious. They will acquit or find extenuating circumstances in the clearest cases of murder; in cases of

(1) 114 Ind. Cas. 353; A. I. R. 1928 Mad. 1186; 51 M. 956; 28 L. W. 575; 55 M. L. J. 591; (1929) M. W. N. 185; 30 Cr. L. J. 317 (F. B.)

(2) (1881) 8 Q. B. D. 176.

(3) 111 Ind. Cas. 327; A. I. R. 1928 Cal. 732; 55 C. 879; 29 Cr. L. J. 823; 10 A. I. Cr. R. 456.

dacoity, they are far too ready to convict. It is scarcely too much to say that a Maraver charged with dacoity before a Tinnevelly Jury has a very slender chance of being acquitted. Another reference has just been argued before us from that district, in which a large number of Maravers have been convicted of dacoity despite the strenuous efforts of the Judge to secure their acquittal. I have had myself to reject appeal after appeal on the ground that no questions of law were involved, although I felt that the verdicts were clearly wrong and that the Judges ought to have made references under s. 307.

In this instance, the Sessions Judge is of opinion that the verdict is plainly unjust and I think that, on the evidence, he is right. The Public Prosecutor concedes that there are some curious features about the case and that the best that can be said of it is that it is on the borderline. Briefly the facts alleged are these. The first two accused owed P. W. No. 18 a considerable sum of money. He sued them and got a decree on a compromise by which the balance of that sum was to be paid in two equal annual instalments; the first of which became payable on 4th August 1930. An offer was made by the debtors to give two pairs of bullocks and a cart in part payment and to deposit the balance in cash. Prosecution Witness No. 10, P. W. No. 18's son, accordingly went to the village on 9th August accompanied by P. Ws. Nos 11 to 15. The bullocks were inspected by P. Ws. Nos. 11 and 12, who said that they were not worth as much as the debtors thought. They were at once assaulted and the other witnesses tried to escape. They were overtaken however and brought back. Pen, ink and paper were produced and accused No. 1 ordered P. W. No. 10 to write out a receipt. Prosecution Witness No. 10 refused, whereupon accused No. 1 drew a sword and threatened to cut him. Prosecution Witness No. 10 then wrote a receipt for the whole sum due minus a certain rebate and accused No. 1 took it. An alarm was raised and the accused made off. The receipt in question is Ex. E and it is dated 24th July.

It is in a perfectly clear and steady hand and certainly was not written under the circumstances alleged by P. W. No. 10. His story is, in this respect, quite preposterous. His hand was, he says, so shaky as the result of the treatment he had received that he was, at first, unable to write properly. When, however accused No. 1 threatened to cut him, his hand recovered its steadiness and he was able to write. If his nerve was so shaken by a slight assault, a threat to murder him would scarcely have restored it. This goes to the root of the case. If it is obvious that the receipt could not have been written under the circumstances alleged, the whole story goes. It is certain that something happened and possible that no money passed and that the receipt was got hold of by unfair means. As the Sessions Judge observes, there is no smoke without a fire and it was probably on that ground that the Jury convicted. The manner in which the accused, most of whom were unknown to the witnesses, were identified was farcical. The identification was made in the presence of a Police Officer alone after nightfall by the aid of a hurricane lantern. The names of the accused had been supplied by P. W. No. 16 and it is impossible to attach any value to an identification so conducted. The presence of P. W. No. 16 is one of the most suspicious features in the case. Among the accused are several Pallars.

The prosecution case appears to have been that four of them were in accused No. 1's service and the rest were brought in for the purpose of helping. The evidence of P. W. No. 16, who is very obviously on bad terms with all the accused, makes several things perfectly clear. One is that none of the Pallars was in the service of accused No. 1; another that, if any Pallars were present, they would not have been helping the Goundens, but opposing them. Some time ago the wife of P. W. No. 16's first cousion P. W. No. 17 eloped with a Pallan. She was outcasted and the Goundens dismissed all the Pallars who were working for them. That being so, it is most unlikely that any Pallar would have come to help accused No. 1. When P. W. No. 10 made his complaint to the Police, he mentioned P. W. No. 16 as the man who could name all the accused Goundens as well as Pallars. Apparently he had arranged with the witness that he should give evidence against his enemies the Goundens and implicate the Pallars whom he and P. W. No. 17 hated. It seems to me practically certain that the Pallar accused have been falsely implicated. With that finding goes another large part of the story. It is unnecessary to say any more. It is quite likely that something improper has been done in relation to Ex. E, but I do not believe the story

of extortion told by P. W. No. 10 and his witnesses. I would accept the reference, set aside the verdict and acquit the accused.

Pandalai, J.—I think the verdict should be set aside and the accused acquitted on the ground that the story of dacoity told about the preparation and handing over of the receipt Ex. E is so unreasonable that no Jury should have accepted it. An examination of the document shows that it was written in a firm hand in the writer's usual style with nothing to show that it was not prepared at leisure and at ease. No man of prudence will accept the story that it was prepared at midday while the writer was exposed to the sun in a field as a result of violence or threat of violence. But in my opinion the accused had only themselves to thank for the view the Jury took of their conduct. They asked the Jury to accept the view that the receipt was prepared in the complainant's village in Telungapatti on 24th July and obtained by accused No 1 on payment to P. W No. 10 Govindasami Chetty of Rs. 2,500 in cash. This was, if possible, still more absurd than the story of the dacoity. I believe myself that the receipt at Villaiparapatti the village of accused No. 1 on 9th August, P. W. No. 10 having been lured there on promise of payment and that it was obtained from P. W No. 10 by the accused by some trickery and without paying money. Prosecution Witness No. 10 and his companions thus outwitted in a village where they could get no help, went away and sent for P. W. No. 10's father and as a result of consultation lodged a case of dacoity. We are not concerned with the effect of the receipt in the Civil Court where the petition for satisfaction of the decree filed by the accused is pending. But I agree that the accused should be acquitted.

I guard myself against saying anything to cast doubt on the reasoning or result of the decision in *Veerappa Goundan* v. *Emperor* (1) not only because it is binding on this Bench and I have to follow and apply it even if I did not agree with it, but also because I see no reason to doubt its soundness. Two propositions are involved in that decision. The first, which is assumed for the purpose of the decision, is that a reference should be made by a Sessions Judge under s. 307 only in cases where in his view the verdict of the Jury is perverse, unreasonable or altogether against the weight of evidence. The second, which is expressly decided, is that on a reference under s. 307, High Court will not retry the case as if there had been no trial but will confine itself to the question whether the Judge's opinion of the verdict, *i. e.*, that it was perverse or unreasonable or altogether against the weight of evidence is correct. If it was correct the Jury's verdict will be set aside but if it was not, the verdict will stand even if it be one which the Court if it had to decide the case for itself in the first instance will not arrive at. In short, the Jury's verdict will be given by the High Court the same weight (the "due weight" spoken of in s. 307) which the trying Judge should have given to it, and the Judge's opinion will be given by the High Court the weight (the "due weight" spoken of in s 307) which it should have as that of the presiding officer of the Court to whom is entrusted the duty of seeing that justice does not suffer by the forms of law. In other words the High Court will give to each branch of the Court the weight which is due to it when acting within its own function and will see that neither encroaches on the function of the other. The Jury's verdict will be upheld within the possible differences of opinion of reasonable men on the same evidence, but not beyond. The Judge's disagreement with the Jury will be affirmed only when it is based on the Jury having given a verdict which, being perverse, unreasonable or against the weight of the evidence, should not have been given. Understood in this way I can see nothing in *Veerappa Goundan* v. *Emperor* (1) which does violence to the language of s. 307 nor anything which is either inconvenient or unsuitable to Indian conditions.

I understand my learned brother as not disapproving of the limit necessarily set on the powers of the Sessions Judge's reference by the requirement that he ought not to refer a case unless he considers the verdict manifestly wrong nor on the powers of the High Court by the requirement that it is confined to considering whether the opinion of the Judge as to verdict being manifestly wrong, is supported by the evidence. If so, I respectfully think that the discretion of this Court in disposing of these references is by no means unlimited and that is all the Full Bench decision means. I agree to the order proposed.

N. S. & A. *Verdict set aside.*

MADRAS HIGH COURT.

Second Civil Appeal No. 368 of 1928.
April 21, 1931.

VENKATASUBBA RAO, J.

JAGANNATHA MUDALI AND OTHERS —APPELLANTS

versus

P. T. CHINNASWAMI CHETTI (DIED) AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 112—Presumption of legitimacy, nature of—Proof of access, effect of—'Access', meaning of.

Under s. 112, Evidence Act, when a child is born during lawful wedlock there is a presumption to start with in favour of legitimacy; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband. [p. 37, col. 2; p. 38, col. 1.]

(Case-law discussed.)

The word 'access' in s. 112 means sexual intercourse not mere opportunity of access. [p. 37, col. 1.]

Second Appeal against the decree of the Sub-Judge, Vellore, in A. S. No. 36 of 1926

Messrs. *T. M. Krishnaswami Ayyar* and *B. C. Seshachala Ayyar*, for the Appellants.

Messrs. *A. S. Sivakaminathan* and *C. Gopalan*, for the Respondents.

Judgment.—This appeal raises a question regarding the construction of s. 112, Evidence Act.

Defendant No. 8 is the wife of one Kuppathai Mudali and defendants Nos. 3 and 4 are her sons. The plaintiff disputes their legitimacy alleging that defendant No. 8 was living in adultery. The point to be decided is, whether defendants Nos. 3 and 4 are the legitimate sons of Kuppathai. The findings of fact which, this being a second appeal, I must accept, are that Kuppathai married defendant No. 8 about 1876, but discarded her in 1881 owing to some suspicion about her chastity, that he then married a second wife and lived at a place called Govindanpadi, whereas defendant No. 8 left for Kilachur, a village within two miles of that place. There she was residing and the Subordinate Judge thinks that she was having immoral relations with some person. Defendant No. 3 was born in 1891 and defendant No. 4 in 1898. It is not found that Kuppathai did not have opportunities of access to his first wife; on the contrary, the evidence seems to indicate that he had them. In regard to the period to which reference must be had, the evidence no doubt is very vague; but Kuppathai in 1902 purchased for her some property and in 1905 executed a document settling some lands on her and on her children. In this Kuppathai describes the boys as the sons of defendant No. 8. I may remark in passing that the learned Subordinate Judge thinks that these words strongly support the contention that the children are illegitimate. There are other passages on which the Judge relies, to which I need not refer. Later in the same year, and again in 1906, Kuppathai bought for her some more property. The evidence also shows that he allowed the boys to visit him and took some kind of interest in them, though what precisely its nature was it is difficult to say. In 1909 he executed a writing repudiating the children as illegitimate. That was attested by several persons including one Rasappa, a brother of defendant No 8. This man has not been cited as a witness although defendant No. 8 admits that they have been on friendly terms. What led to this repudiation the evidence does not clearly show; but it is suggested that it was some members of his caste that induced Kuppathai to take this step. This was followed in 1915 by a deed which he executed revoking the settlement of 1905 Then there was an open quarrel which led to various proceedings in Courts, where the legitimacy of the boys was asserted by the one side and disputed by the other. I have forgotten to mention that in 1909, about the time when Kuppathai repudiated the boys, he married a third wife. He having died in 1918, his second and third wives sold a part of his estate to the plaintiff, who thereupon has brought the suit. It is in this way that the question of the legitimacy of defendants Nos. 3 and 4 has been raised. The Subordinate Judge, differing from the trial Court, has decided the point against them.

Their Counsel has not succeeded in showing that his findings, so far as they are questions of fact, can be attacked in second appeal. I have referred in this judgment to those facts alone which bear on the question, whether Kuppathai had opportunities of access to his wife or not. That being the important point with which I have to deal, as I shall show presently, I do not propose to refer to the other facts on which the Subordinate Judge relies. The question, as I have said, is what is the effect of s. 112, Evidence Act?

According to that section the fact that a child was born in lawful wedlock is 'conclusive proof" that it is the legitimate

son of its mother's husband. If the section had stopped there, the presumption would be an irrebuttable one, what is termed *presumptiones juris et de jure*. But the section does not end there, for then follows a clause beginning with the word "unless" which reads thus:

"Unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

The effect of the section taken with that clause therefore is that the presumption is not an irrebuttable one, though the words "conclusive proof" (defined in s. 4) are used. The section itself enacts how that presumption can be rebutted. It can yield only to positive proof of want of access—whatever the word "access" may mean. If that access is proved, nothing further remains; the presumption rebuttable in the first instance becomes at once irrebuttable. This is the effect of s. 112 That there are two distinct presumptions, differing in kind from each other, is sometimes lost sight of, and that has led to some confusion. With these remarks, let me now turn to the meaning of the word "access." If that means "opportunity of access" the plaintiff must fail, for Kuppathai, I have said, had such opportunity. If, on the other hand, it means sexual intercourse, I am afraid I cannot disturb the Subordinate Judge's finding in Second Appeal. In my opinion, there can be no possible doubt on the authorities that the word means sexual intercourse. That was declared after great deliberation to be the law in the *Banbury Peerage case* (1), It was there pointedly stated that access in this connexion means sexual intercourse and nothing short of it. Now the learned Judges go so far as to use the word "access" in the sense of sexual intercourse to distinguish it from non-access or non-generating access. The expression "opportunities of access," is also found used by the Judges as something different from actual intercourse. The effect of the *Banbury Peerage case* (1), may be thus summed up. The presumption of legitimacy arises from the birth of a child during wedlock, but that presumption may be rebutted by evidence that such access did not take place between the husband and the wife as by the laws of nature it is necessary, for the man to be in fact the father of the child. It is not the opportunity of access that matters, but sexual intercourse. The presumption in favour of legitimacy is also thus expressed:

"Where a child is born in lawful wedlock sexual intercourse is presumed to have taken place between husband and the wife."

This presumption, in whatever way it may be stated, is, as pointed out, a rebuttable presumption, a presumption that may be rebutted by counter evidence showing non-access.

Then comes the question, Where does the other presumption to which I have referred to, *presumptiones juris et de jure* come in? Now let us turn to the next leading case on the point, *Morris* v. *Davies* (2). The Lord Chancellor (in the House of Lords), after stating that the presumption that in the case of husband and wife, sexual intercourse took place can be rebutted, goes on to observe:

"If sexual intercourse be proved, that is, if the Jury or the Judge trying the question of fact be satisfied that sexual intercourse took place between husband and the wife at the time of the child being conceived, the law will not permit an enquiry whether the husband or some other man was more likely to be the father of the child."

This is the point of distinction. If access or sexual intercourse is proved, the presumption to be drawn becomes an irrebuttable one. The point is brought out very clearly in the following passage from the judgment of Swift, J.

"Any woman may, and some do, have sexual intercourse with more than one man in the course of a few hours, and if a woman has within the period during which conception must have taken place had connexion with more than one man* * * the law presumes that if one of those men is her husband, the child is his * * * * However many men she has had connexion with nothing can bastardize the child unless non-access of or non-intercourse by the husband can be proved; *Warren* v. *Warren* (3), at page 112.*

In the words of Alderson, B [in *Cope* v. *Cope* (4)] the law will not, under such circumstances, allow the balance of the evidence as to who is most likely to have been the father. In short, there is a presumption to start with in favour of legitimacy; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of or intercourse by, the husband is proved, no evidence

(1) (1811) 57 E. R. 62; 1 Sim. & St. 153; 24 R. R. 159.

(2) (1836) 7 E. R. 365; 5 Cl. & F. 163; 1 Jur. 911; 3 Russ. 318; 5 L. J. Ch. 177; 8 L. J. Ch. 120. 47 R. R. 50.

(3) (1925) P. 107; 94 L. J. P. 68; 133 L. T. 352; 69 S. J. 725; 41 T. L. R. 599.

(4) (1833) 5 Car & Pay. 604; 1 M & Rob. 269; 42 R. R. 787.

*Page of (1925) P.—[*Ed.*]

will be allowed to show that the child is not the child of the husband. The circumstance that the wife had intercourse with several at that time makes no difference. It is confounding these two presumptions, when the law is being stated, that leads to difficulty; but as regards what the law on the point is, there can be, as I have, said, no doubt.

Then the further question arises: What is the kind of evidence that is required to rebut the presumption of legitimacy, in other words, the presumption that the husband had intercourse with the wife, which should have made him the father of the child? That presumption is a very strong one, but the strength of it would vary with the circumstances of each case. The *Aylesford Peerage case* (5) furnishes a striking instance, where it was held that the presumption of legitimacy was rebutted. The facts are, the lady eloped in 1876 and a deed of separation was executed in 1877. From the time of the elopement till the birth of the child in 1881, the mother lived in a state of adultery with Lord Blanford. The husband and the wife, no doubt, were at the same time, during the critical period when the child might have been conceived, at different houses in London. In those circumstances the question was raised, whether the presumption was rebutted. It was answered in the affirmative. Lord Blackburn goes so far as to say that although the marriage tie remained undissolved, the facts stated having been found, no presumption can arise, that the husband had cohabited with his wife. But it seems to me, having regard to s. 112, Evidence Act, it is unnecessary to go so far. The presumption must be drawn under that section, though, on the facts proved, it may become attenuated. In *Hitherington* v. *Hitherington* (6), where an order was made under s. 4, Matrimonial Causes Act, 1878, authorizing a wife to refuse to cohabit with her husband, it was held that from the time of such an order:

"all the presumption which exists in the case of married persons as to access and the legitimacy of children is reversed."

Again, I may point out that it is not necessary for us to go so far. The case shows, that while normally the presumption is strong, in certain cases it is not quite so strong. The lastmentioned case is approved in *Andrews* v. *Andrews* (7). In the case to which I have referred, *Morris* v. *Davies* (2), the husband and wife agreed to separate and afterwards lived apart, but within such distance as afforded them opportunities of sexual intercourse. On the facts, it was held that the presumption of law in favour of the legitimacy of a child begotten and born of the wife during the separation, was rebutted. It is unnecessary to multiply cases. The short question is: Has the learned Judge correctly applied these principles? He is wrong in stating that there was judicial separation between Kuppathai and his wife. Such a conception is foreign to the Hindu Law. The statement, that in the case of children born after such separation, there is no presumption that they are legitimate, is, as I have said, also open to exception. But have these errors vitiated his judgment? In the weight of the evidence, he has not been influenced by his somewhat inaccurate statement of the rule of presumption. Indeed, the case was a difficult one to try, but all the facts were considered by the Judge. It may be, on the evidence, another Judge may come to a different conclusion, but that is no reason why I should disturb the finding in second appeal.

The appeal as well as the cross appeal are dismissed with costs.

N. S. & A. *Appeal dismissed*

(5) (1886) 11 A. C. 1.
(6) (1887) 12 P. 112.
(7) (1924) P. 255; 93 L.J. P. 137; 40 T. L. R. 873.

MADRAS HIGH COURT.

Second Civil Appeal No. 1388 of 1927.
October 21, 1930.

MADHAVAN NAIR, J.

SARRAJU VENKATARAGHAVAIAH —DEFENDANT—APPELLANT

versus

SARRAJU CHENCHU SUBBAIAH— PLAINTIFF—RESPONDENT.

Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21, scope of—Madras Proprietary Estates Village Service Act (II of 1894), ss. 10, 11, scope of—Karnam—Appointment by proprietor—Revenue Officer cancelling such appointment and making new one—Suit for declaration that order of Revenue Officer is ultra vires, competency of—Civil Courts, jurisdiction of.

Section 21 of the Madras Hereditary Village Offices Act takes away the jurisdiction of the Civil Court only in cases in which the jurisdiction is conferred on the Revenue Courts by s. 13 of the Act. Where the case of the plaintiff is that he has been validly appointed as *karnam* by the proprietor, that he is holding the office and discharging its duties and that the appointment of the defendant by the Revenue Divisional Officer in cancellation of his own

appointment is null and void, the suit is cognisable by the Civil Court. *Krishnaswami Naidu* v. *Akkulammal* (1), *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (2) and *Kodandaramayya* v. *Ramalingayya* (3), referred to.

Whether the plaintiff is the next heir in order of succession or not, if he is in possession of the office and is discharging its duties, there is sufficient legal character within the meaning of s. 42, Specific Relief Act, to sustain an action for declaration that he was validly appointed *Karnam* and that cancellation of his appointment by the Revenue Officer concerned is null and void. *Kodandaramayya* v. *Ramalingayya* (3), referred to. [p. 40, col. 1.]

Section 11 (2) Madras Proprietary Estates Village Service Act confers powers on the Divisional Officer to appoint another individual to the office in cases where a proprietor who has the right to appoint omits to do so within the statutory poriod or if the person again appointed by the proprietor is also disqualified under s. 10 (1). Where action is taken by the Revenue Officer under s. 11 (1) the right of appointment is conferred on the Revenue Divisional Officer only in respect of cases where the nominee of the proprietor is disqualified under s. 10 (1) but does not extend to cases where the nominee is not in fact the nearer heir to the last holder of the office, that is, the cases where the prorprietor's appointment contravenes the provisions of s. 10 (2). Where the plaintiff does not suffer from any of the heads of disqualifications referred to in s. 10 (1) the Divisional Revenue Officer has no jurisdiction to set aside the order of the proprietor. *Krishnaswami Naidu* v. *Akkulammal* (1), referred to. [p. 41, col. 2.]

Where the Divisional Officer makes an appointment after taking action under s. 11 sub-s. (1), the sub-section should be understood as confining the right of appeal to cases where the appointment is disallowed by the Revenue Divisional Officer on the ground that the proprietor has contravened the provisions of s. 10 (1). This sub-section does not bar a suit by an aggrieved party from the order of the Divisional Officer's order. [p. 41, cols. 1 & 2.]

Appeal against the decree of the District Court, Nellore, in A. S. No. 131 of 1926 preferred against the decree of the Court of the District Munsif, Kavali, in O. S. No. 454 of 1925.

Mr. *B. Somayya* for the Appellant.

Mr. *M Patanjali Sastri*, for the Respondent.

Judgment.—The defendant is the appellant. This second appeal arises out of a suit instituted by the plaintiff for a declaration that the order of the Revenue Divisional Officer of Kavali dated 18th May 1925 appointing the defendant as *karnam* of Somavarappadu is *ultra vires* and does not bind him.

On a vacancy arising in the office of *karnam* in the proprietary village of Somavarappadu, the proprietor appointed the plaintiff to the office by his order dated 9th December, 1924 and sent notice of the appointment as required by the Act (Act II of 1894) to the Revenue Divisional Officer, Kavali. On the ground that he is a nearer heir the defendant, a minor by his guardian, applied to the Revenue Divisional Officer praying that he should be appointed as the *karnam*. On 18th May 1925 the Revenue Divisional Officer disallowed the appointment of the plaintiff as *karnam* holding that the defendant was the next heir to the office and directed the registration of his name as heir to the last holder of the office.

The plaintiff's case is that the order of Revenue Divisional Officer is illegal and *ultra vires* and he prays for its cancellation.

The defendant's case is (1) that the Civil Court has no jurisdiction to entertain this suit by reason of the provisions of s. 21 of the Madras Hereditary Village Offices Act, (Act III of 1895), and the Madras Proprietary Estates Village Service Act, (Act II of 1894); (2) that a suit of this nature is barred by s. 42 of the Specific Relief Act; (3) that even according to the pedigree sent by the proprietor to the Revenue Divisional Officer he, the defendant, is the next heir to the office in question and not the plaintiff; and that the Revenue Divisional Officer has on this ground jurisdiction to set aside the proprietor's order appointing the plaintiff who is not the next heir to the office; and (4) that the plaintiff's only right is to prefer an appeal under s. 11 (3) of Act II of 1894 against the order of the Revenue Divisional Officer.

The Madras Act of 1894 admittedly applies to the office of the *karnam* in question and the provisions of the Madras Act III of 1895 also apply to it by reason of s. 3 (1) of that Act. Section 21 of Act III of 1895 provides that "no Civil Court shall have authority to take into consideration or decide any claim to succeed to any of the offices specified in s. 3 .....". The office in question being an office specified in s. 3, the question is whether the Court has no jurisdiction to entertain the suit. Section 13 (1) of the same Act provides that "any person may sue before the Collector for any of the village offices specified in s. 3.....", on the ground that he is entitled, under sub s 2 or 3 of s. 10 of the Madras Proprietary Estates Village Service Act, Act II of 1894, to hold such office subject to certain provisions. Section 10 of the Madras Proprietary Estates Village Service Act, Act II of 1894, lays down certain rules to be observed by the proprietor in making the appointment. It contains three sub-sections; the 1st sub-

section sets out the qualifications to be possessed by the person to be appointed; the 2nd sub-section, the rule of succession to be followed and the 3rd sub section, the rule to be followed in case the next heir is not qualified or in case there is no heir at all. It has been held in a series of decisions in this Court, *Krishnaswami Naidu* v. *Akkulammal* (1), *Muvvula Seetham Naidu* v. *Doddi Rami Naidu* (2) and *Kodandaramayya* v. *Ramalingayya* (3), that s. 21 of Act III of 1895 takes away the jurisdiction of the Civil Court only in cases in which the jurisdiction is conferred on the Revenue Courts by s. 13 of the Act. The correctness of this proposition of law is not challenged by the learned Advocate for the appellant. What he argues is that the plaintiff's present suit, though the plaint is cleverly worded to take it out of the scope of s. 13, is substantilly a suit for the village office specified in s. 3 on the ground that he is entitled to it under sub-s. 2 of s. 10 of the Madras Proprietary Estates Village Service Act and so, the Civil Court has no jurisdiction to determine it. I have read the plaint carefully and I cannot agree with this contention. The plaintiff does not bring his suit for the office on the ground that he is entitled under sub s. 2 or 3 of s. 10 of Act II of 1894 to the office in question. His case is that he has been validly appointed as *karnam* by the proprietor, that he is holding the office and discharging its duties and that the appointment of the defendant by the Revenue Divisional Officer in cancellation of his own apppointment is null and void. He does not ask for a declaration that he is the heir to the office in question or for restoration to his appointment as *karnam*. "His position apparently is", as pointed out by the learned District Munsif "that if the order of the Revenue Divisional Officer is held to be illegal and *ultra vires* and set aside, his appointment as *karnam* by the proprietor will stand good." In my opinion a suit of this nature does not obviously fall within s. 13 of Act III of 1895 and, therefore, it appears to me that s. 21 of that Act is not a bar to the maintainability of the suit.

The second question is whether a suit for a declaration that the order of the Revenue Divisional Officer is *ultra vires* and does not bind the plaintiff, is barred by s. 42 of the Specific Relief Act. It is argued that, as according to the genealogical tree furnished by the proprietor himself the defendant and not the plaintiff is the next heir to the last holder of the office of *karnam*, the plaintiff is not *entitled* to the office under sub-s. 2 of s. 10 and, therefore, the plaintiff has no legal character sufficient to sustain the action and the suit for the declaration, therefore, should have been dismissed by both the lower Courts. The argument was not put in this form in the lower Courts. What was argued there was that a suit of this nature for a declaration, that the order of the Revenue Divisional Officer appointing the defendant *karnam* is *ultra vires*, is not maintainable and the lower Courts rightly overruled the objection pointing out that according to the decision of the Privy Council in *Robert Fischer* v. *Secretary of State for India in Council* (4) the suit is "in substance one to have the true construction of a Statute declared and to have an act done in contravention of a statute righly understood, pronounced void and of no effect". It was not argued in the lower Courts that he has no title to maintain the suit. It is now argued that the decision in *Robert Fischer* v. *Secretary of State for India in Council* (4) is inapplicable as the plaintiff in that case had obviously title to institute the suit which the plaintiff in this case, does not have. Whether the plaintiff is the next heir in the order of succession or not, it is clear that he is now in possession of the office and is discharging its duties. This by itself will give him sufficient title to sustain the action. But apart from it, if the Revenue Divisional Officer had no jurisdiction to pass the order cancelling the plaintiff's appointment, then his present title to the office as nominee of the proprietor, cannot be questioned. The substantial question is, therefore, whether the order of the Revenue Divisional Officer which is called into question is *ultra vires* and not binding on the plaintiff and this is the third point for decision.

When the office of *karnam* falls vacant in a village in a proprietary estate, s. 9 of Act II of 1894 makes it obligatory on the proprietor of the village to appoint a person to the vacant office and send notice of the appointment in writing to the Divisional Officer in charge of the division,

(1) 50 Ind. Cas. 185; 9 L. W. 90; 24 M. L. T. 489; (1919) M. W. N. 29.

(2) 5 Ind. Cas. 137; 33 M. 208; 7 M. L. T. 181; 20 M. L. J. 91.

(3) 60 Ind. Cas. 650; 12 L. W. 663; (1920) M. W. N. 644.

(4) 22 M. 270; 26 I. A. 16; 7 Sar. 459; 3 C. W. N. 161 (P. C.).

Section 10, as I have already pointed out, lays down certain rules to be observed by the proprietor in making appointments. Sub-section 1 of that section enumerates the several disqualifications to the office. It states that "(1) no person shall be eligible for appointment to any village-office who (*a*) is not of the male sex; (*b*) has not attained the age of majority; (*c*) is not physically and not mentally capable of discharging the duties of the office; (*d*) has not qualified according to the educational test prescribed for the office in question by the Board of Revenue by rules made under s. 32; and (*e*) has been convicted by a Criminal Court of any offence which, in the opinion of the Revenue Officer in charge of the division or of the District Collector, disqualifies him for holding the office." Sub-section 2 says "the succession to all hereditary village offices shall devolve on a single heir according to the general custom and rule of primogeniture governing succession to impartible *zemindaris* in Southern India." In the present case it will be remembered that the Divisional Officer set aside the appointment of the plaintiff by the proprietor on the ground that the appointment contravened the rule of succession mentioned in sub-s. 2 of s. 10. This was done under s. 11. Sub section 1 of s. 11 confers powers on the Revenue Divisional Officer to record his objections to the appointment made by the proprietor and call on him to appoint another person. This sub section is as follows :—

"If the Revenue Officer to whom notice of appointment is sent under s. 9 considers the person appointed to be qualified under sub-s. 1 of the preceding section, he may, at any time within three months from the date of the receipt by him of the said notice of appointment, and, in cases falling under cls. (*c*) and (*e*) in sub-s. 1 of s 10, after giving notice to the parties concerned and making enquiry, record his objections and call upon the proprietor to appoint another person, and the proprietor shall thereupon do so and send notice of such new appointment to the said Revenue Officer within six weeks after such requisition....."

(It may be observed in passing that the word 'qualified' appearing in sub s. 1 of s. 11 in the Government publication of the Act is apparently a mistake for the word 'disqualified'). Sub-section 2 states in certain cases the Divisional Officer may himself make the appointment. Stated generally, this sub-section confers powers on the Divisional Officer to appoint another individual to the office in cases where a proprietor who has the right to appoint omits to do so within the statutory period or if the person again appointed by the proprietor is also disqualified under sub-s. 1 of s. 10. Where action is taken by the Revenue Officer under sub s. 1 of s. 11, it appears to me that the right of appointment is conferred on the Revenue Divisional Officer only in respect of cases where the nominee of the proprietor is disqualified under sub-s. 1 of s. 10, but does not extend to cases where the nominee is not in fact the nearer heir to the last holder of the office, that is, the cases where the proprietor's appointment contravenes the provisions of sub s 2 of s. 10. This appears to be clear from the language of the sub-section. It is admitted on all hands that the plaintiff does not suffer from any of the heads of disqualifications referred to in sub-s. 1 of s. 10. In my opinion the Divisional Officer, therefore, had no jurisdiction to set aside the order of the proprietor and his order is not warranted by the powers conferred on him by the Statute. The observations of Sadasiva Ayyar, J., in *Krishnaswami Naidu* v. *Akkulammal* (1) lend support to this view of the jurisdiction of the Divisional Officer to set aside the appointment by a proprietor in a case like the present one.

The last question is whether the plaintiff is precluded from instituting the suit as he is given the right under sub s. 3 of s. 11 of appeal to the District Collector against the Divisional Officer's order. This sub-section runs as follows :

"Whenever an appointment is disallowed under this section, an appeal shall lie to the District Collector within one month, or, if the Officer disallowing the appointment is the District Collector an appeal shall lie to the Board of Revenue within three months."

Where the Divisional Officer makes an appointment after taking action under sub s. 1 of s. 11, I think this sub-section should be understood as confining the right of appeal to cases where the proprietor's appointment is disallowed by the Revenue Divisional Officer on the ground that the proprietor has contravened the provisions of sub-s. 1 of s. 10. If so understood, it is clear that the plaintiff has no right of appeal in the present case. Even if the sub section is to be understood as giving the plaintiff a right of appeal in all cases against the Divisional Officer's order it does not say that the aggrieved party has no right of suit.

For the above reasons this second appeal fails and is dismissed with costs.

N. S. & R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

Civil Revision Petitions Nos. 1588 and 1589 of 1930.

April 8, 1931.

SUNDARAM CHETTY, J.

DASARI VENKATACHARYULU—DEFENDANT—PETITIONER

versus

MANCHALA YESOBU AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151—Inherent powers of Court—Striking off defence on failure to pay batta.

In a suit the plaintiff applied for the appointment of a receiver in respect of some standing crops. The Court however directed one of the defendants to furnish security of Rs. 100 and take away the crops. He furnished a security bond and the Court ordered the testing of the sufficiency of the bond by issuing a warrant to an *amin* to investigate the matter. For this issue of process *batta* had to be paid by the defendant which he did not. Court then ordered him to pay cash into Court and warned him that in case of default his defence would be struck off. The defendant failed to comply with this order with the result that the Court struck off his defence:

Held, that though there was no provision in the Code of Civil Procedure for striking off the defence under the circumstances mentioned above, it was competent to the Court to do so under its inherent powers under s. 151, Civil Procedure Code. [p. 42, col. 2; p. 43, col. 1.]

Petitions under s. 115 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise the orders of the Court of the District Munsif, Gudivada, dated the 23rd January, 1930, and 4th March, 1930, and made in O. M P. No. 3486 of 1929, in O. S. No. 395 of 1929, and in O. S. No. 395 of 1929 respectively.

Mr. *Ch. Raghava Rao*, for the Petitioner.

Judgment—These revision petitions raise a somewhat novel point for determination. The petitioner is the 3rd defendant in the suit. It appears that the plaintiffs applied for the appointment of a Receiver in respect of some standing crops in the suit land In connection with that application the Court passed an order directing the 3rd defendant to furnish security for Rs 100. On his furnishing such security he could appropriate the crops No Receiver was actually appointed. That being so, it was the duty of the 3rd defendant to furnish the required security which alone would entitle him to cut and carry away the crops In pursuance of the order of the Court he put in a security bond into Court. The Court passed an order on 6th December, 1929, to have the sufficiency of the security tested. Usually a warrant will be issued to an *Amin* of the Court to make an investigation as to the adequacy of the security offered. For this purpose *batta* had to be paid for the issue of a process. There is no doubt that the person bound to pay the *batta* was the 3rd defendant, inasmuch as it was his duty to furnish the security to the satisfaction of the Court. Unless the security tendered by him is accepted by the Court it will be of no avail. It was not, therefore the duty of the plaintiffs to have paid the *batta* for the testing of the security tendered by the 3rd defendant. Default in the payment of the *batta* was doubtless on the part of the 3rd defendant. The security tendered by him not having been tested, the Court was not in a position to accept it. In these circumstances the learned District Munsif treated the case as one of non compliance with the order of the Court directing security to be furnished and, therefore, passed an order directing the 3rd defendant to depost into Court a sum of Rs. 100 within 15 days. A warning was also given at the same time that, if such deposit be not made, his defence would be struck off. In spite of this stringent order, the 3rd defendant failed to make the deposit and consequently his defence was struck off by the Court on 4th March, 1930. Against these orders the 3rd defendant has filed the revision petitions.

There is no express provision in the Code of Civil Procedure which would cover a case of this kind. Rule 21 of O. XXI, Civil Procedure Code, enables the Court to strike off the defence if default is made in the manner mentioned in that rule. Rule 16 of O. VI, r. 20 of O. XVI and r. 10 of O. VIII contain some provisions for punishing a party for default in a particular manner. The present case can only be brought under s. 151 of the Code which deals with the inherent power of the Court to pass such orders as may be necessary in the ends of justice, or to prevent the abuse of the process of Court. In this case the 3rd defendant not only made default in the payment of *batta* but failed to obey the further order of the Court directing him to deposit the sum of Rs. 100, he having failed to furnish the required security. Without fulfilling that condition he had no right to cut and carry away the crops. There was justification for the Court to treat the conduct of the 3rd defendant as something amounting to a contempt of Court. Any penalty which the Court thinks fit to impose on the 3rd defendant for such

wilful default or disobedience should be deemed to be a step taken by the Court in the exercise of the inherent powers vested in it by s. 151, Civil Procedure Code. The decisions in *Gauri Shankar* v. *Manki Kunwar* (1) and *East Indian Railway Company* v. *Jit Mal Kallu Mal* (2) are cases which have a bearing on the present case by way of analogy. The striking off of the defence of the 3rd defendant in this case would be within the jurisdiction of the Court in the exercise of its inherent powers under s. 151. There is no case directly applicable to the facts of the present case; but still it seems to me that the order passed by the lower Court in the circumstances of this case is not without justification and, therefore, I see no proper grounds to interfere with it in revision. I may also observe that the striking off of the defence is not the only order which the Court can pass by reason of the 3rd defendant's default or disobedience. All that I can say is that this is one of the orders which the Court would be entitled to make in order to see that the ends of justice are satisfied or that the process of Court is not abused. These Civil Revision Petitions are, therefore, dismissed.

N. S. & R. L. *Petitions dismissed.*

(1) 74 Ind. Cas. 466; 45 A. 624; 21 A. L. J. 571; A. I. R. 1924 All. 17.

(2) 86 Ind. Cas. 862; 47 A. 538; 23 A. L. J. 212; L. R. 6 A. 212 Civ.; A. I. R. 1925 All. 280.

MADRAS HIGH COURT.

Civil Appeal No. 214 of 1929.

January 28, 1 31.

CORBETT AND CORNISH, JJ.

THIRUVENGADAM PILLAI AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

P. GNANASAMBANDAM PILLAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Alienation—Suit by reversioners—Limitation—Widow's duty to keep down interest on debts—Bona fide creditor, rights of—Interest—Reasonableness of rate.

If a suit to challenge a mortgage by a widow is barred by limitation the reversioners cannot be allowed to do indirectly what they could not do directly by showing that the original mortgage to discharge which the later mortgage was executed was itself not binding on the estate. [p. 44, col. 2.]

A widow is not bound to discharge her husband's debts out of the income of his estate ; but she is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property. But an exception is recognised in favour of the alienee. If there was actual pressure at the time of the alienation and the widow had then no funds available for the discharge of the debts or the alienee, after reasonable enquiry, *bona fide* believed that the alienation was necessary, he will be protected. [p. 44, col. 2.]

In order to determine of the reasonableness of a particular rate of interest the whole conditions and the terms of the lending must be considered together. [p. 45, col. 1.]

Appeal against a decree of the Sub-Judge, Mayavaram, dated the 25th October, 1928, in O. S. No. 10 of 1925.

Messrs. *S. Varadachariar* and *R. Rajagopala Aiyangar*, for the Appellants.

The Advocate-General, Messrs. *S. Jagadisa Ayyar*, *S. Nagaraja Ayyar* and *N. Somasundaram*, for the Respondents.

Judgment.—The plaintiffs are the appellants. They sued for a declaration that a mortgage (Ex. 1) executed by defendant No. 3, a Hindu widow, of her husband's land in favour of defendant No. 1 was void as against them, the husband's reversionary heirs. The husband died in 1896. In 1897 the widow executed a mortgage Ex. 6 *f* in favour of one Rangasami who was the father in law of defendant No. 2. This was for securing a loan of Rs. 2,000 and the instrument recites that the money was required to discharge debts due by her deceased husband. It appears that the widow later sold some plots of land from time to time and that the sale proceeds were used to reduce the amount of the mortgage debt due to Rangasami. Subsequently, the mortgagee's rights became vested in defendant No. 2, who brought a suit upon the mortgage against the widow. On 17th January, 1913, defendant No. 2 obtained *ex parte* a preliminary decree for the recovery of Rs. 2,373 12 0 then due, together with interest at 9 per cent. per annum on Rs. 1,500, the balance of principal due from date of plaint to 17th July, 1913, the date fixed for payment, and with further interest at 6 per cent. on the whole amount from 17th July, 1913, until payment. It was for the purpose of discharging the decree amount, which by that time had swollen to Rs. 2,845, that on 9th September, 1914, the widow executed Ex. 1, the suit mortgage in favour of defendant No. 3.

The plaintiffs impeach this mortgage upon two grounds. First, they say it is a fictitious transaction, part of a scheme of the widow and her mother in-law to transfer the husband's lands to the family of defendant No. 2 in fraud of the reversionary heirs. We do not think that the evidence sustains this allegation. The plaint avers nothing more in support of it than that defendant No. 1 is a cousin

of defendant No. 2's husband and was under obligations to Rangasami, defendant No. 2's father-in-law, who had looked after defendant No. 1 during his minority. The defendant No. 1 gave evidence at the trial and he has deposed that, in pursuance of his contract under Ex. 1 he did pay off the decree debt due to defendant No. 2; that he did not do this by a cash payment, but by adjusting this debt against a debt due by defendant No. 2 to him and his family. His story is corroborated by documentary evidence Exhibit 2 is a pro-note dated 8th April, 1916, given by defendant No. 1 to defendant No. 2 for a loan of Rs. 8,600. Exhibit 3 is a receipt, given on the same date by defendant No. 2 to defendant No. 1 for payment of Rs. 3,263-13-0, which is stated to be the principal and interest up to date in respect of the amount due by defendant No. 3 under the mortgage decree. Defendant No. 2 has accepted the genuineness of her signature to this document, but she has no recollection of the circumstances in which she signed it, as she says her husband managed all business and money transactions Exhibit 2 bears an endorsement (Ex. 2-*a*) dated 11th February, 1918, that the note had been discharged. A number of other documents Exs. 4, 5 and 8 support defendant No. 1's story that the mutual debts of defendant No. 1's and defendant No. 2's family were adjusted. The learned Subordinate Judge has discovered no reason for doubting the genuineness of these documents or of the the transactions which they evidence. None is apparent to us. In fact, the evidence with regard to them is all one way.

The plaintiff's second ground is that the mortgage Ex. 1 stands in no better position than the mortgage Ex 6-*f* and that if it can be shown that the earlier mortgage and the decree upon it were attributable to the widow's improvidence in alienating property to pay debts which could and ought to have been discharged, from income in her hands, at least with regard to the interest, the reversioners would not be bound thereby. Two issues were framed in the lower Court *viz.*:

"(1) Was the mortgage, Ex. 6-*f* binding upon the husband's estate and (2) were the plaintiffs entitled to question the validity of the decree in respect of that mortgage."

It is indisputable that the plaintiff's right to sue for a declaration that the mortgage (Ex. 6-*f*) is not binding or that the decree is not binding would be barred by limitation. But the argument is that lapse of time will not make that binding on the estate which was not binding before We think however that the learned Sub-Judge was right in striking out these issues. To allow the plaintiffs now to open the question of the binding character of the previous alienation and the decree upon it would, in effect, remove the bar which the Limitation Act has placed in their way. In other words, the plaintiffs cannot be allowed to do indirectly what they cannot do directly. That was the view expressed by a Full Bench of the Punjab Chief Court in *Khiali Ram* v. *Gulab Khan* (1), and we agree with it. In that case, plaintiffs, reversioners of the husband sought to avoid the bar of limitation to a suit to declare the widow's alienation void, by showing that the mortgage executed by her husband (in discharge of which his widow had sold the property to the mortgagee) was a fictitious transaction; and it was ruled that they could not do this. The case reported as *Jaggi* v. *Prithi Pal* (2), proceeds on the same principle, and so too *Karri Adeyya* v. *Tammulamoddi Govindu* (3). decided by one of us.

The plaintiffs, therefore, have to fall back on their case that defendant No. 1 cannot be regarded as a *bona fide* lender. Their allegation is that connected as he was with the families of defendants Nos. 2 and 3 he must have been aware of the circumstance that led to the mortgage Ex. 1 and that the widow was allowing interest to accumulate without any effort to keep it down out of her income. The principle has been laid down that a widow is not bound to discharge her husband's debts out of the income of his estate; but that she is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property. But an exception is recognized in favour of the alienee. If there was actual pressure at the time of the alienation and the widow had then no funds available for the discharge of the debt, or the alienee, after reasonable inquiry, *bona fide* believed that the alienation was necessary, he will be protected:

(1) 11 Ind. Cas. 392; 33 P. R. 1911; 190 P. L. R. 1911 (F. B.)

(2) A. W. N. (1894) 134.

(3) 131 Ind. Cas. 609; A. I. R. 1931 Mad. 274; 31 L. W. 336; 58 M. L. J. 417; (1930) M. W. N. 97; Ind. Rul. (1931) Mad. 561.

see 18 Ind. Cas. 953 [*Boddu Jaggayya* v. *Goli Appala Raju* (4)] and 24 Ind. Cas. 534 [*S. Appalaswamy* v. *S. Venkanna* (5)]. In the present case it has been proved that the net income available to the widow from her husband's lands was about Rs. 200 per annum, and that the income had only become available from the date of the compromise of the widow's suit in January, 1912. By this compromise she recovered the control and enjoyment of her husband's lands which since his death had hitherto been in the management of her mother-in-law. So that at the date when she executed the mortgage (Ex. 1) there was not more than between Rs. 600 to Rs. 700 at the widow's disposal to meet a debt of Rs. 2,845 due under the decree. There is evidence, which has been accepted by the lower Court, that the widow was being pressed to discharge the debt, and it is apparent that if she did not, the property was liable to be brought to sale in execution of the decree. We think, therefore, that defendant No. 1's mortgage is justified.

Defendant No. 1 has filed cross-objections to the reduction made by the learned Sub-Judge in the rate of interest fixed by the mortgage instrument. He has held that the provision for payment of compound interest at 12 per cent. per annum from 9th September, 1916, with annual rests, is onerous and penal and he has awarded interest at $\frac{3}{4}$ per cent. per mensem on the arrears of interest till 9th September, 1916, and compound interest at the same rate with annual rests afterwards. The question of the reasonableness of a particular rate of interest was discussed by their Lordships of the Judicial Committee in *Sunder Mull* v. *Satya Kinder Sahana* (6). There it was stated that the whole conditions and terms of the lending must be considered together. The learned Sub-Judge has heard evidence as to the ordinary rate of interest in the locality, and he has taken into consideration the value of the security offered by the widow, which was ample, as well as the widow's need for money, which was pressing. In these circumstances we are not prepared to interfere in a matter to which the Sub-Judge has obviously given much care and which he was well fitted to decide.

We think however that the proper course is to declare in the decree that that portion of the debt comprising the disallowed interest is not binding on the estate and in other respects that the suit is dismissed.

With this modification the appeal and the cross objections will be dismissed with costs.

N. S. & A. *Order accordingly.*

(4) 18 Ind. Cas. 953; (1913) M. W. N. 275.
(5) 24 Ind. Cas. 534; (1914) M. W. N. 488.
(6) 108 Ind. Cas. 337; A. I. R. 1928 P. C. 64; 55 I. A. 85; 7 Pat. 294; 26 A. L. J. 364; 27 L. W. 461; (1928) M. W. N. 242; 9 P. L. T. 273; 54 M. L. J. 427; 5 O. W. N. 400; 47 C. L. J. 403; 30 Bom. L. R. 93; 32 C. W. N. 657; I. L. T. 40 Pat 120 (P. C.)

MADRAS HIGH COURT.

Civil Miscellaneous Petition No. 3605 of 1931.

September 10, 1931.

CURGENVEN AND CORNISH, JJ.

G. SIRUR—PETITIONER,

versus

R. MYTHILI AMMAL AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 10 (2)—Appeal—Security for costs—Failure to give security—Dismissal—Power to restore—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 168, applicability of—Insolvency, whether extends time.

Order XLI, r. 10 (2), Civil Procedure Code, is of a mandatory character and if security is not furnished within the time allowed the Court is bound to reject the appeal *Sabitri Thakurain* v. *Savi* (6), followed. [p 47, col. 1.]

An application for restoration of an appeal dismissed under O XLI, r. 10 (2) is governed by Art. 168 of the Limitation Act. [p 46, col. 1.]

Insolvency is not a disability under the Limitation Act and adjudication of a party against whom an *ex parte* order is passed is not a sufficient ground for extending the time for making an application to set aside the order. *Lekhraj Chuni Lal* v. *Sham Lal Narrondas* (2), *Kissen Gopal Karnani* v. *Suklal Karnani* (3), *Khunni Lal* v. *Rameshar* (4) and *Official Assignee of Rangoon* v. *Chidambaram Chetty* (5), distinguished. [p. 46, col. 2.]

Application praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order (1) setting aside the order of the High Court, dated 13th February, 1931 and made in O. S. A. No. 63 of 1930 on the file of the High Court, dismissing as having abated the said appeal as against the 1st respondent therein, and (2) to review the orders dated 19th December, 1931, and 10th February, 1931, passed on Civil Miscellaneous Petitions Nos. 5376 of 1930 and 548 of 1931.

Mr. *V. V. Srinivasa Ayyangar* for Mr. *M. E. Rajagopalachariar*, for the Petitioner.

Messrs. *T. M. Krishnaswami Aiyar* and *G. Rajagopalan* instructed by Mr. *N. T. Shamanna*, for the Respondents.

Order.—This is an application by the appellant in O. S. Appeal No. 63 of 1930, to set aside the dismissal of that appeal as against the 1st

respondent and to review or set aside certain interlocutory orders passed in the same appeal. The appeal was from a judgment of Waller, J., dated the 15th October, 1929, annulling the adjudication of the 2nd respondent and directing the appellant to pay the 1st respondent's costs. It was admitted on the 1st September, 1930, and on the 8th November the 1st respondent applied for a direction that the appellant should furnish security for her costs in the appeal. The application was allowed *ex parte* on the 19th December, no one appearing on behalf of the appellant, who was directed to give the required security within one month from that date On the last day of that period, the 19th January, 1931, an application was filed on behalf of the appellant (C. M. P. No. 548 of 1931) to rescind this order. That also was dismissed for default on the 10th February, again, no appearance being put in for the appellant. On the 13th February the appeal itself was dismissed under the provisions of sub r (2) of r. 10 of O. XLI, Civil Procedure Code. It is this last order which the appellant primarily attacks, and in order to do so he pleads that the order of the 10th February cannot be sustained because on the previous day, the 9th, he was adjudicated insolvent and, further, that he had sufficient cause for not appearing before the Court when the original order to give security was passed on the 19th December.

It is indisputable that before the Court can set aside the orders of the 10th February and 19th December, it must restore the appeal itself, as unless the appeal is pending there can be no revival of the interlocutory applications, which depend for their existence upon the pendency of the appeal. As regards the restoration of the appeal the appellant has been met by the defence of limitation. There has been some difference of judicial opinion as to whether an appeal dismissed under r. 10 (2) of O. XLI can be restored. It was held in *Srinivasam Pillai* v. *Rukmani Ammal* (1), to which one of us was a party, that this could be done and for the purpose of this case we propose to assume the power. It seems clear, however, and indeed has not been seriously disputed before us that such an application must be governed by Art. 168 of the Limitation Act, which provides for the re-admission of an appeal dismissed for want of prosecution. This article for appeals corresponds, we think, to Art. 163 for suits and the latter article expressly refers to dismissal for failure to furnish security for costs. It is reasonable to hold that such a failure comes under the general description of "want of prosecution". If this is correct the appellant had thirty days within which to apply and it is not disputed that his application was forty-one days out of time It has been vaguely suggested that the adjudication of the appellant affected this question, but in what manner has not been explained. Insolvency is not a disability under the Limitation Act and there is no reason to hold that the Official Assignee would have had a longer time within which to apply than the insolvent himself. We think accordingly that this objection is fatal.

The insolvency of the appellant is also the ground upon which we are invited to set aside or review the order of the 10th February, which dismissed for default an application to set aside the *ex parte* order directing the appellant to furnish security for costs. The point taken is, in brief, that the appellant was disqualified by his adjudication from conducting the application and that the Court before dismissing it ought to have given the Official Assignee an opportunity to carry it on. The cases relied on by Mr. V. V. Srinivasa Ayyangar for this position, *Lekhraj Chuni Lal* v. *Sham Lal Narrondas* (2), *Kissen Gopal Karnani* v. *Suklal Karnani* (3), *Khunni Lal* v. *Rameshar* (4) and *Official Assignee of Rangoon* v. *Chidambaram Chetty* (5), may be distinguished by the circumstance that in all of them the Court when it passed its order had been apprised of the insolvency. It had, therefore, an opportunity to apply the provisions of O. XXII, r. 8, Civil Procedure Code. In the present case this was not so. As has been stated, no appearance was put in and the Court was wholly unaware that the applicant had been adjudicated. On the materials before it, therefore, it had no alternative but to dismiss the application. It may be that in the peculiar circumstances of the case the Official Assignee could not reasonably have been expected to carry on the proceeding, but we have no information about that, and can only proceed upon the general principle

(1) 117 Ind. Cas. 791; 55 M. L. J. 330; 28 L. W. 358. 1928) M. W. N. 701; A. I. R. 1928 Mad. 964.

(2) 16 B. 404.

(3) 98 Ind. Cas. 781; 53 C. 844; 31 C. W. N. 22; A. I. R. 1927 Cal. 76.

(4) 64 Ind. Cas. 52; 43 A. 621; 19 A. L. J. 685; A. I. R. 1922 All. 361.

(5) 61 Ind. Cas. 300; (1920) M. W. N. 704; 12 L. W. 551.

that some one representing the applicant must have appeared to save the application from dismissal for default. We think, therefore, that no grounds have been shown for restoring this application, though we prefer to rest our decision upon other and perhaps more conclusive reasons. Even had the application been restored it is highly doubtful whether, the time within which to furnish security having expired, the Court was competent to take any action other than to dismiss the appeal. The mandatory character of O. XLI, r. 10 (2) has been stressed by the Privy Council in *Sabitri Thakurain* v. *Savi* (6), which was a closely analogous case. If security is not furnished within the time allowed, the Court is bound to reject the appeal. The petitioner might, of course, have applied for an extension of the time, or in some other way averted the operation of the order for security.

Even if it be assumed that the original order to give security could be re-opened by this means, we can find no ground whatever on the merits for holding that the appellant had sufficient reason for failure to put in an appearance. Admittedly his agent in Madras received notice of the application in good time, and he had no lack of professional advice because the applicant's affidavit states that his agent informed Mr. Venkatavaradachariar's clerk to request him to instruct Mr. K. Bhashyam Ayyangar to oppose it. Having done that, the agent, like his principal, was taken away from Madras by other interests Mr. Venkatavaradachari, it is said, fell ill and his clerk was under the impression that the case would be taken by Mr. Bhashyam Ayyangar. The blame is thus thrown upon the clerk of the appellant's Advocate, who apparently had been left to arrange that this application should be opposed. We think it is clear that both the applicant and his agent had other matters to attend to and neglected to ensure that the application was opposed. In the circumstances they do not, we think, succeed in proving their own diligence by throwing the blame upon an Advocate's clerk, and we are unable upon the facts asserted to agree that there is any case for setting aside the *ex parte* order.

The result accordingly is that the application is dismissed with taxed costs.

N. S. & A. *Petition dismissed.*

(6) 60 Ind. Cas. 274; (1921) M. W. N. 159; 40 M. L. J. 308; 19 A. L. J. 281; 48 I. A. 76; 33 C. L. J. 307; 25 C. W. N. 557; 23 Bom. L. R. 681; 48 C. 481; 14 L. W. 362; 3 U. P. L. R. (P. C.) 57 (P. C.)

MADRAS HIGH COURT.

Civil Miscellaneous Appeal No. 364 of 1927.

July 31, 1931.

WALLER AND KRISHNAN PANDALAI, JJ.

YANATI VENKATARAGHAVAMMA—DEFENDANT—APPELLANT

versus

BYRISETTY SINGARAYYA SETTY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r 66 (2) (e)—Sale proclamation—Matters to be stated—Pending litigation.

The fact that the property to be sold is the subject-matter of a pending litigation is a thing material for a purchaser to know and can, therefore, be mentioned in the proclamation for sale. *Venkataratnam* v. *Ranganayakamma* (1), dissented from.

Appeal against an order of the District Court, Nellore, dated the 15 September, 1927, and made in E. A. No. 191 of 1927, in O. S. No. 56 of 1925 on the file of the Court of the Subordinate Judge, Nellore.

Mr. *P. Venkataramana Rao*, for the Appellant.

Mr. *M. Ramachandra Rao*, for the Respondents

Judgment.—This is an appeal against an order refusing to set aside a sale in execution. Only two of the grounds urged before the lower Court are pressed here. The first is that bidders were scared away by a notification issued at the sale itself, warning them that the appellant's daughter's claim to the property had been dismissed and that she had filed a suit. Reliance is placed on some observations by Seshagiri Aiyar, J., in *Venkataratnam* v. *Ranganayakamma* (1), on the undesirability of issuing such warnings. With great respect we must express our dissent. Rule 66 (2) (*e*) of O. XXI, Civil Procedure Code, directs the Court to specify "every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property". In this instance, the Court thought that it was material for intending buyers to know that the property was under litigation and directed the *Amin* to give them that information and we think that it was entirely justified in doing so. Nor does the complaint come very well from the appellant, for it seems tolerably obvious that it is she that is responsible for her daughter's effort to defeat or delay the decree and the sale under it.

The next complaint is that the sale was

(1) 48 Ind. Cas. 270; 41 M. 995 at p. 997; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 922.

illegal as it was adjourned for over seven days. What happened was that the sale went on from day to day continuously from 18th to 29th April which was neither illegal nor irregular. It was not adjourned in the proper sense of the word. The Judge was, no doubt, absent for three days, while the sale was going on, but it appears that he had issued a geneal order that all sales were to continue till his return.

We find that both points against the appellant. Assuming that there had been irregularities, it is for her to show that they caused her substantial injury She complains that land worth Rs. 40,000 was sold for Rs. 6,000 odd. On the evidence, no doubt, it appears that the land might have been worth about Rs. 40,000 had the title been clear, but what was the position? The appellant's daughter had filed a suit claiming the property. The appellant was supporting her by admitting that her own title was defective. She had, further, before the sale, alienated nearly one third of the property to two of her relations. Under the circumstances, if it fetched much less than its value the fault would appear to be her own and no one else's. We dismiss the appeal with costs.

N. S. & A *Appeal dismissed.*

MADRAS HIGH COURT.

Civil Revision Petition No. 1 of 1931.

May 12, 1931.

JACKSON, J.

SENGODA GOUNDAN AND ANOTHER —PETITIONERS

versus

VAYYAPURI GOUNDAN—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195 (1) (c), 476—Forgery—Power to complain against witnesses.

The Court has no power under s. 476, Criminal Procedure Code, to complain against witnesses for abetting forgery. Under that section the Court can complain of an offence referred to in s. 195 (1) (c), only if it is an offence alleged to have been committed by a party to the proceeding in the Court. *Govinda Aiyar* v. *Rex* (1), followed. *In re Devji valad Bhavani* (3) and *Emperor* v. *Balgaunda* (4), not followed.

Petition under ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise an order of the District Court, Salem, dated the 21st November, 1930, and made in O. P. No 28 of 1930.

Messrs. *T. Rangachariar, Ramachandra Pantulu* and *V. Ganapathi*, for the Petitioners.

Mr. *C. Brooke Elliot* for Mr. *V. Sankaran*, for the Respondent.

Judgment.—The petitioners seek to revise the order of the District Judge, Salem, under s. 476, Criminal Procedure Code, complaining against them for abetting a forgery. The learned Judge has overlooked *Govinda Aiyar* v. *Rex* (1), which confines s. 476 to the exact offences referred to in s. 195, so that offences in s. 195 (1) (c) must be offences "alleged to have been committed by a party". The amendment of these sections in 1923 has not affected the reasoning adopted by the Full Bench, and so far as this province is concerned that ruling constitutes the binding law. Anybody can complain against an abettor of the offences in s. 195 (1) (c) and there is no question of the Court itself complaining *qua* Court under s. 476. Of course there is nothing to prevent the presiding officer himself complaining if he likes, as pointed out in *Emperor* v. *Mukund* (2), only then s. 200 (*a-a*) will not apply. In Bombay it has always been held that s. 476 in reference to s. 195 (1) (c) is not confined to parties. *Cf. In re Devji valad Bhavani* (3) from which *Govinda Aiyar* v. *Rex* (1) dissents and which *Emperor* v. *Balgaunda* (4) affirms. It is a pity that the Legislature, knowing of this disagreement, did not put the matter beyond question in 1923; but, since it did not do so, nothing is likely to be gained by referring the matter to another Full Bench to see if Madras can be brought into line with Bombay. The wording of the sections admits either view, and the provinces must agree to differ over what, after all, is a mere matter of procedure.

Following *Govinda Aiyar* v. *Rex* (1) as regards the abettors of the alleged forgery I cancel the lower Court's complaint. The petition is allowed.

N. S. & A *Petition allowed*

(1) 50 Ind. Cas. 824; 42 M. 510; 36 M. L. J. 448; 9 L. W. 422; 20 Cr. L. J. 344; (1919) M. W. N. 459; 26 M. L. T 92 (F. B.)

(2) 110 Ind. Cas. 108; A. I. R. 1928 Lah 510; 29 Cr. L. J. 652; 10 A. I. Cr. R. 474; 9 Lah. 678.

(3) 18 B. 581.

(4) 133 Ind Cas. 269; 33 Bom. L R. 296; A. I. R 1931 Bom. 305; 55 B. 461; 32 Cr. L. J. 1017; Ind. Rul. (1931) Bom. 381; (1931) Cr. Cas. 561.

PATNA HIGH COURT.

Civil Appeal No. 5 of 1928.
April 24, 1931.
Kulwant Sahay and Mohammad Noor, JJ.

TRIBENI PRASAD SINGH—APPELLANT
versus
RAMASRAY PRASAD CHAUDHURI—RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 47, 65, O. XXI, r. 95—Evidence Act (I of 1872), s. 91—Contract Act (IX of 1872), s. 23—Limitation Act (IX of 1908), Sch. I, Art. 138—Sale—Consideration—Third party's right to question—Part of consideration dependent on result of litigation—Validity of sale—Execution sale—Title of auction-purchaser—Absence of sale-certificate, effect of—Other evidence to prove title, admissibility of—Suit by auction-purchaser within twelve years, maintainability of—Hindu Law—Suit against family—Omission to implead minor members—Validity of sale.

In the case of a sale of property the question of payment and non-payment of the consideration is a matter between the vendor and the vendee *inter se*; it cannot be raised by a third party. *Nilmadhab Parhi* v. *Hara Prashad Parhi* (1) and *Jagdip Sahay* v. *Sonu Lal* (2), relied on. [p. 51, cols. 1 & 2.]

The mere fact that a part of the consideration for a sale of property is dependent on the result of a suit relating to that property does not make the transaction bad as opposed to public policy. *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (3), relied on. [p. 51, col. 2.]

The title of a purchaser at an auction-sale in execution of a decree is derived from the sale itself and not from the sale certificate. The sale certificate is merely evidence of title and not the title-deed, in the sense that the title is conveyed or created by it, and the purchaser can, therefore, establish his title by evidence independent of the sale certificate. *Vishnu Shankar Joshi* v. *Yusuf Nur Mahomad* (4), distinguished. *Tantadhari Singh* v. *Sundar Lal Missir* (5), *Narayan Bhagwan Gandhi* v. *Shamrao Laxuman* (6), *Jagan Nath* v. *Baldeo* (7), *Doorga Narain Sen* v. *Beney Madhab Muzoomdar* (8), *Tara Prasad Maytee* v. *Nund Kishore Giri* (9) and *Velan* v. *Kumarasami* (10), relied on. [*ibid.*]

The omission to sue a minor member of a joint family if the interest of the family was properly looked after in the suit, will not in any way affect the sale held in execution of the decree passed in a suit against the family. *Nanomi Babuasin* v. *Modhun Mohun* (12), *Jagdish Narayan Prashad Singh* v. *Manmatha Nath Dey* (13), *Sheo Shanker Ram* v. *Jaddo Kunwar* (14) and *Raghunandan Prasad Singh* v. *Ghananand Singh* (15), referred to [p. 53, col. 1.]

The decree-holder auction-purchaser can bring a suit for recovery of possession of the property purchased at the auction sale within twelve years of the sale as provided in Art. 138, Limitation Act. Such a suit is not barred by s. 47, Civil Procedure Code. [p. 54, col. 1.]

Appeal against a decision of the Additional Sub-Judge, Monghyr, dated the 29th August, 1927.

This case was originally heard by a Full Bench and after the decision of the Full Bench which is reported in 133 Ind. Cas. 337, the matter was placed before the Division Bench for final disposal.

Mohammad Noor, J.—This is an appeal against the decree of the Additional Subordinate Judge of Monghyr decreeing the plaintiff-respondent's suit for possession of certain properties with mesne profits subsequent to the institution of the suit. The facts leading to the present appeal are these: Jagdip Narain Singh and Sant Prasad Singh who were members of a joint Hindu family mortgaged to Babu Gopi Lal 4 annas *pucca* share of village Mighaul, Tauzi No. 1079, and 2 annas 10 *gandas pucca* share equivalent to 10 annas *kucha* share in a 4 annas partitioned *patti* of village Matihani Gopal, Tauzi No. 1097, for Rs. 4,350, bearing compound interest at 12 per cent. per annum with four-monthly rests under a registered mortgage deed, dated 19th September, 1890, corresponding to 20th *Bhado* II, 1297 *Fasli*. The mortgage money was not paid and on 15th September, 1903, Babu Gopi Lal instituted a mortgage suit No 407 of 1903, in the Court of the Subordinate Judge of Monghyr. In that suit the original mortgagors, Babu Jagdip Narain Singh and Babu Sant Prasad, were defendants first party, their sons and grandsons were defendants second party and one BabuSakhichand and members of his family who had acquired a subsequent mortgage in one of the properties, namely, Mighaul were defendants third party. The suit was decreed on 7th June, 1904, and the decree was confirmed on appeal by the Calcutta High Court on 7th July, 1905.

The final decree for sale was subsequently passed and Babu Gopi Lal, the decree-holder, took out execution; and the mortgaged properties were sold on 30th May, 1914, for Rs. 40,966 and were purchased by the decree-holder. On that very day the decree-holder filed a petition before Court stating that if the judgment-debtor does not file objection of any kind and does not put in any petition for setting aside the sale he would return the purchased properties on taking Rs. 20,000 only. This was however not to be. The judgment-debtors filed an application for the setting aside of the sale which was rejected on 22nd May, 1915, and the sale was confirmed. There was an appeal to this Court which was dismissed on 3rd August, 1917. The decree-holder auction-purchaser subsequently died and it is said that some quarrel arose in the family. Whatever may be the reason, nothing seems to have been done after the confirmation of the sale by this Court. The

sale certificate was not taken out, the delivery of possession under O. XXI, r. 95, was not applied for and a period of about 12 years expired since the date of the sale. On 22nd May, 1926, the heirs and successors of Babu Gopi Lal, the original decree-holder auction-purchaser, conveyed to the plaintiff, Babu Ramasray Prasad Chaudhury, the entire share in the two aforesaid villages purchased by their ancestor at the execution sale above referred to. The conveyance was by three deeds of sale, Exs. 2, 2-a and 2-b. One deed was by some of the heirs for 6-annas share, a second deed for another 6 annas share by some other heirs, and the third deed for the remaining 4-annas share by the rest of the heirs treating the property sold as 16 annas. On the basis of these conveyances the plaintiff instituted the present suit on 29th May, 1926, seeking to recover the property and mesne profits since the suit, basing his title on the sale held on 30th May, 1914. The sons and grandsons of the original mortgagors, Babu Jagdip Narain Singh and Sant Prasad, are the defendants first party; the representatives of Babu Sakhichand, who had acquired a subsequent mortgage in Mighaul, are the defendants second party, and the heirs and successors of Babu Gopi Lal, who are the vendors of the plaintiff, are the defendants third party. Various defences were taken before the lower Court. I shall later on deal with so much of the defence of the defendants first party as is relevant for this appeal when I come to the appeal itself. Suffice it to say that the learned Subordinate Judge has decreed the suit and the defendants first party have appealed.

At this stage I propose to dispose of the defence of the defendants second party, the heirs of Sakhichand, who had acquired a subsequent mortgage in one of the properties named Mighaul. I have already said that Babu Sakhichand himself, and members of his family, were defendants third party in the original mortgage suit in which the property was sold. The decree was passed in their presence. Since then they sued on their mortgage and obtained a decree. What happened of this decree is not known. Their defence in the present suit was that their mortgage, dated 11th September, 1903, though subsequent to the mortgage of Gopi Lal, should have a priority over the latter, on the ground that their money was advanced for the satisfaction of another mortgage of Mighaul prior to the mortgage of Gopi Lal. An issue was raised on this point, and the learned Subordinate Judge after going into the facts has decided it against them. They have not appealed. It is, therefore, not necessary to deal with this part of the case any further.

Before I take up the question raised in the appeal itself I would like to dispose of a small matter which has been urged on behalf of the appellants. It appears that the plaintiff after obtaining the decree in this suit executed it and obtained formal delivery of possession. When he applied to the Revenue authorities for the mutation of his name it was found that in the meantime a third party had got his name recorded in the registers of the Land Registration Department on the basis of some transfer from the defendants first party. The Revenue authorities refused to mutate the plaintiff-respondent's name and he has brought a separate suit against the defendants first party and their transferee whose name is entered in the records of the Land Registration Department. On 2nd November, 1928, the respondent put in an application in this Court bringing all these facts to the notice of the Court and requesting that as the appellant had no subsisting interest in the property in suit the appeal had become infructuous and should be dealt with as such.

At the hearing of the appeal the learned Advocate for the respondent (plaintiff) has not pressed this application, but the appellant tried to take advantage of it and urged that as according to the admission of the respondent himself the defendants-appellants had no subsisting interest, the suit itself was infructuous and ought to be dismissed on this ground, the conveyance by the defendants being before the Court. I am unable to accede to this contention. The plaintiff's case in the plaint was that he was resisted in taking possession of the property by the defendants first party. In this view the plaintiff has a good cause of action against them (appellants) and we must determine the matter between the parties as they are before us. Whether the decree which may be passed in this suit will be binding upon any other person who may have acquired any interest in the property from the appellant is a matter which does not concern us. In their written statement the defendants first party never asserted that they are not connected with the property

in dispute. They allowed the case to proceed before the lower Court and have filed an appeal before this Court. The question should, therefore, be determined and we overrule the contention of the appellants.

I now come to the defence raised by the defendants first party, the representatives of the original mortgagors. I will only deal with such of them as have been pressed before us in the appeal. The learned Advocate for the appellants Mr. Abani Bhushan Mukharji has raised the following points : (1) that the plaintiff purchased merely the right to sue and not an existing right in immovable property, and therefore the sale to him by the heirs of Gopi Lal is invalid; (2) that no sale certificate having been obtained, there is no evidence of title to the properties sold; and the other evidence which is available is not admissible in evidence. The sale can only be proved by the sale certificate itself and no decree for possession can be passed in its absence; (3) that the sale is not binding upon defendants Nos. 7 and 8 of the first party, namely Babu Jharkhandi Prasad Singh and Babu Jadunandan Prasad Singh, who were not parties to the original mortgage Suit No 407 of 1903; (4) that the suit is barred by limitation governed by Art. 178, Limitation Act; (5) that the suit is barred by s. 47, Civil Procedure Code.

As to the first point there is no force in the contention. Section 65, Civil Procedure Code, is explicit and says that when a sale of an immovable property has become absolute the title of the auction-purchaser shall commence from the date of the sale. In this case the sale became absolute and the order of the Court making the sale absolute was confirmed by this Court. By the sale a right in the property sold was acquired by Babu Gopi Lal, the decree-holder auction-purchaser, and the plaintiff as the representative-in-interest of Gopi Lal, acquired a subsisting right in the property. A plea was taken before the lower Court that under the terms of the sale deeds (Exs. 2, 2-*a* and 2-*b*) the plaintiffs had not acquired any right as they had not paid the consideration money to their vendors, the heirs of Babu Gopi Lal. This is, however, a matter between the plaintiff and the defendants third party. In their written statements the defendants third party explicitly stated that title had passed to the plaintiff. The question of payment and non-payment of the consideration money is a matter between them *inter se*, and in my opinion it cannot be raised by the defendants first party. The learned lower Court has relied upon 20 Ind. Cas. 325 [*Nilmadhab Parhi* v. *Hara Prashad Parhi* (1)] and 52 Ind. Cas. 363 [*Jagdip Sahay* v. *Sonu Lal* (2)] for the authority that the execution of a sale-deed passes title to the vendee unless there is a contract to the contrary between the parties. I agree with the findings of the learned lower Court and hold this point against the appellants. These sale-deeds are not of a nature which can be held to be invalid on the ground of public policy as speculative transfers by way of gambling in litigation. No doubt a part of the consideration is dependent upon the result of the suit but this does not to my mind make the transaction bad as opposed to public policy. This was the view taken by the Judicial Committee of the Privy Council in *Bhagwat Dayal Singh* v. *Debi Dayal Sahu* (3). The property has been sold for its full value and the consideration dependent upon the result of the suit is only about a third of it. The transaction is not a gamble and not invalid. The right sold was the vendor's interest in the property acquired by the sale in execution and not a mere right to sue.

As to the second point raised by the learned Advocate it is again enough to refer to the provisions of s. 65, Civil Procedure Code. It says that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. It is clear that the title of the auction-purchaser is derived from the sale and not from the sale certificate. It accrues on the sale becoming absolute but takes effect from the date of sale itself. The sale certificate is merely evidence of title of the auction-purchaser and not the title-deed in the sense that the title is conveyed or created by it. The word "sale-certificate" itself denotes that it is only a certificate by the Court that the auction-purchaser has purchased the property.

No provision of law has been placed before us to show that the title of the auction-purchaser is derived from the sale certificate. The learned Advocate has relied upon *Vishnu Shanker Joshi* v. *Yusuf Nur Mahomad* (4). The

(1) 20 Ind. Cas. 325; 17 C. W. N. 1161; 19 C. L. J. 146.
(2) 52 Ind. Cas. 363.
(3) 35 C. 420; 35 I. A. 48; 12 C. W. N. 393; 7 C. L. J. 335 (P. C.).
(4) 88 Ind. Cas. 962; A. I. R. 1925 Bom. 483; 27 Bom. L. R. 963.

case does not appear to be in point. There the dispute was as regards two sales held by two different Courts. One of them was not confirmed at all. The main question to be decided was which of these two sales was to prevail and the learned Judges, if I may say so, rightly held that one of the sales not having been confirmed could not prevail. No doubt they did refer to the sale certificate also, but, the sale not having been confirmed the question of sale-certificate was immaterial. On the other hand the learned Advocate for the respondent has referred us to the case of *Tantadhari Singh* v. *Sundar Lal Missir* (5) where Mookerjee, J., observed as follows:

"It is settled law that when a person has purchased immovable property at an execution sale, he can establish his title by evidence independent of the sale certificate . . . . . We agree in this view of the law, and hold that the Subordinate Judge ought not to have decided against the plaintiffs upon the question of title, merely because they had failed to produce their sale certificate."

Mookerjee, J., in dealing with the effect of non-production of the sale-certificate, referred to the observation of Chandavarkar, J., in *Narayan Bhagwan Gandhi* v. *Shamrao Laxuman* (6) and a decision of a Full Bench of the Allahabad High Court in *Jagan Nath* v. *Baldeo* (7) and also to the earlier decisions of the Calcutta High Court in *Doorga Narain Sen* v. *Beney Madhab Mazoomdar* (8) and *Tara Prasad Maytee* v. *Nund Kishor Giri* (9) and that of the Madras High Court in *Velan* v. *Kumarasami* (10). It is enough if I consider the Full Bench decision of the Allahabad High Court above referred to. In that case it was held that it was not incumbent on a purchaser at an execution sale, which had been duly confirmed, to produce his sale certificate, but it was competent for him to prove his purchase *aliunde*. The confirmation of the sale in his favour was *prima faice* evidence of his title to the property, and was sufficient to pass such title to him, of which a certificate if afterwards obtained by him would merely be evidence that the property had so passed. The question was again considered by the Calcutta High Court in the case of 1 Ind. Cas. 62 [*BrajaNath Pal* v. *Joggeswar Bagchi* (11), where Mookerjee, J., referring to the case of *Tantadhari Singh* v. *Sundar Lal Missir* (5), observed that the purchaser of immovable property at an auction sale can establish his title by evidence independent of the sale-certificate, as a sale-certificate does not create title, but is merely evidence of title. The law on this point is so settled that I do not propose to discuss it at great length. The learned Advocate for the appellant referred us to s. 91, Evidence Act, and contended that as O. XXI, r. 94, Civil Procedure Code, makes it incumbent upon the Court to grant a sale-certificate to the auction-purchaser, no other evidence to prove the sale and the property sold is admissible. I am unable to agree with this. Section 91, Evidence Act, prescribes that

" . . . . . in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof . . . . . of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herein before contained."

In this case there is no matter which is required by law to be reduced in the form of a document. The sale is held under the order of the Court and there are records of these orders in the order sheet which has been produced. On these grounds I hold this point against the appellants.

The third point refers to the effect of the decree and the sale against defendants Nos. 7 and 8, Babu Jharkhandi Prasad Singh and Babu Jadunandan Prasad Singh. They are the sons of one of the original mortgagors, Babu Sant Prasad Singh. The plaint and the decree in the mortgage suit show that one of the minor sons of Babu Sant Prasad Singh was named therein as Panchu Singh. The plaintiff's contention is that Panchu was another name of defendant No. 7, Jharkhandi Prasad Singh. This is supported by the judgment and the decree of the High Court of Calcutta in the mortgage suit (Exs. 11 and 15). The learned lower Court has held it as a fact that Panchu was another name of Jharkhandi Prasad who was party to the suit and described therein as son of Babu Sant Prasad. It has not been shown that Babu Sant Prasad had another son named Panchu. I, therefore, agree with the finding of the learned lower Court that Jharkhandi Singh is an *alias* of Panchu Singh who was a party to the original mortgage suit. There is no doubt that Babu Jadunandan Prased Singh was not a party to the mortgage suit. The

(5) 7 C. L. J. 384.
(6) 27 B. 379; 5 Bom. L. R. 233.
(7) 5 A. 305; A. W. N. (1883) 48 (F. B.).
(8) 7 C. 199.
(9) 9 C. 842; 12 C. L. R. 448.
(10) 11 M. 296.
(11) 1 Ind. Cas. 62.

case of the plaintiff in this respect is that he was not born at the time of the institution of the suit. I do not think so. It appears that one Ambica Prasad Singh, brother of Babu Jadunandan Prasad Singh, was a party to the suit and it is asserted on behalf of the appellant and is not strenuously disputed by the plaintiffs that Ambica who was a party to the original mortgage suit was a younger brother of Babu Jadunandan Prasad Singh. If he was born at the time of the institution of the suit Babu Jadunandan Prasad Singh, who was older, must have been born before the institution of the suit.

There is no doubt that he was left out from the original suit, but this will not in any way help the appellant The omission to sue a minor member of a joint family, if the interest of the family was properly looked after in the suit, will not in any way affect the sale held in execution of the decree passed in the suit, *vide Nanomi Babuasin* v. *Modhun Mohun* (12) and 45 Ind. Cas. 76 [*Jagdish Narayan Prashad Singh* v. *Manmath Nath Dey* (13)], relied upon by the learned lower Court: see also *Sheo Shanker Ram* v. *Jaddo Kunwar* (14) and *Raghunandan Prasad Singh* v. *Ghananand Singh* (15). The plaint in the mortgage suit shows that Babu Jagdip Narayan Singh and Babu Sant Prasad Singh, the mortgagors, were sued as *kartas* and managers of the joint Hindu family and there are large number of cases of this Court showing that when a suit is brought against a *karta* of a joint Hindu family in his representative capacity, the suit will not fail for non-joinder of other members of the family. The defendant does not impugn the debt or the mortgage and the utmost that he can claim is that he has still the equity of redemption subsisting in him. The amount that he will now have to pay in order to redeem will far exceed the value of the properties, and his learned Advocate did not express his readiness to avail himself of this right when it was pointed out to him that this was all he could get. On these grounds I would decide this point also against the appellants.

Before I come to the question of limitation and the applicability of s. 47, Civil Procedure Code, I would like to dispose of, in passing, one other defence of the appellants raised before the lower Court which, though referred to by the learned Advocate, has not been seriouly pressed. In para. 8 of the written statement of defendant No. 1 it is stated that according to the terms of of the petition filed by Babu Gopi Lal on 30th May, 1914, the sum of Rs. 20,000 was paid to him and he gave up his right under the sale and did not, therefore, take out the sale-certificate or delivery of possession. I have referred to this petition of 30th May, 1914. It was to the effect that if the judgment-debtors did not put in petition for setting aside the sale, and did not raise any objection to it, the decree-holder auction-purchaser would return the property to them on payment of Rs. 20,000 only. The learned lower Court has disbelieved the payment of Rs. 20,000, by the defendant first party, and I have no hesitation in accepting this finding. First of all the offer was conditional to the judgment-debtors not raising any objection to the sale. In fact objections were raised, application for setting aside the sale was filed and it was fought up to this Court. It is unbelievable that after fighting to the bitter end the decree-holder auction-purchaser would have given up the property so easily on receipt of Rs 20,000 only. Then it is further unreasonable to believe that the judgment debtor actually paid Rs. 20,000, to the decree-holder auction-purchaser and took no document from him or did not insist on the filing of some sort of petition before the Court. This point, though urged by Mr. Abani Bhushan Mukharji, has not, as I said, been strenuously pressed by him, and I see no force in it, and, therefore, decide this point also against the appellants.

I now come to the most important point in the case, namely, the question of limitation and the applicability of s. 47, Civil Procedure Code. The importance of the applicability of s. 47, Civil Procedure Code, is only in so far as it affects the question of limitation. Under the present Code the question whether a particular relief can be obtained by an application under s. 47, Civil Procedure Code, or by a separate suit is, unless the question of limitation comes in, of academic interest only. Now the Courts are empowered to treat a petition under s. 47, Civil Procedure Code, as a plaint and *vice versa* Therefore, had this suit been brought within three years of the date of purchase, the question would have been of no practical importance. But it has been instituted long after the expiry of

(12) 13 C. 21; 13 I. A. 1; 4 Sar. 682 (P. C.).
(13) 45 Ind. Cas. 76.
(14) 24 Ind. Cas. 504; A. I. R. 1914 P. C. 136; 41 I. A. 216; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 645; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810 (P. C.).
(15) 126 Ind. Cas. 377; A. I. R. 1930 Pat. 521; 11 P. L. T. 483; Ind. Rul. (1930) Pat. 617.

three years and just before the expiry of 12 years. The question is, whether the decree-holder auction-purchaser can bring a suit for recovery of possession of the property purchased at an auction sale within 12 years of the sale as provided in Art. 138, Limitation Act, or his only remedy is by an application for delivery of possession to the executing Court for which the period of limitation prescribed is three years only? There was divergence of judicial pronouncements on this question.

We were referred to the Full Bench decision of this Court in the case of *Abdul Gani* v. *Raja Ram* (16). There it was held that an application for delivery of possession under O. XXI, r. 95, Civil Procedure Code, does not relate to the execution, discharge or satisfaction of the decree and, therefore, an order under that section was not appealable. It practically held that s. 47, Civil Procedure Code, does not apply to an application for delivery of possession. That decision was based on the *cursus curiæ* of the Calcutta High Court. Since then the Calcutta High Court in the case of *KailashChandraTarafdar* v. *Gopal Chandra Poddar* (17) has held that the decree-holder auction-purchaser applying for possession under O. XXI, r. 95, comes within the provision of s. 47, Civil Procedure Code, as it was a question between the parties to the suit and was a proceeding relating to the execution, discharge or satisfaction of the decree. It is obvious that if the delivery of possession to the decree-holder auction purchaser comes within the purview of s. 47, Civil Procedure Code, a separate suit will be barred and the only remedy of the decree-holder will be by way of an application for which as I have said the period of limitation is three years. We felt some doubt as to the correctness of the decision of the Full Bench of this Court in *Haji Abdul Gani* v. *Raja Ram* (16) and with the consent of the Hon'ble the Chief Justice by our order, dated 5th December, 1930, we referred under rr. 1 and 6, Chap. V of the Rules of this Court the following question of law for decision by a specially constituted Bench:—

'Whether a suit instituted by the decree-holder auction-purchaser or his representative-in-interest for recovery of possession of the property purchased in execution of the decree is barred by the provisions of s. 47, Civil Procedure Code, or, in other words whether a decree-holder who becomes a purchaser of the property sold in execution of his own decree ceases as such to be the party to the suit, and whether the question relating to delivery of possession of the property purchased by the decree-holder-auction purchaser is a question relating to the execution, discharge or satisfaction of the decree."

The reference was heard by a Bench of this Court consisting of Sir Courtney-Terrell C. J., Sir Jwala Prasad, Ross, Wort and Kulwant Sahay, JJ. Their judgment was delivered on 21st April, 1931, and the question of law referred by us was answered in the negative. It has been held that the suit instituted by decree-holder-auction-purchaser or his representative-in-interest for recovery of possession of the property purchased in execution of the decree is not barred by the provisions of s. 47, Civil Procedure Code It follows that the suit is maintainable and the period of limitation is 12 years under Art. 138, Limitation Act The suit is, therefore, not barred either by the provisions of s. 47, Civil Procedure Code or by Art. 138, Limitation Act.

The result is that the appeal is dismissed with costs.

Kulwant Sahay, J.—I agree.

A. *Appeal dismissed.*

(16) 35 Ind. Cas. 468; 1 Pat L. J. 232; 3 P. L. W. 62 (F. B).

(17) 95 Ind Cas. 494; A. I. R. 1926 Cal. 798; 53 C. 781; 43 C. L. J. 345; 30 C. W. N 649 (F. B.).'

PATNA HIGH COURT.

First Civil Appeal No. 93 of 1929.

June 2, 1931.

MACPHERSON AND FAZL ALI, JJ.

SACHINDRA MOHAN GHOSH—

—PLAINTIFF—APPELLANT

versus

RAMJASH AGARWALLA—DEFENDANT

—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (2)—Compromise decree—Compromise embodied in decree—Compromise creating lease—Registration, whether compulsory.

All decrees and orders are not excluded from compulsory registration but only those are excluded which partake the character of the documents mentioned in cls. (*b*) and (*c*) of sub-s. (1) and if a consent decree operates to create a lease its registration is compulsory. [p. 56, col. 2.]

First Appeal against a decision of the Subordinate Judge, Dhanbad, dated the 1st March, 1929.

Messrs. *P. R. Das, S. C Mazumdar* and *N. N. Ray*, for the Appellant.

Messrs. *A. B. Mukherjee* and *U. N. Banerjee*, for the Respondent.

Fazl Ali, J.—The main question to be decided in this appeal is whether the plaintiff can recover rent for more than three years prior to the institution of the

suit. It appears that in the year 1918 the proprietor of the Jharia Raj Estate, instituted a suit against the defendant for recovery of *khas* possession of certain lands. The suit was compromised on the 11th February, 1920, and one of the terms embodied in the decree was as follows:—

"The plaintiff gives up his claim for *khas* possession which he made regarding the surface land of the disputed *Mauza* Fatepur. The defendant will hold possession of the said lands in his purchase right".

"The defendant agrees to pay to the plaintiff the annual *jama* of Rs 792 for 66 *bighas* in three plots specified in the schedule below...The defendant pays to the plaintiff Rs. 792 the rent for 1325 *B. S.* last and from the current year the defendant will pay the *jama* to the plaintiff every year in four equal instalments... As a security for the payment of the amount of rent and cess with interest due to the plaintiff the aforesaid land and the machineries, workshop and house etc, thereon shall always be treated as "first charge" so long as the amount of rent etc., with interest due to the plaintiff will not be paid, the defendant will not be competent to transfer the same to any one by sale or gift or remove the same."

The present suit was instituted on the 14th April, 1928, by the Receiver of the Jharia Raj Estate to recover the arrears of rent for the years 1327 to 1334 at the rate of Rs. 792 per year as provided for in the petition of compromise which was embodied in the decree. The defendant resisted the suit on various grounds, but his main ground of attack is stated in para. 9 of the written statement which runs as follows.—

"That defendant further submits that on account of the non-registration the decree in Suit No. 718 of 1918 is not admissible in evidence and the plaintiff cannot claim any rent from this defendant under the said decree".

At the trial it appears to have been admitted by the defendant that he was liable to pay rent for three years before the institution of the suit and so the Subordinate Judge decreed the plaintiff's claim in part. He held, however, that the compromise decree relied on by the plaintiff was not admissible in evidence for want of registration and so the plaintiff's claim for arrears prior to three years before the suit was barred by limitation.

The plaintiff has now appealed to this Court and the points urged on his behalf are (1) that the learned Subordinate Judge was wrong in holding that the compromise decree required registration and (2) that at least the latter part of the decree which provides that the rent will be treated as a first charge on the land and machineries etc, does not require registration and that in view of this clause it should have been held that the period of limitation in this case was twelve and not three years.

The first question, therfore, to be considered is whether the compromise decree was inadmissible in evidence for want of registration. The answer to this question depends not only on the proper construction of s. 17 of the Indian Registration Act, but also on the construction of the decree itself so as to determine whether it operates to create a lease or not. I think there can be no doubt that the decree did create a lease because the terms recited therein virtually amount to a settlement of 66 *bighas* of land with the defendant in lieu of a future recurring annual payment. Turning now to s. 17 it may be noticed that it is divided into two sub sections, the first enumerating the classes of documents which are required to be registered and the second providing that the rule as to compulsory registration would not apply to certain documents which but for the proviso might fall under the first sub-section. Under the first sub-section there are five classes of documents which are mentioned under cls. (*a*) to (*e*) respectively of which cl. (*a*) relates to instruments relating to gift of immovable property and cl. (*d*) relates to a lease of immovable property from year to year or for any term exceeding one year or reserving a yearly rent. So far as this sub section is concerned, its language is plain and can give rise to no serious difficulty. Considerable difficulty, however, has arisen in interpreting sub-s. (2) read with cl. (*vi*) which may be read as follows :—

"Nothing in cls. (*b*) and (*c*) of sub-s. 1 applies to any decree or order of a Court."

One of the difficult questions which arose in relation to this provision was as to how far it would apply to a decree which incorporates matters which are outside the scope of the suit. The argument which used to be advanced in this connection was substantially this—that the Court is under no obligation to record a compromise and pass a decree with regard to matters which are extraneous to the suit and if such matters are embodied in the decree, the decree to that extent is without jurisdiction and is not protected by sub s. (2), cl. (*vi*): See *Gurdeo Singh* v. *Chandrika Singh* (1). It has, however, been held by the Privy Council in *Pranal Anni* v. *Lakshmi Anni* (2) and *Hemanta Kumari Debi* v. *Midnapur Zamindary Co., Ltd*, (3), that

(1) 1 Ind. Cas 913; 36 C. 193; 5 C. L. J. 611.

(2) 22 M. 508; 26 I. A. 101; 1 Bom. L. R. 394; 3 C. W. N. 485; 9 M. L J. 147; 7 Sar. 516 (P. C.).

(3) 53 Ind. Cas 534; 47 C. 485; 37 M. L. J. 525; 17 A. L J. 1117; 24 C. W N. 177; (1920) M. W. N. 66; 27 M. L. T. 42; 11 L. W. 301; 46 I. A. 240; 31 C. L. J. 298; 22 Bom. L. R. 488 (P. C.).

even if the compromise goes beyond the property in suit, it will not, if embodied in the decree, require registration and the term "decree" as used in cl. (*vi*) ought to receive a liberal construction. Thus the effect of these decisions and a number of other decisions is that so far as the compromise decree relates to properties within the scope of the suit, it operates as *res judicata*, but so far as it relates to properties outside the scope of the suit, such a decree, if the terms of the compromise are embodied in the decree, is evidence of the terms embodied therein. In either case it is not necessary to register such a compromise petition or the decree.

The second difficulty in construing sub-s. (2) of s. 17, cl. (*vi*) arises in consequence of the fact that it refers only to cls. (*b*) and (*c*) and not to cls. (*a*), (*d*) and (*e*). Ordinarily construed this clause would mean that a decree or an order of a Court embodying the terms of an instrument coming under s. 17, cls. (*b*) and (*c*) is exempted from registration, but if it embodies the terms of an instrument which comes, for example, under cl. (*a*) or (*d*), that is to say, if it amounts to a gift or a lease, it will not be exempted from registration. In some cases, however, it was actually suggested, if not decided, that even if a decree purports to create a lease, it would be admissible in evidence though not registered. Whatever doubts and difficulties may have surrounded the interpretation of the sub-section before have been set at rest now by the decision of the Judicial Committee in *Hemanta Kumari Debi* v. *Midnapur Zemindari Co., Ltd.*, (3) and a number of other decisions which have followed it. In *Hemanta Kumari Debi's case* (3) the parties to the suit having compromised it presented a petition to the Court in which one of the terms was that Hemanta Kumari (the plaintiff in that suit) had agreed that if she succeeded in another suit which she had brought to recover certain land other than that to which the compromised suit related, she would grant to Watson & Co., a lease of that land upon specified terms and prayed for a decree in terms of the compromise. A decree was thereupon passed by the Court and the petition was recited in full in the decree. Hemanta Kumari succeeded in the suit which she had brought to recover the other land, but she refused to grant a lease of the land to the assignees of Watson & Co. The latter, therefore, brought a suit against Hemanta Kumari for specific performance of the agreement of the lease comprised in the petition of compromise and incorporated in the consent decree. The High Court of Calcutta decreed specific performance. One of the questions which arose before the Judicial Committee was whether the petition of compromise which contained the agreement of which specific performance was sought required registration. Lord Buckmaster in delivering the judgment of the Judicial Committee on this point observed as follows—

"If the document in question can be regarded as a lease within the meaning of this definition, it could not be received in evidence. Their Lordships are of opinion that it cannot be so regarded. "An agreement for a lease," which a lease is by the Statute declared to include, must in their Lordships' opinion be a document which effects an actual demise and operates as a lease.....The present agreement is an agreement that upon the happening of a continent event at a date which was indeterminate and having regard to the slow progress of Indian litigation, might be far distant, a lease would be granted. Until the happening of that event it was impossible to determine whether there would be any lease or not. Such an agreement does not, in their Lordships' opinion satisfy the meaning of the phrase "agreement for a lease".....So far, therefore, as this decision depends upon the need for registration of the document as a lease, the Registration Act places no obstacle in the respondents' way. By s. 17 (1) (*b*), however, it is also provided that other non-testamentary instruments which purport or operate to create, whether in present or in future, any right, title or interest, vested or contingent, of the value of Rs. 100 and upwards, to or in immoveable property, need registration. But this is subject to the exception provided in sub-s. (2) of s. 17 which states that "nothing in cls. (*b*) and (*c*) of sub-s. (1) applies to" among other things "any decree or order of a Court". If, therefore, the decree in the present case can be regarded as a decree within the meaning of that exception, there is nothing in the Registration Act to affect the matter."

Now, this reasoning plainly suggests that all decrees and orders are not excluded from compulsory registration but only those are excluded which partake the character of the documents mentioned in cls. (*b*) and (*c*) of sub-s. (2) and if the consent decree operated to create a lease it would in their Lordships' opinion have required registration. This is exactly how this decision was construed by the Calcutta High Court in *Rajani Kanta* v. *Raj Kumari Dasi* (4). In that case Rankin, C. J., who delivered the judgment. (Mitter, J., agreeing), dealt with the question as follows :—

"The first question, therefore, is whether the *solenama* requires registration as being a lease. There can be no doubt that the intention of it was to operate as the grant of a tenancy to take effect [at

(4) 104 Ind. Cas. 812; 31 C. W. N. 1099.

once and in my judgment there is no escape from the conclusion that it was a lease. That being so, there is no escape from the further conclusion that it is not exempt as being an order or a decree of the Court, from the requirement of registration, because that requirement is only foregone on the face of s. 17, Registration Act, in cases coming within cls. (b) and (c) sub-s. (1) s. 17. This was clearly held by the Privy Council in the judgment delivered by Lord Buckmaster in the case of *Hemanta Kumari Debi* v. *Midnapur Zamindari Co., Ltd.* (3)."

In *Sarat Chandra Das* v. *Sarajini* (5), another Division Bench of the Calcutta High Court held that the question was "now concluded by the ruling of their Lordships in *Hemanta Kumari's case* (3)". The same view has been held by the Calcutta High Court in several other cases; See *Nazar Ali* v. *Indra Kumar* (6), *Janaki Nath* v. *Mohendar Narain* (7), *Sailesh Chandra Sarkar* v. *Bireswar Chatterjee* (8). The Lahore High Court has also recently held in *Attar Chand* v. *Chandu Lal* (9), that cl. (b) of sub-s. (2) of s. 17, is not applicable to a lease. Again in *Charu Chandra Mitra* v. *Shambhu Nath Pandey* (10), a case decided by a Full Bench of this Court, Atkinson, J., after referring to the decision of the Judicial Committee in *Bindesri Naik* v. *Ganga Saran Sahu* (11), to which I shall also have to refer presently, said—

"I am aware that a more extended interpretation has been given to this decision by the learned Judges who decided the case of *Natesan Chetty* v. *Vengu Nachiar* (12). So wide is the interpretation which their Lordships attributed in that case to the decision of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu* (11), already cited that practically it would apply so as to cover the case of the grant of a lease as a matter of compromise in a judicial proceeding in a pending litigation which would apparently be within the provisions of cl. (*d*) of s. 17 of the Registration Act. *We wish it to be clearly understood for the purposes of our decision in this case that we do not consider that the decision of their Lordships of the Privy Council is wide enough to cover the case of a document constituting a lease arising out of the compromise in a judicial proceeding within the provisions* cl. (d) *of sub-s. (1) of s. 17 of the Registration Act. We think it applies to documents coming within the class of documents contemplated in cls.* (b) *and* (c) *which are protected under the provisions of cl.* (*vi*) *of sub-s. (2) of s. 17 of the Registration Act from registration*".

This view also seems to have been accepted in another decision of this Court; See *Rampadarath Singh* v. *Sohrai Koeri* (13). It appears to me therefore that it is now too late to contend that a decree even though it operates to create a lease, does not require registration under s. 17 of the Registration Act. It is true that the provision requiring a decree to be registered seems to be not so very necessary because the same results which are intended to be secured by the registration of a document may also be secured by the document being embodied as part of a decree. But the language of s. 17 as well as s. 29-A of the Registration Act shows that the framers of the Act did not intend to exclude decrees from registration and this is also clear from the amendment recently made in the Registration Act after the decision in *Hemanta Kumari's case* (3) by inserting the following words in cl. (*vi*) of sub-s (2),

"except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of a suit or proceeding".

Mr. P. R. Das, however, appearing for the appellant does not concede that the view to which I have referred is based on a correct reading of s. 17 and he relies on the decisions in *Bindesri Naik* v. *Ganga Saran Sahu* (11), *Natesan Chetty* v. *Vengu Nachiar* (12), 19 Ind. Cas. 551 [*Ambica Charan Sher Kaibarta* v. *Srinath Dutta* (14)], *Hemanta Kumari Debi* v. *Midnapur Zemindari Co*, (3), and *Charu Chandra Mitra* v. *Shambhu Nath Pandey* (10). The last two cases, as I have already shown, far from favouring Mr. Das's contention negative the view which he is trying to support; but the other three cases may be briefly dealt with. In *Bindesri Naik* v. *Ganga Saran Sahu* (11), the dispute between the parties was whether the plaintiff was entitled to recover interest on a secured loan after the date fixed for payment in the instrument of mortgage. The High Court held that by reason of various petitions of adjournment in which both parties had joined, the defendant had admitted the liability to pay *post diem* interest. The defendant, however, contended throughout that the petitions could not be relied on by the plaintiff as they were not registered in accordance with the provisions of the Registration Act. The Privy Council came

(5) 79 Ind. Cas. 257; 27 C. W. N. 897; A. I. R. 1924 Cal. 135.

(6) 118 Ind. Cas. 895; 56 C. 427; A. I. R. 1929 Cal. 462; Ind. Rul. (1929) Cal. 703.

(7) 126 Ind. Cas. 550; 57 C. 775; A. I. R. 1930 Cal. 94; Ind. Rul. (1930) Cal. 742.

(8) 126 Ind. Cas. 715; A. I. R. 1930 Cal. 559; Ind. Rul. (1930) Cal. 763.

(9) 117 Ind. Cas. 240; 10 L. 685; 11 Lah. L. J. 50; A. I. R. 1929 Lah. 291; 30 P. L. R. 112.

(10) 46 Ind. Cas. 358; 3 P. L. J. [illegible]; 1 P. L. W. 393; (1918) Pat. 193 (F. B.).

(11) 20 A. 171; 25 I. A. 9; 2 C. W. N. 129; 7 Sar. 273 (P. C.).

(12) 3 Ind. Cas. 701; 33 M. 102; 6 M. L. T. 313; 20 M. L. J. 20.

(13) 52 Ind. Cas 20; 4 P. L. J. 667; (1920) Pat. 114; 3 U. P. L. R. (Pat) 166..

(14) 19 Ind. Cas. 551.

to the conclusion on the construction of the mortgage deed itself that the interest was payable but they also added

"although in the view which their Lordships take, the question whether those proceedings can be founded on without their having been registered in terms of the Registration Act does not necessarily arise in this appeal, they think it right to add that having heard Counsel fully upon the point, they are satisfied that the provisions of s. 17 of the Act did not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or of orders made by the Court".

These observations have been explained in several cases including the Full Bench decision of this Court to which I have already referred and it is clear that as none of the documents relied on in the case with which their Lordships had to deal fell under cl. (*a*), (*d*) or (*e*) of sub-s. 2 of s 17, their Lordships had no occasion to make a pronouncement as to what the effect would have been, if any of these documents fell under any of the clauses which have not been specifically mentioned in s. 17, sub-s. (2). As to the case of *Natesan Chetty* v. *Vengu Nachiar* (12), I have already referred to the remarks of Atkinson, J , in *Charu Chandra Mitra's case* (10) that it attributes too wide an interpretation to the decision of the Privy Council in *Bindesri Naik* v. *Ganga Saran Sahu* (11) and I take it that if it was meant to be laid down in that case that a decree, even though it purports to create a lease, need not be registered, that view did not find favour with the Full Bench of this Court. The view that was put forward in that case was that sub-s. (2) is in the nature of a proviso and

"that provisos are often inserted unnecessarily excepting cases which could not otherwise fall within the enactment for the purpose of removing apprehensions and so cases which are otherwise clearly outside the scope of an enactment cannot be brought within it by any inference founded on the terms of the proviso".

I would, however, say with great respect that this reasoning assumes that the exceptions referred to under sub-s. (2) would have been, even in the absence of that sub-section, outside the scope of s. 17, sub-s. (1). Besides whatever observations were made by the learned Judges who decided that case as to the application of s. 17 to such compromise decrees as operate to create a lease, may be taken to be in the nature of mere *obiter dicta* because their Lordships themselves while dealing with the compromise in that case said

"Now we are not clear that we are bound to construe the compromise as creating a new lease so as to give an opportunity for the objection".

In any event that decision can no longer be followed after the decision of *Hemanta Kumari's case* (3).

The argument of Mr. P. R. Das which is to the effect that only cls. (*b*) and (*c*) of sub-s. (1) were mentioned in sub-s. (2) because they are comprehensive enough to include the documents which come under the other clauses which were not mentioned including cl. (*d*) may also be met on the same reasoning and it may also be pointed out that if it was intended by the Legislature to include in sub s. (2) documents falling under cls. (*a*), (*d*) and (*e*) also, it was hardly necessary to mention specifically cls. (*b*) and (*c*) and omit the other clauses. In that case it would have been sufficient to say that

"nothing in sub-s. (1) would apply to the classes of documents enumerated in sub-s. (2)."

As regards the decision of Sir Lawrence Jenkins in 19 Ind. Cas. 551 *Ambica Charan Sher Kaibarta* v. *Srinath Dutta* (14), it may be pointed out that it was based entirely on the decision in *Natesan Chetty* v. *Vengu Nachiar* (12) and besides the facts of the case not being fully stated in the report, we do not know whether the particular document referred to in that case did come under s. 17 sub-s. (1) cl. (*d*) of the Registration Act. The suit was for recovery of rent and the plaintiff's case was that the *pro forma* defendant had created a *a kaimi maurosi* interest in his favour. The *pro forma* defendant admitted this but the contesting defendant contended that the document by which the *kaimi* interest was created should have been registered. It was found that *the compromise related to the suit and its subject-matter* and it was held therefore that s. 17 of the Registration Act afforded no answer to the plaintiff's claim. Besides, even assuming that it was laid down by implication in this case that if a lease is incorporated in the decree, it does not require registration, it cannot be regarded as an authority for that proposition after the decision of *Hemanta Kumari's case* (3) and the other cases of the Calcutta High Court to which I have referred. It is true that this case was referred to with approval by Atkinson, J., in *Charu Chandra Mitra's case* (10), but I take it that it was referred to merely as supporting the proposition that even though the decree or order of the Court does not expressly incorporate *verbatim* the entire provisions of the compromise, it is within the protection provided by cl. (*vi*), sub-s. (2) s. 17 of Registration Act. It was also referred to as

one of the cases in which the decision in *Gurdeo Singh* v. *Chandrika Singh* (1), was not followed.

I will now pass on to consider the next point raised by Mr. Das, that is to say, that at least the latter part of the decree, which provides that rent will be a charge on the land, should be admitted in evidence because this statement standing by itself does not constitute a lease or come within the mischief of cl. (*d*) of sub-s. (1) of s. 17 of the Registration Act. It is pointed out on behalf of the respondents that this is after all one of the important clauses of the lease and if the decree is inadmissible in evidence because it operates to create a lease, then none of the terms of the lease can be admitted in evidence. It appears to me that this argument substantially meets Mr. Das's contention. It is, however, urged by Mr. Das that an unregistered document which is required to be registered may be used in evidence for a collateral purpose and reliance is placed on *Sarat Chandra Das* v. *Sarajini* (5), where a compromise decree was excluded on the ground that it ought to have been registered as a document incorporating the lease, but an admission made therein as to the amount of rent was used for the purpose of fixing the liability of the lessee. It is also urged by Mr. Das that the compromise having been acted upon, the terms of the compromise may be proved not by the document but by the actings of the parties. Now, I am not prepared to hold that to use the document for the purpose of proving an important clause in the lease would be using it for a collateral purpose. As to the actings of the parties, although the fact as to what is the amount of the rent payable in this case might be legitimately proved by showing that such rent has actually been paid in the past by the defendant, I do not see any evidence of conduct or any act of the parties which would prove that the parties had acutally made rent a charge on the property.

It appears to me, therefore, that the Subordinate Judge was right in holding that the terms of the compromise even though embodied in the decree were not admissible in evidence and that being so, the plaintiff is not entitled to recover more than three years' rent or compensation for the occupation of the land which was admittedly in possession of the defendant.

The appeal therefore fails and is dismissed with costs.

Macpherson, J.—I agree.

B. L. *Appeal dismissed.*

PATNA HIGH COURT.

Criminal Revision No. 161 of 1931.

May 2, 1931.

WORT, J.

BINDESHWAR PRASAD—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Prevention of Cruelty to Animals Act (XI of 1890), s. 6—Offence by servant—Liability of owner—'Permits', 'employs,' meanings of—Criminal Procedure Code (Act V of 1898), s. 190 (c)—Charge against servant—Power to issue process against master also.

The word "permits" in s 6, Prevention of Cruelty to Animals Act does not involve any conscious act on the part of the person who is held to be liable under the section. The fact that the accused was absent and ignorant of the use of the animal by his servant, is, therefore, no defence to a charge under s. 6. [p. 60, col. 1.]

Where an animal is the property of the accused and is employed in the work of the accused it is nonetheless employed by the accused by reason of the fact that the accused employs a driver to drive the animal. [p. 60, col. 2.]

Where a complaint is made against a bullock-driver it is open to the Court to take cognizance of the offence against the owner of the animal also under s. 190 (*c*), Criminal Procedure Code. *Charu Chandra Das* v. *Narendra Krishna Chakravarty* (1), followed. [p. 60, col. 1.]

Criminal Revision from an order of the Sub Divisional Magistrate, Barh, dated the 15th December, 1930, an application against which was rejected by the order of the Sessions Judge, Patna, dated the 26th January, 1931.

Mr. *Baldeva Sahay*, for the Petitioner.

Judgment—This Rule is directed against the order of the learned Sessions Judge upolding the conviction of the petitioner under s. 6 of the Prevention of Cruelty to Animals Act, being Act XI of 1890.

It is stated as one of the points in the case that the original complaint was filed against the employee of the petitioner, that is to say, the bullock driver and not against the petitioner, and that when the Magistrate issued a summons against the petitioner, who was not named in the complaint, the trial was without jurisdiction. In my judgment that argument cannot be supported. In the case of *Charu Chandra Das* v. *Narendra Krishna Chakravarti* (1) the same question came up for disposal by a Divisional Bench of the Calcutta High Court, and in the course of the judgment it is stated that "it appears to us that this is not a matter in which the Magistrate acted without jurisdiction. The matter was before him on the complaint made against another person and as the evidence disclosed the fact which has been found by the Magistrate that the petitioner was concerned in that offence, process was

(1) 4 C. W. N. 367

issued against him. It seems to us that the Magistrate was competent to act in this manner and that he was not barred, as stated in the petition made to this Court on which the rule was granted, by reason of s. 190 (c), Criminal Procedure Code."

in other words, the Magistrate acted under s. 190 (c): and the Court goes on to hold that the trial was not without jurisdiction. It is to be noted that the statement to which I have referred was this. In the evidence it was disclosed that another person was concerned in the matter. That is really the substantial point in this case whether another person was concerned in the matter: in other words, whether the petitioner, who was the master was concerned. The argument is based on the fact, which I, do not think is disputed, that the master who was the owner of this bullock, was away at Barh at the time, and it is stated, therefore, that he had no knowledge of the fact that the bullock-driver was using a sick bullock in a bullock cart. Section 6 of the Prevention of Cruelty to Animals Act provides:

"If any person employs in any work or labour any animal which by reason of any disease, infirmity, etc., he shall be guilty of an offence under the Act."

The second part of that section says:

"or permits any such unfit animal in his possession or under his control to be so employed."

The argument addressed to me by the learned Advocate who appears on behalf of the petitioner is that the use of the word "permits" in that section connotes some conscious act on the part of the petitioner and that in the circumstances at any rate the petitioner being absent and being ignorant of the use of this bullock, it cannot be said that he permitted the use of this bullock. The learned Sessions Judge points out that the expression used in the Act is "permits such use" and not "knowingly permits such use". In the first place it is obvious that on fundamental principles of the criminal law, apart from Statute, a person canont be convicted of a crime of another unless the evidence is such as to prove that he abetted or instigated the crime. But it is to be remembered that in this case we have to construe the Statute and it is upon the construction of that Statute and not upon the general principles of the criminal law that this matter is to be determined, I am inclined to agree with the learned Sessions Judge that the expression "permits" does not involve any conscious act on the part of the person who is held to be liable under the section. But it is not for that reason only I would uphold the conviction. The Act says:

"If any person employs in any work or labour any animal."

There is no doubt in this case that the bullock was the property of the petitioner and that it was employed in the work of the petitioner; it is nonetheless employed by the petitioner by reason of the fact that the petitioner employs a bullock-driver to drive this bullock or other bullocks. It seems to me, therefore, that the section aims not only at the liability of a person actually in charge of the animal but also aims at the person who owns it: in other words, he cannot shelve his responsibility by pleading ignorance of the fact. In my judgment this petitioner employed the bullock within the meaning of s. 6, and, therefore, the conviction was right. The Rule is discharged.

A *Rule discharged.*

PATNA HIGH COURT.

Criminal Revision No. 10 of 1931.

April 20, 1931.

MACPHERSON AND DHAVLE, JJ.

GOPI MAHTO—PETITIONER

versus

EMPEROR—OPPOSITE RALTY.

Criminal Procedure Code (Act V of 1898), ss. 103, 165—Penal Code (Act XLV of 1860), ss. 52, 99, 352—Search by Police Officer—Inhabitants of the locality not called—Legality of search—Omission to comply with s. 165 (1) (5)—Resistance to search—Conviction under s. 352—Legality of.

Where a Police Officer, in view of the attitude of the men who had assembled on the scene did not serve upon them or upon any other person of the *basti* a notice under s. 103, Criminal Procedure Code, asking them to witness the search but asked two other respectable persons who had come with him from another village to act as search witnesses:

Held, that the failure of the Police Officer in the circumstances to secure search witnesses from the locality was no more than an irregularity and did not by itself entitle the accused to resist the search. In s. 103 the emphasis is on 'respectable' not on 'locality.' *Emperor* v. *Sit Nyein* (1), followed. [p. 62, col. 1.]

Where a Police Officer did not comply with the requirements of s. 165, Criminal Procedure Code, in the matter of making a record and sending a copy to the Magistrate and there was no ground for holding that there was anything to prevent him from complying with the requirements in question and the accused pushed the Police Officer back to prevent him from making the search:

Held, that the Police Officer was not acting in good faith within the meaning of s. 52, Penal Code, and the accused were not guilty of an offence under s. 352, Penal Code. [p. 61, col. 1.]

Macpherson, J.—Failure on the part of a Police Officer to comply with s. 165 (5) is not a ground for holding that the search was made without due care and attention: [p. 63, col. 1.]

Quære:—Whether failure to comply with s. 165 (1) would give room for such a finding. [*ibid.*]

Criminal Revision from an order of the Additional Sessions Judge, Patna, dated the 3rd November, 1930, affirming that of the Sub-Divisional Officer, Dinapore, dated the 26th September, 1930.

Mr. *Yunus*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

Dhavle, J.—The three petitioners were convicted by the Sub-Divisional Magistrate of an offence under s. 353 of the Indian Penal Code and sentenced each to a fine of Rs. 100 with six months' rigorous imprisonment in default. The Magistrate also found two of the petitioners, Gopi and Mahabir, guilty of an offence under s. 341 of the Indian Penal Code, but considered it unnecessary to pass a separate sentence under this section. On appeal the Additional Sessions Judge of Patna altered the conviction of the three petitioners under s. 353 to one under s. 352 but maintained the sentence. He also upheld the conviction of Gopi and Mahabir under s. 341.

James, J., who admitted the revisional application, also directed a notice to issue on Gopi and Mahabir to shew cause why sentence should not be pronounced against them under s. 341 as no sentence was imposed under this section by the trial Court. In doing so he observed that any imposition of sentence that may be made by the High Court would amount to an enhancement and that a notice was, therefore, necessary.

The facts are that the Sub-Inspector of Police Station Maner was making an investigation into a case of theft of a bicycle and during the investigation received information that the stolen bicycle was concealed in the house of the petitioner Avadh Kurmi of village Musepur or Musapur. He proceeded at once to the house of Avadh and demanded the bicycle, and on receiving a refusal from the three petitioners who were all there, asked two of his companions, Baldeo Misser (the man who had given the information) and Deosaran, to act as search witnesses, and intimated to the petitioners that he would search the house. The petitioners told the Sub-Inspector not to enter the house and when he insisted upon entering it, they pushed him back along with a constable who was with him. The Sub-Inspector had previously to this posted his men round the house, and upon being pushed back he asked Jumai Gope, a *chaukidar*, to run to the *thana* for help. The petitioner Avadh then went inside, took a bicycle and went away with it by the door where Jumai had been posted. The Sub-Inspector and the constable ran to arrest Avadh but were prevented by Gopi and Mahabir from going in that direction.

The only point urged in support of the application in revision is that the search which the Sub-Inspector proposed to make was illegal, and that the petitioners were, therefore, entitled to resist it and committed no offence even under s. 352 of the Indian Penal Code in pushing the Sub-Inspector and his constable back. The grounds on which it is contended that the search was illegal are the failure of the Sub-Inspector to call two respectable "inhabitants of the locality," under s. 103 of the Code of Criminal Procedure, to witness the search, and his failure to comply with the requirements of s. 165 of the Code of Criminal Procedure in the matter of recording in writing the grounds of his belief that anything necessary for the purposes of his investigation would be found in the house and that such thing could not in his opinion be otherwise obtained without undue delay, and specifying in such writing the thing for which the search was to be made, and also in the matter of sending a copy of such record forthwith to the nearest Magistrate empowered to take cognizance of the offence. The Sub-Inspector has explained that in view of the attitude of the men who had assembled on the scene, he did not consider it worthwhile to serve upon them or upon any other persons of the *busti* a notice under s. 103, asking them to witness the search, but asked Baldeo and Deosaran to act as search witnesses. Baldeo and Deosaran are both men of Balua and had come with the Sub-Inspector to Musapur from that village. A reference to the survey map of the *thana* shows that Balua is at least four miles from Musapur and is separated from it by two or three villages. It is plain, therefore, that Baldeo and Deosaran cannot be said to be "inhabitants of the locality." The lower Courts have held that having regard to the attitude of the local inhabitants, the Sub-Inspector "did the only thing which was possible in those circumstances" and that there was "sufficient compliance with the law as enacted in s. 103 of the Code of Criminal Procedure." The Additional Sessions Judge has further observed that the gist of s. 103 is that there must be respectable search winesses; and this observation is supported by the opinion of

Twomey, J., in 8 Ind. Cas. 988 [*Emperor* v. *Sit Nyein* (1), that the stress is on the word "respectable" and not on the word "locality." The respectability of the men from Balua has not been challenged. In my opinion the failure or inability of the Sub-Inspector in the circumstances to secure search witnesses from the locality was no more than an irregularity and would not by itself have entitled the petitioners to resist the search if the Sub Inspector's action had otherwise come within the first paragraph of s. 99 of the Indian Penal Code. As to the failure of the Sub-Inspector to comply with the requirements of s. 165 in the matter of making a record and sending a copy of it to the Magistrate, the Additional Sessions Judge has held that the procedure of the Sub-Inspector not being strictly legal, the petitioners were not guilty of an offence under s. 353, being an offence committed against a public servant as such, but that they were guilty under the general law, namely, on the facts proved, guilty of an offence under s. 352, in that they pushed the Sub-Inspector otherwise than on grave and sudden provocation. The petitioners would certainly be guilty of this offence unless they were entitled in the circumstances to push the Sub-Inspector back in order to prevent him from searching Avadh's house. If the Sub-Inspector had proceeded strictly according to law, the petitioners would have had no right whatsoever to resist him. Now para. (1) of s. 99 of the Indian Penal Code, to which I have already referred, leaves private persons without any right of private defence against any act of a public servant which may not be strictly justifiable by law, provided it does not reasonably cause the apprehension of death or grievous hurt, and is done, or attempted to be done, by the public servant acting in good faith under colour of his office. The proposed house search could not have reasonably caused any apprehension of death or grievous hurt, and it was a Sub-Inspector of Police under colour of his office that proposed to make the search. The question then is whether the Sub Inspector can be said to have acted in good faith on the occasion: if so, the petitioners were not entitled to resist him at all, but if otherwise, they were within their rights in keeping him out, and it is not alleged that they used more violence than was necessary to prevent him from conducting a search which was not strictly in accordance with the law. The learned Additional Sessions Judge has at one place in his judgment remarked that the Sub-Inspector was actuated by good faith; but I take the remark to mean no more than that the Sub-Inspector honestly believed the information that had reached him about the bicycle being concealed in Avadh's house. Such an honest belief was, however, not sufficient to bring the Sub-Inspector within the protection of the first paragraph of s. 99; for having regard to s 52 of the Indian Penal Code, it was necessary for him, if he was to make the search "in good faith," to proceed with due care and attention. The search was to be made under s. 165, a section which authorised him to do so.

"after recording in writing the grounds of his belief and specifying in such writing .... the thing for which the search is to be made."

and which required a copy of the record to be sent forthwith to the nearest Magistrate. The learned Additional Sessions Judge has found that none of these preliminaries to a legal search was complied with, and he has not found that the failure of the Sub-Inspector in this regard occurred in spite of "due care and attention". The evidence of the Sub-Inspector gives no ground for holding that there was anything to prevent him from complying with the requirements in question; indeed his case was that he had complied with them, but this was not accepted by the Additional Sessions Judge.

In the view that I have taken it is unnecessary to discuss *Lal Mea* v. *Emperor* (2) and *Emperor* v. *Param Sukh* (3) which were cited on behalf of the petitioners. The Assistant Government-Advocate has cited 71 Ind. Cas. 503, [*Gokal* v. *Emperor* (4)], but that was a case where the constables who had arrested a woman on a defective warrant were clearly acting in good faith so that it was not open to the woman's friends to assault them. In view of the Sub-Inspector's unexplained failure to comply with the requirements of s. 165 as found by the learned Sessions Judge, and especially of the failure to comply with the requirements of cl. (1) of that section, I find it difficult to hold that he was acting in good faith, within the meaning of s 52 of the Indian Penal Code, and the petitioners were, it seems to me,

(1) 8 Ind. Cas. 988; 3 Bur. L. T. 143; 11 Cr. L. J. 746.

(2) 93 Ind. Cas. 1038; 43 C. L. J. 184; 27 Cr. L. J. 542; A. I. R. 1926 Cal. 663.

(3) 91 Ind. Cas. 43; 23 A. L. J. 1037; L. R. 6 A. 173 Cr.; 27 Cr. L. J. 11; A. I. R. 1926 All. 147.

(4) 71 Ind. Cas. 503; 20 A. L. J. 921; A. I. R. 1923 All. 87; 24 Cr. L. J. 151; 45 A. 142.

justified in pushing him and his constable back in order to prevent a search which was not strictly in accordance with the law. I would, therefore, reverse the conviction and with it the sentence passed on the petitioners under s 352 of the Indian Penal Code.

As a matter of fact the charge that led to this conviction was in these terms:

"That you on or about the 12th day of April, 1930, at Musapur, police-station Maner, used criminal force to Sub-Inspector J. N. Misser and constable Suraj Singh with intent to prevent them from discharging their duty as public servants and thereby committed an offence punishable under s. 353.....

This is really wide enough to cover the action of Gopi and Mahabir in preventing the Sub-Inspector and the constable from catching and arresting Avadh when he was going away with the bicycle. There is force, however, in the contention of the learned Counsel for the petitioners that the charge under s. 353 was taken by all concerned to be confined to the act of pushing the Sub-Inspector and the constable and that the obstruction offered to them later on when Avadh was going away with the bicycle formed the subject of the charge under s. 341 of the Indian Penal Code. The lower Courts have found an offence under this section brought home to Gopi and Mahabir. In showing cause why sentence should not be pronounced against them under this section, learned Counsel has found it impossible on the facts found to challenge the conviction, but he has laid stress on the fact that the trying Magistrate, who knew all the circumstances, considered a separate sentence unnecessary. The offence was, however, not by any means venial. The Sub-Inspector of the *thana* was making an investigation into the theft of a bicycle and was acting under colour of his office in proposing to search the house for that article. It was fortunate for these petitioners and for their relative Avadh that the Sub-Inspector's procedure was marked by irregularities; they could have had no knowledge of this, but in their defence they were entitled to rely on it. When, however, it came to Avadh escaping with the bicycle and the Sub-Inspector and the constable going after him to arrest him—arrest him under s. 54 of the Code of Criminal Procedure—Gopi and Mahabir acted lawlessly and without any technical excuse to be subsequently found for them. Gopi is the father and Mahabir some kind of uncle of Avadh but their offence really comes under a much graver section, *viz.* s. 353 though fortunately for them they were only charged under s. 341 for this act, and they are naturally not prepared to face a retrial. Having regard to Gopi's age, however, I would sentence him under s. 341 of the Indian Penal Code not to any substantive imprisonment but to a fine of Rs. 200, with one week's simple imprisonment in default, and I would sentence Mahabir under the same section to one month's simple imprisonment and a fine of Rs. 100 with one week's simple imprisonment in default.

Avadh who has been acquitted will be entitled to the refund of any part of the fine that he may have paid.

Macpherson, J.—I agree to the order proposed.

I am inclined to hold that the conviction under s. 353 is good at least against Gopi and Mahabir because of their obstruction to the arrest of Avadh. But as it is true that the Court below dealt vaguely with this part of the case it is not necessary to press the point, especially in view of the sentence proposed which is adequate punishment for these petitioners. On the question of law I prefer not to express a final opinion as to whether failure on the part of the Sub-Inspector to comply with s. 165 (1) of the Code of Criminal Procedure would give room for a finding that the search was "without due care and attention". But I am satisfied that failure on his part to comply with s. 165 (5) would afford no ground for such a finding

A. *Order modified.*

PATNA HIGH COURT.

Miscellaneous Judicial Case No. 39 of 1930.

May 20, 1931.

COURTNEY-TERRELL, C. J., AND DHAVLE, J.

SACHINDRA MOHAN GHOSH

versus

COMMISSIONER OF INCOME-TAX, BIHAR AND ORISSA.

Income Tax Act (XI of 1922), s. 12 (2)—Allowances—Salary of Receiver of property partly assessable and partly not—Portion of salary incurred in respect of assessable property, whether allowable as deduction.

Where a Receiver was appointed to manage the property of an estate consisting of assessable income in the shape of mining royalties and agricultural income which was not assessable to income-tax:

Held, that s. 12 (2) of the Income Tax Act did not require that the whole of the salary of the Receiver should be incurred solely for earning the income before any part of it could be deducted in calculating

the assessable income and that, therefore, the portion of the Receiver's salary which was incurred for the making or earning of the royalty income could be deducted as expenditure under s. 12 (2).

Messrs. *K. P. Jayaswal* and *N. N. Roy*, for the Assessee.

Mr. *C. M. Agarwala*, for the Commissioner of Income-Tax.

Courtney-Terrell, C. J.—The facts which have given rise to the present reference may be simply stated. The assessee is the Receiver and manager appointed by the High Court of Calcutta to take charge of and manage the property known as the Jheria Raj estate. He was appointed in proceedings in which the widows of the late proprietor sued the present proprietor and he was appointed at a salary of Rs. 1,000 a month. The property of the Raj consists to the extent of an annual income of about 6 lakhs, of mining royalties and to the extent of about Rs. 60,000 of agricultural income which, of course, is not taxable under the Indian Income Tax Act. The assessee claimed under s. 12 (2) of the Act to deduct his salary as an allowance for expenditure incurred solely for the purpose of making or earning the income of the estate. The Income-tax Officer allowed as a deduction one-half of the salary. The matter went on appeal before the Assistant Commissioner and he disallowed the salary altogether as a deduction on the ground, as stated by him, that the purpose of the appointment of the Receiver was merely that he might look after the interests of the parties to the litigation and that he was not appointed for the purpose of earning the income of the estate. This view of the matter has been upheld by the Commissioner on appeal and the case reaches us for final decision.

First, it may be said that so far as the assessee's position as a manager is concerned the mere fact that he was appointed by the Court by reason of litigation to my mind makes no difference at all. He is in exactly the same position as though he were a manager appointed on behalf of a minor or a sick person who could not personally manage the estate and was forced to have somebody appointed for that purpose. His functions are twofold. He has to manage that part of the estate of which the income is not assessable, that is to say, the agricultural part of the estate, and he also has to manage that part of the estate of which the income is taxable, that is to say, the property which produces the mining royalties. Sub-s. (2) of s. 12 of the Income-Tax Act is as follows:—

"Such income, profits and gains shall be computed after making allowance for any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of making or earning such income, profits or gains, provided that no allowance shall be made on account of any personal expenses of the assessee"

Now it is contended on behalf of the Department that the true construction of this section is that if any part of the salary paid to the manager is to be attributed to some function other than that of making or earning of the taxable income no part of the aggregate salary may be split off and treated as attributable to the making or earning of the income. But in my opinion sub-s. (2) does not require that the whole of the Receiver's salary should be incurred solely for the purpose of earning income before any part of it can be deducted even if such part may represent no more than the Receiver's services in earning the income. The most cogent illustration of the position was that, I think, offered in the course of the argument by my brother Dhavle who put the case in this way:—Suppose that there had formerly been two managers one to manage the agricultural part of the estate and the other to manage the royalty part and suppose the former was paid Rs. 200 a month and the latter Rs. 800 a month. In such circumstances it could not be doubted that the salary paid at the rate of Rs. 800 a month could be deducted as being incurred solely for the purpose of making or earning the royalty income. But if it was found as a matter of convenience better to appoint a single manager at Rs. 1,000 a month to carry on both such functions, if that course were taken, could it be argued that no part of the salary of such a manager could be attributed to the earning of the royalty income? In my opinion the answer to the question propounded, that is to say, is any portion of the salary of the Receiver allowable as expenditure under sub s. (2) of s. 12 should be in the affirmative. We are not called upon to state what the proportion attributable to the tax-paying part of the estate is or what amount should be deducted. That will be for the proper tribunal when the question arises. The assessee having succeeded in his contention should, in my opinion receive Rs. 200 as his costs.

Dhavle, J.—I agree.

A. *Order accordingly*

ALLAHABAD HIGH COURT.

Reference No. 226 of 1931.
September 3, 1931.
Sulaiman, J.

EMPEROR—APPLICANT
versus
HARIHAR KALWAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 117, 118—Security for keeping peace—Nature of surety required—Direction to produce 'surety in moveable property', legality of.

In making an order under s 117, Criminal Procedure Code, calling upon a person to give security for keeping the peace there should be no restriction in the order itself that the accused should produce sureties in moveable property. So far as the order goes the Magistrate should follow the words of s. 117 and the bond executed by the sureties should be in the form given in the schedule. [p. 66, col. 2]

Obiter.—If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may, by way of precaution, accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties. [*ibid.*]

Reference submitted by the Sessions Judge, Benares, as per his letter No. 61-III, dated the 25th March, 1931.

The Assistant Government Advocate, for the Crown.

Order—On the 15th of February, 1931, the Magistrate issued an order under s. 117 (3), Criminal Procedure Code, against Hari Har accused to execute a personal bond in Rs. 1,000, with two sureties in like amounts, each in cash, for keeping the peace until the conclusion of the enquiry.

The Sessions Judge modified the order on the 24th of February, 1931, and ordered his release on his executing a bond for Rs. 1,000, with two sureties in like amounts to the satisfaction of the Court concerned. The accused, however, was not released, because he was involved in another offence. When the District Magistrate was moved he pointed out that the Sessions Judge had no power to interfere with the order under s. 107 read with s. 117 (3), Criminal Procedure Code but might have reported to the High Court. When the matter came up again before the Sessions Judge, he had admitted that he had mistaken the order to be an order of bail and had wrongly amended it. He passed a fresh order on the 12th of March, that unless the original order was amended by the Magistrate in the light of the observations contained in his order dated the 24th of February, 1931, the record be submitted to the High Court with the recommendation that the words "in cash" be deleted. On receipt of this direction, the Magistrate on the 19th of March, amended his previous order and substituted "two reliable sureties in moveable properties" instead of "two cash sureties." The Magistrate this time used the word "Securities" without carefully reading his previous order which had said "sureties". Then on the 21st of March the Sessions Judge again expressed an opinion that "a surety in cash" had no meaning at all. He directed the record to be submitted to the High Court, and asked for the explanation of the Magistrate. The Sessions Judge gave his reasons for holding that it is not open to a Magistrate to direct that the property which is offered as security by the sureties be of a particular nature. The Magistrate submitted his explanation and the District Magistrate added a supplementary explanation stressing that the Magistrate was not bound to accept security of immoveable property, which would cause considerable difficulty in realisation in case of forfeiture. After this, the Sessions Judge passed a fresh order on the 25th of March, 1931, submitting the record to the High Court along with a copy of the previous order passed by him in the case of another accused person, dated the 7th of July, 1930, which gave fuller reasons in support of his view.

The case went backwards and forwards on so many occasions because there was a difference of opinion between the Sessions Judge and the Magistrate as to the nature of the security that can be demanded.

No reported case has been brought to my notice which would throw light on this divergence of views.

It is to be noted that both s. 117 and s. 118 refer to the execution of a bond by the accused "with or without sureties." The expression "security" is not used. The sections do not contemplate the furnishing of a registered hypothecation bond as good security. It obviously requires guarantees given by the sureties.

Section 118 applies equally to an order to give security for keeping the peace under s. 107 and for maintaining good behaviour under ss. 108, 109 and 110, Criminal Procedure Code.

In Sch. V a form is given for the execution of a bond by sureties for the accused's good behaviour. The form merely requires a written undertaking given by the sureties that in case of the accused making default, they bind themselves jointly and severally to forfeit to His Majesty a particular sum of money. It does not go on to add that they are hypothecating any property for that sum. It seems to me that the same

form is intended for sureties for the accused's keeping the peace. It is, therefore, obvious that what the Code requires is that there should be sureties able to make good the amount. These persons should be reliable and be possessed of such status, means or property that the amount would be recovered by seizure of their properties or, if arrested, they would make good the amount.

No doubt under s. 514, Criminal Procedure Code when there is a forfeiture of the bond, the Magistrate cannot proceed by attaching and selling any immoveable property of the surety but can only seize his moveable property. But if the penalty cannot be recovered by attachment and sale of the moveable properties the person can be arrested and imprisoned. This in many cases would be just as effective to compel him to pay up, provided, of course, he has the means. It, therefore, does not follow that a person cannot be a good surety unless he is actually possessed of moveable properties sufficient to yield the amount of his bond. Indeed, moveable properties which can be easily removed or transferred may in most cases be the flimsiest security. It may equally well happen that a person is of respectability and good social status and possessed of considerable immovable property and one who can be relied upon to procure that amount in case of the accused's default, and yet he may not for the time being be in possession of moveable properties of the value of the bond. There would be no reason to reject such a person merely because some inconvenience might be felt afterwards in recovering the amount from him. It would be unfair to accused persons if any general rule or practice were laid down that no person who is not possessed of sufficient moveable properties should be accepted as a surety.

It would not be improper for a Magistrate in case of doubt to permit a surety who has signed the bond in the form mentioned above also to execute separately a registered bond hypothecating immovable property in order to satisfy the Magistrate that he is possessed of sufficient means. But neither such a registered security bond is necessary under the provisions of the Code, nor is a Magistrate bound to accept such security if offered

The Magistrate has to satisfy himself as to the means and station in life of the surety as well as his character. He has to exercise his discretion in accepting him; but that discretion must not be exercised in an arbitrary manner. The primary consideration is whether the surety is likely to fulfil the undertaking given by him.

The amended order of the Magistrate says "two reliable sureties in moveable property". Although I do not agree with all that the Sessions Judge has said, I agree with him that in the order itself there should be no restriction as regards moveable property. So far as the order goes, the Magistrate should follow the words of s. 117 and not introduce the restrictive words "in moveable property". When sureties are produced the, Magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. When they have been accepted, the bond executed by them should be in the form given in the schedule. If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may by way of precaution accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties.

I accordingly order that the words "in moveable property" after the word "sureties" in the order of the Magistrate dated the 9th of March, 1931, be deleted.

A *Order accordingly.*

ALLAHABAD HIGH COURT.

Privy Council Appeal No. 12 of 1925.
(First Civil Appeal No. 79 of 1922.)
July 6, 1931.

MUKERJI AND ALLEN, JJ.

Musammat MUNNI BIBI *alias* AMBIKA DEI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus.

TIRLOKI NATH AND OTHERS—DEFENDANTS AND ANOTHER—RESPONDENTS.

Contract Act (IX of 1872), s. 69—'A person who is interested', meaning of—Payment made in respect of certain estate—Estate going to opposite party in litigation—Right of payer to be recouped—Lien on estate.

The words 'a person who is interested' in s. 69, Contract Act, do not mean that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. All that is necessary for a person making a payment to recover it is that he should really believe and honestly believe that he must make the payment in his own interest. [p. 67, col. 2; p. 68, col. 1.]

When a proprietor in good faith pending litigation makes the necessary payments for the

preservation of the estate in dispute and the estate is afterwards adjudged to his opponent he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents. *Munni Lal* v. *Tirloki Nath* (1), followed. *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (2), *Tulsha Kunwar* v. *Jageshar Prasad* (3), *Khushal Singh* v. *Khawani Lal* (4), *Bindubashinee Dassee* v. *Harendra Lal Roy* (5), *Radha Madhub* v. *Sasti Ram* (6), *Janki Prasad* v. *Baldeo Prasad* (7) and *Khudho* v. *Durga Prasad* (8), referred to. [p. 68, col. 1.]

A person who makes a payment on account of another in respect of an immoveable property does not acquire a lien or charge on the property so saved, by way of a salvage lien. *Chedi Lal* v. *Bhagwan Das* (9) and *Chitor Mal* v. *Shib Lal* (10), followed. [p. 68, col. 1.]

Messrs. *B. Malik* and *G. Agarwala*, for the Appellants.

Messrs. *N. P. Asthana* and *S. N. Seth*, for the Respondents.

Judgment—The present proceedings arise out of First Appeal No. 79 of 1922 of this Court from the decree in which an appeal was filed before their Lordships of the Privy Council as Privy Council Appeal No. 12 of 1925. Their Lordships of the Privy Council decided the appeal, reversed the judgment of this Court but left one point to be determined by this Court and that point is, whether in the circumstances of the case, the plaintiffs cannot recover possession of the property decreed to them except on payment of a sum of Rs. 7,200 and interest thereon or any other sum?

The judgment has been reported in the local law journal (1931) A.L.J. 453 [*Munni Lal* v. *Tirloki Nath* (1)] and is of course also on the record. The facts are given there and we shall not state them in detail again.

Two questions have been argued before us. The first is whether the claim on behalf of the descendants of Gokul Nath comes within the purview of s. 69 of the Indian Contract Act? and secondly, if it does, whether the defendants can insist on being paid as a condition precedent to the plaintiffs getting possession?

On the first point we do not feel any difficulty in holding in favour of the defendants. Section 69 of the Indian Contract Act runs as follows:—

"A person who is interested in the payment of money which another is bound by law to pay and who therefore, pays it, is entitled to be reimbursed by the other."

In the litigation that took place at the instance of Narain Singh and which ended with the decree in his favour in this Court on 18th January, 1912, (page 292) there can be no doubt that the title of Gokul Nath's mother Kashi Dei was entirely negatived. There were two judgments and each party relied on one of them. For the defendants it was argued that the judgment of 18th April, 1895, (page 221) operated as *res judicata* against the plaintiffs and on behalf of the plaintiffs it was contended that the judgment of 18th January, 1912, (page 292) operated as *res judicata*. The Court of first instance held that the later judgment operated as *res judicata* This Court held that the earlier judgment operated as *res judicata* and their Lordships of the Privy Council held that the first Court was right.

There can be no doubt that it was a difficult proposition of law to decide, *viz.*, whether in spite of the decree given to Narain Singh, the question of title was or not open as between the defendants?

This Court thought that the judgment in Narain Singh's favour, although it allowed Narain Singh to sell the property in suit as the property of Amar Nath, left the question of title open as between the heir of Amar Nath and the heirs of Kashi Dei and her son Gokul Nath. In their judgment which was reversed by their Lordships of the Privy Council, the learned Judges held that the payment by Gokul Nath was a payment made in good faith and in the belief that his title to the house was a good one (see page 97 of the printed record) It is impossible to believe that Gokul Nath would go and raise money on the security of his own property, besides the property in suit, and pay the large sum of Rs. 7,200 to Narain Singh, if he had not believed that the judgment obtained by Narain Singh did not settle the question of title as between himself and Amar Nath's heirs.

That being the case, the question is whether Gokul Nath acted as a person interested in payment within the meaning of s. 69 of the Indian Contract Act?

There are numerous cases including a a decision of their Lordships of the Privy Council in which it has been held, in effect, that the words "a person who is interested" do not mean that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. The decisions point to the conclusion that all that is necessary for a person making a payment to recover it is that he should really believe and honestly believe that he must make the

(1) 132 Ind. Cas. 598; (1931) A. L. J. 453; A. I. R. 1931 P. C. 114; 35 C. W. N. 661; 53 C. L. J. 552; 33 Bom. L. R. 979; 53 A. 103; Ind. Rul. (1931) P. C. 182; (1931) M. W. N. 742; 61 M. L. J. 196; 34 L. W. 459; 58 I. A. 158 (P. C.).

payment in his own interest. If we accept this interpretation, we should have no hesitation in holding that Gokul Nath came within the rule of law.

In the case of *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (2) the plaintiff paid the money when he had a decree in his favour, which decree was subsequently reversed in appeal At page 148 * of the report their Lordships of the Privy Council are reported to have said:

"Now, it seems to their Lordships to be common justice that when a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute, and the estate is afterwards adjudged to his opponent, he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own, to reimburse himself out of the rents."

It has been argued that this case does not apply because Gokul Nath had the judgment of this Court dated 18th January, 1912, before him and as a sane person should have seen that the judgment took away any vestige of title that might have otherwise remained in him. We have however already met this point and have shown that in spite of this judgment Gokul Nath had occasion to believe and did believe that the judgment was not conclusive as between the defendants and that the earlier judgment yet stood in his favour.

Several other cases, *viz.*, *Tulsha Kunwar* v. *Jageshar Prasad* (3), *Khushal Singh* v. *Khawani Lal* (4), *Bindubashinee Dassee* v. *Harendra Lal Roy* (5) and *Radha Madhub* v. *Sasti Ram* (6) have been cited on behalf of the defendants.

As against these cases, the learned Counsel for the plaintiffs has cited three cases decided by this Court, *viz*, *Janki Prasad* v. *Baldeo Prasad* (7), *Khuddo* v. *Durga Prasad* (8) and *Chedi Lal* v. *Bhagwan Das* (9).

We have examined all the cases cited by either side. These cases may be divided into two lots. In one set of cases, it was found that the person who made the payment was actually interested in making the payment and did make the payments in good faith. In the other set of cases it was found, and in this set come the cases cited on behalf of the plaintiffs, that where the plaintiff knew perfectly well and had no occasion to believe otherwise, that he had no vestige of title under which he could make a payment, he could not recover.

There is no difficulty really in the law itself, but the difficulty arises in the application of it to the particular facts of a case. We are of opinion that s. 69, as interpreted by their Lordships of the Privy Council in *Dakhina Mohan Roy* v. *Saroda Mohan Roy* (2) does apply and Gokul Nath was interested in making the payment and if he had brought a suit within the period of limitation, the plaintiffs could not possibly have resisted it on the ground that they were not bound to reimburse him.

The second point raised is of some difficulty and no case has been cited on behalf of either side in support of the arguments advanced.

The argument on behalf of the defendants is that s. 69 is based on equitable principles and that no question of limitation arises when the claim is made by the defendants. On the other hand, the argument for the plaintiffs is this. Supposing that s. 69 applied, it gave only a personal remedy to Gokul Nath against the heirs of Amar Nath and there was no charge in favour of Gokul Nath on the particular property now in suit. It is further argued that there being no charge, it was open to Gokul Nath, if he had brought a suit to recover his money, to realise it by sale of any property belonging to the heirs of Amar Nath and, therefore, it cannot be said that the payment is particularly connected with the property now in suit and with no other property.

There is a difference of opinion among the High Courts of India as to whether a person, who makes a payment on account of another, in respect of an immoveable property, acquires or not a lien or charge on the property so saved, by way of a salvage lien. In this High Court the principal case is that of *Chitor Mal* v. *Shib Lal* (10) and the same view is taken in Calcutta in *Kinu Ram* v. *Mozaffar Hussain* (11). In Madras a contrary view was taken and a charge was granted and Bombay followed Madras. In Bombay however, a contrary view was taken later on and in accordance with the view of the Allahabad High Court. In England no charge is allowed (see Coote's

(2) 21 C. 142; 20 I. A. 160; 6 Sar. 366; 17 Ind. Jur. 576 (P. C.).
(3) 28 A. 563; 3 A. L. J. 372; A. W. N. (1906) 114.
(4) A. W. N. (1906) 282.
(5) 25 C. 305; 2 C. W. N. 150.
(6) 26 C. 826.
(7) 30 A. 167; A. W. N. (1908) 58; 5 A. L. J. 163.
(8) 3 A. L. J. 729.
(9) 11 A. 234; A. W. N. (1889) 67.
(10) 14 A. 273; A. W. N. (1892) 117.
(11) 14 C. 809.

* Page of 21 C.—[*Ed.*]

Law of Mortgage, 1927, page 1381). As members of the Allahabad High Court, we are bound to follow the Full Bench decision of this Court and must hold that no charge is created by the payment. That being so, it appears to us that it is not open to the defendants to say that this particular property now in suit must make good the money which Gokul Nath was entitled to recover at the hands of the heirs of Amar Nath.

We decide accordingly, and hold that the plaintiffs are entitled to a decree for possession as was granted to them by their Lordships of the Privy Council without any condition sought to be attached by the defendants. We see no reason to alter the order as to costs as made by the Subordinate Judge whose judgment was ultimately upheld by their Lordships of the Privy Council. As to further costs incurred since the case was remitted to this Court it should follow the event and, therefore, we direct that the defendants shall pay the costs of the plaintiffs of the present hearing.

R. L. *Order accordingly.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No 1160 of 1929.
April 9, 1931.

PULLAN AND NIAMAT ULLAH, JJ.

BASDEO RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAIMANGAL RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Regulation XVII of 1806—Mortgage by conditional sale—Foreclosure proceedings—Expiry of year of grace—Conditional vendee's title, nature of—Mortgage by mortgagor after expiry of year of grace—Rights conveyed by mortgagor—Mortgagor ejected—Reversion of ex-proprietary rights to zamindar—*Adverse possession by mortgagee.*

On the expiration of the year of grace, provided anything remains unpaid under the mortgage and the proceedings under the Regulation were regular, the title of the conditional vendee becomes that of an absolute vendee and the sale becomes an absolute sale on that date. No subsequent proceedings to obtain possession are necessary to establish the title of the vendee. *Ali Abbas* v. *Kalka Prasad* (3), followed. *Forbes* v. *Ameer-un-nissa* (2), distinguished. [p. 70, col. 1.]

Where the title of the conditional vendee has become absolute and the mortgagor is in possession he becomes an exproprietary tenant and a mortgage by him of the land effects a mortgage of the rights of an exproprietary tenant. [p. 70, col. 2.]

When an exproprietary tenant is ejected his rights do not escheat to the Crown but revert to the *zemindar* and the latter can redeem a mortgage by the former of rights as exproprietary tenant. *Tulsi Ram Sahu* v. *Gur Dayal Singh* (4), followed. [p. 70, col. 2.]

Possession, for however long a period, by a mortgagee can give him no title other than the title which he has acquired by the mortgage. [*ibid.*]

Second Appeal from a decision of the Subordinate Judge, Ghazipur, dated the 31st May, 1929.

Messrs. *P. L. Banerji* and *K. Verma*, for the Appellants

Dr *K. N. Katju* and Mr. *G. S. Pathak*, for the Respondents.

Judgment.—This is a plaintiffs' appeal in a suit brought for redemption of a mortgage executed by Dhondha Rai and others on the 19th of September, 1878, in favour of the predecessors in-interest of the defendants in this suit. The plaintiffs claimed to represent the mortgagors and their suit has been dismissed on appeal by the Subordinate Judge, first, on the ground that the plaintiffs had no right or title to redeem the mortgage as the legal representatives of the mortgagors, and, secondly, because the mortgagees had acquired a proprietary title by adverse possession for more than twelve years.

The plaintiffs' ancestors were the mortgagees of Dhondha Rai and others in virtue of two deeds executed on 23rd August, 1869, and the 16th of December, 1876 respectively. A notice of foreclosure was served by the mortgagees on the mortgagors in accordance with Regulation XVII of 1806 on the 23rd of August 1877 and the order of foreclosure was passed on the 2nd of October, 1877 Under Regulation XVII of 1806 a year's grace was allowed to the mortgagors for satisfaction of the mortgage amount, and that year of grace expired on the 23rd of August, 1878. The property to be foreclosed was contained in twelve villages and on the 12th of July, 1878, before the expiry of the year of grace a compromise was entered into between the mortgagees and the mortgagors by which it was agreed that if the mortgagors relinquished their expropriatary rights in 3½ villages those 3½ villages would be accepted by the mortgagees in satisfaction of their claim and the remaining 8½ villages would be released from foreclosure. This compromise, however, did not come into effect as the mortgagors did not forego their claim to expropriatary rights, and in 1880 a suit was brought by the mortgagees for possession in accordance with the order of the foreclosure. After the expiry of the year of grace on the 19th of September, 1878, Dhondha and others mortgaged seventeen *bighas* '*sir*' land

situated in the 8½ villages which would have been released from foreclosure if the compromise had taken effect to the predecessors of the present defendants. When the present suit was brought for redemption of this mortgage by the present plaintiffs they were met with the defence that as they had become absolute owners of the property by foreclosure on the expiry of the year of grace on the 23rd of August, 1878, they could not sue for redemption of a mortgage executed by the former proprietors of the land on the 19th of September, 1878, because the mortgagors had no right subsisting at the time of the mortgage and, therefore, could not be represented by the present plaintiffs who were the actual proprietors at that time.

In the Courts below the plaintiffs pleaded that they did not become absolute proprietors on the expiry of the year of grace because their title was kept in abeyance by the compromise and they should not be held to have acquired the absolute rights until the conclusion of the suit brought by them for possession in the year 1880. This suit was contested and went on appeal to the High Court whose decision is reported as *Dhondha Rai* v. *Meghu Rai* (1). This argument was supported by a reference to the decision of the Judicial Committee in *Forbes* v. *Ameerun nissa Begum* (2). But we do not consider that that judgment is an authority for the view put forward by the plaintiff-appellants. Indeed, this very argument was addressed to a Full Bench of this Court in the case of *Ali Abbas* v. *Kalka Prasad* (3) and rejected by them. The Full Bench held,

"that on the expiration of the year of grace, provided that anything remains to be paid under the mortgage and the proceedings under the Regulation were regular, all of which facts appear to have been found here, the title of the conditional vendee becomes that of an absolute vendee and the sale becomes an absolute sale on that date."

The subsequent proceedings taken to obtain possession were not necessary to establish the title of the vendees. Nor do we consider that the proposed compromise had any effect in postponing the rights of the present plaintiffs to absolute ownership. In that compromise there was a provision that if the mortgagors failed to carry out their part of the agreement the compromise would cease to operate and the foreclosure would take effect We are of opinion, therefore, that the Subordinate Judge was right when he found that on the 19th of September, 1878, the present plaintiffs, and not the mortgagors, were the owners of the property mortgaged.

But the learned Subordinate Judge went on to hold that the mortgagors were at the time of the execution of the mortgage trespassers and made the mortgage as such. In this we consider that the Subordinate Judge was wrong, and this mistake vitiates his finding. At the time of the mortgage the mortgagors had a right in the mortgaged property as exproprietors and it cannot be said that by their mortgage they conveyed no rights to the mortgagees. The mortgagees themselves were treated as being tenants, and a suit was brougut for their ejectment along with their mortgagors in the year 1903. That suit was decreed against the original mortgagors who were ejected, but the Revenue Court declined to eject the mortgagees on the ground that they were mortgagees of proprietary rights. This finding was not challenged at the time by any suit brought in the Civil Court. But that is immaterial in so far as the suit for redemption is concerned. There is nothing in the proceedings of 1903 which could give to the mortgagee any other title than that of a mortgagee, and if the present plaintiffs can be shown to have a right to redeem such a mortgage their failure to eject the mortgagees at that time operates as no bar to redemption. Indeed in our opinion, the fact that the present defendants accepted the position of mortgagees precludes them from acquiring a proprietary title by adverse possession. Possession for however long a period by a mortgagee can give him no title other than the title which he has acquired by his mortgage. The mortgage, therefore, if it can be held to have been a mortgage conveying any rights, is still in existence and can be redeemed by any persons entitled by law to redeem such a mortgage. In our opinion the mortgage was executed by persons who had an interest in the property mortgaged as ex-proprietary tenants. The right of those persons as exproprietary tenants was extinguished by their ejectment in the year 1903. But those rights did not escheat to the Crown. They reverted to the *zemindar* as was held in the case of a mortgage of a fixed-rate tenancy by a Full Bench of this Court in the case of *Tulsi Ram Sahu* v. *Gur Dyal Singh* (4). The persons in whom the

(1) 4 A. 332; A. W. N. (1882) 56.
(2) 10 M. I A. 340; 5 W. R 97; 1 Ind. Jur. (N. S.) 117; 1 Suther. 621; 2 Sar. 153 (P. C.)
(3) 14 A. 405; A. W. N. (1892) 108.
(4) 7 Ind. Cas. 231; 33 A. 111; 7 A. L. J. 1011.

exproprietary rights vested were the present plaintiffs who were the owners of the proprietary title in the mortgaged property, and, in our opinion, they have at the present time an interest in the property mortgaged which entitles them to claim redemption.

We accordingly allow this appeal with costs including in this Court Counsel's fees on the higher scale, set aside the decree of the Court below and restore the decree of the Court of first instance.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1072 of 1928.
March 18, 1931.

PULLAN AND NIAMAT ULLAH, JJ.

RAM CHARRITTER MISIR—
DEFENDANT—APPELLANT
versus
SURAJ TELI—PLAINTIFF AND ANOTHER—
RESPONDENTS

Limitation Act (IX of 1908), Sch. I, Arts. 44, 144—Suit for possession by minor on attaining majority against transferee from guardian—Limitation—Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Limitation, question of, not raised in lower Appellate Court, effect of.

A suit for possession by a minor on attaining majority against the transferee from the guardian where the latter had obtained permission from the District Judge to effect the transfer on the ground of fraud, or misrepresentation is governed by Art. 44 and not by Art. 144, Limitation Act. [p. 72, col. 2.]

A point of limitation may be re-opened in second appeal even if it was not urged in the lower Appellate Court where the facts on which it rests are not in dispute. [p. 71, col. 2; p. 72, col. 1.]

Second Appeal from a decision of the Additional Subordinate Judge, Ballia, dated the 13th April, 1928.

Messrs. *A. P. Pandey* and *S. K Nehru*, for the Appellant.

Messrs. *Haribans Sahai* and *Janaki Prasad*, for the Respondents.

Judgment.—This is a defendant's appeal and arises out of a suit brought by the plaintiff-respondent for recovery of certain property sold by his mother, who was the certificated guardian, during his minority, to the defendant-appellant.

It appears that an application was made by the guardian to the District Judge for permission to mortgage the property in dispute. The District Judge made some enquiries to satisfy himself as regards the propriety of transfer of the minor's property and directed the guardian of the minor to produce the draft of the mortgage-deed for which sanction had been applied for. At a later date the draft of a sale-deed was filed. It has been found that the District Judge was under the impression that the draft produced before him was that of the proposed mortgage deed to which his permission referred. The District Judge, it has again been found, sanctioned the draft under the impression that it related to the transaction of mortgage to which proceedings before him referred. The sale-deed was eventually executed on the 1st June, 1918, for a sum of Rs. 500. The plaintiff-respondent instituted the suit which has given rise to this appeal on the 22nd January, 1927, claiming possession and impugning the sale-deed executed by his guardian as void. It was expressly stated in the plaint that he attained majority on the 1st December, 1923, a question on which the defendant appellant joined issue. It is not necessary for us to find the exact date on which the plaintiff attained majority, as for purposes of the appeal it is enough to assume that the date given by the plaintiff is correct.

Both the Courts below have decreed the suit. The Court of first instance held that the permission of the District Judge was obtained by misrepresentation and fraud and that the plaintiff's suit was governed by 12 years' limitation provided for by Art. 144. On these findings it decreed the plaintiff's suit for possession subject to payment by him of a sum of Rs. 244, part of the consideration of the sale-deed (namely, Rs. 500) which according to that Court was warranted by legal necessity. In appeal before the lower Appellate Court the question of limitation does not seem to have been raised either in the petition of appeal or in arguments, and the learned Additional Subordinate Judge affirmed the decree passed by the Court of first instance without reference to the question of limitation.

The only point urged in second appeal is that the plaintiff's suit is, on the face of the plaint, barred by limitation. We may clear the ground by disposing of the contention put forward before us by the learned Advocate for the respondents that the plea of limitation was abandoned before the lower Appellate Court. It is true that the finding of the Court of first instance that Art. 144 of the Indian Limitation Act applied was not impugned in the grounds of appeal. The judgment of the lower Appellate Court is also silent

as to any question of limitation having been raised before it in course of the arguments. We are inclined to think that the Pleader who represented the appellant in the lower Appellate Court was of opinion that the question of limitation had been rightly decided by the Court of first instance. We are, however, of opinion that it is open to the appellant to re-agitate the question of limitation on the facts admitted by the plaintiff-respondent. If there had been any complication as regards facts on which the plea rests so that the finding of the lower Appellate Court could possibly have been in favour of the respondent, we might not have entertained the plea of limitation under the circumstances referred to; but the argument addressed to us rests on facts admitted by the plaintiff himself. The date on which, according to the plaintiff-respondent, he attained majority was the 1st December, 1923, and the suit having been initituted on the 22nd January, 1927, was barred by three years' rule, if it is applicable.

The only question is whether Art. 44 or Art. 144 of the Indian Limitation Act applies. It is argued that as permission of the District Judge was obtained by practising fraud, the transaction entered into by the guardian in pursuance of such permission is void. The contention is not, in our opinion, sound Section 30, Guardians and Wards Act, declares that the transfer made by a certificated guardian without the permission of the District Judge is voidable. If the permission of the District Judge was obtained through fraud or misrepresentation, it is certainly void, but the transaction itself is not void on that score. A permission obtained by a fraudulent misrepresentation being void is a nullity, and a transfer ostensibly made in pursuance of such permission must be considered to be one made without permission, and as such it is not voidable under s. 30, Guardians and Wards Act. In this view, there can be no doubt that Art. 44 of the Limitation Act is applicable, and the plaintiff cannot avail himself of the longer period provided for by Art. 144 for a suit for possession if his claim to have the voidable alienation made by the guardian during the plaintiff's minority set aside is barred. In the case before us, the suit having been admittedly brought more than three years from the date the plaintiff attained majority is clearly barred.

The result is that this appeal must succeed. It is accordingly allowed, and the decrees passed by the Courts below are set aside and the plaintiff's suit is dismissed. The defendant appellant is not allowed costs incurred by him in the lower Appellate Court. He will have his costs of the Court of first instance and of this Court.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Criminal Revision No. 356 of 1931.
October 7, 1931.
NIAMAT ULLAH J.

Syed HAMID HASAN AND OTHERS —APPLICANTS
versus
EMPEROR THROUGH *Hakim* SYED HUSAIN MUKHTAR— OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107—Jurisdiction to take proceedings—'Person within jurisdiction,' meaning of.

For initiating proceedings against a person under s. 107, Criminal Procedure Code, it is not necessary that that person should reside within the jurisdiction of the Magistrate; it is enough if he is within the local limits of the Magistrate's jurisdiction. But a person who resides outside the jurisdiction cannot be held to be a person within the jurisdiction merely because he is present in Court in obedience to a summons issued by the Magistrate under s. 112. [p 73, col. 2.]

Messrs. *S M Husain* and *K. Masud Hasan*, for the Applicants.

The Assistant Government Advocate, for the Crown.

Judgment—This is an application for revision of an order of the District Magistrate of Ghazipur purporting to be one on appeal from an order of the Joint Magistrate of that District passed in proceedings under s. 107, Criminal Procedure Code, pending before him against the present applicants, who are residents of Jaunpur and took objection to the jurisdiction of the Joint Magistrate taking proceedings under the aforesaid section The objection was overruled. They moved the District Magistrate who dismissed "the appeal." No appeal lay to the District Magistrate from an interlocutory order of the kind passed by the Joint Magistrate and the proceedings before the District Magistrate should be regarded as those in revision under s 435, Criminal Procedure Code and I treat them as such. The revision to this Court is in no way affected by error of procedure, if any, in moving the District Magistrate.

The proceedings under s 107, Criminal Procedure Code were initiated by an ap-

plication presented before the Joint Magistrate by one Hakim Syed Husain, a *Mukhtar* practising in the Criminal Courts at Ghazipur, complaining that the present applicants were likely to commit a breach of the peace. It appears that the parties were interested in a certain *waqf* as to which a civil suit had been instituted by the present applicants. Certain allegations made by them in the plaint were considered by Hakim Syed Husain to be defamatory. Accordingly the latter instituted criminal proceedings before a Magistrate in the Ghazipur District for prosecution of the present applicants for an offence under s. 500, Indian Penal Code. The applicants being accused in the aforesaid case, had to come from Jaunpur to Ghazipur on the dates fixed for hearing. The Hakim's application for action being taken against them under s. 107, Criminal Procedure Code, which was made during the pendency of the defamation case, alleged that the present applicants intimidated him when they came to Ghazipur for the defamation case threatening to institute some case against the complainant, presumably false, in some Court in the Jaunpur District and when he (the complainant) would go to that place for such case he would be molested. The complaint is not clearly worded and placing a construction most favourable to the complainant it amounts to an allegation that the applicants are likely to commit a breach of the peace in Ghazipur and Jaunpur and that the occasion on which a breach of the peace in Ghazipur was apprehended would be the visit of the applicants to that place for purposes of the defamation case. Assuming this allegation to be true the question is whether the Joint Magistrate of Ghazipur has jurisdiction to take proceedings under s. 107, Criminal Procedure Code, against the applicants who are residents of Jaunpur but have to visit Ghazipur for the purposes of the defamation case.

The answer to the question formulated above turns on the right interpretation of s. 107 (2), Criminal Procedure Code, which provides that no proceedings under that section can be taken unless both the person informed against and the place where the breach of the peace or disturbance is apprehended are within the local limits of the Magistrate's jurisdiction. The contention raised by the applicants is that they are not residents of Jaunpur and go to Jaunpur only for the purposes of the defamation case and the Joint Magistrate has no jurisdiction to proceed against them. Section 107 (2) makes no reference to the residence of the persons proceeded against; all that it provides is that if the such persons "are" not within the jurisdiction of the Magistrate his jurisdiction is ousted. A person may be within the limits of a Magistrate's jurisdiction and yet may not have residence within such limits. At the same time to hold that a person 'is' within the local limits of a Magistrate's jurisdiction only because he is present in Court when the Magistrate draws up his order under s. 112, Criminal Procedure Code, having appeared in obedience to a summons issued by the Magistrate, is to make the section nugatory. Section 114 of the same Code empowers the Magistrate to issue a summons to a person against whom he decided to take proceedings under s. 107, sub-s. (2) of which is imperative that "no proceedings shall be taken" unless the person informed against is within the local limits of the jurisdiction." Issuing a summons under s. 114 is part of such proceedings and it is clear that if the person informed against is not within the local limits of the Magistrate's jurisdiction when the proceedings are to be initiated he has no jurisdiction.

The record shows that the applicants were in Jaunpur when the complaint was filed and process issued. They appeared in obedience to the summons served upon them in Jaunpur when the order under s. 112, Criminal Procedure Code, was read out to them. As already stated they took objection to the jurisdiction of the Magistrate to take proceedings under s. 107, Criminal Procedure Code, against them.

In the view I take of the question involved in this revision it must succeed. It is accordingly allowed and the proceedings so far as they were taken by the Joint Magistrate are quashed.

A. *Proceedings quashed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 347 of 1929.

November 3, 1931.

MUKERJI AND NIAMATULLAH, JJ.

Musammat NANHI—DEFENDANT—APPELLANT

versus

Musammat KETKI PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55 (2)—Sale—Covenant for title—Provision that vendee may sue for refund of price—Whether excludes suit for damages on partial dispossession.

Where a sale-deed provided that if the vendee was dispossessed of the whole or any portion of the prop-

erty sold on account of defect in the vendor's title the vendee shall have a right to recover his consideration money along with damages from the property transferred or from other property of the vendor, and the vendee being dispossessed of a portion by a stranger, instituted a suit for recovery of a proportionate part of the price paid:

Held, that the covenant in the sale-deed that the vendee might recover the entire consideration amount was only an enabling provision intended for the benefit of the vendee and did not exclude the implied warranty of title contemplated by s. 55 (2), Transfer of Property Act, and the suit for a proportionate part of the price alone was maintainable. [p. 74, col. 1.]

Second Appeal from the decision of the District Judge, Farrukhabad, dated the 11th February, 1929.

Mr. *P. N. Sapru*, for the Appellant.

Messrs. *U. S. Bajpai* and *G. S. Pathak*, for the Respondent.

Judgment.—This is an appeal by the defendant and arises out of a suit brought by the plaintiff-respondent for damages for breach of a covenant, alleged to be express and in the alternative, said to be in a sale-deed dated 22nd March, 1912, executed by the defendant-appellant in favour of the plaintiff-respondent for a sum of Rs 2,000, conveying certain house property. The Court of first instance dismissed the suit. The lower Appellate Court has decreed the plaintiff's claim to a smaller amount than that claimed by the plaintiff.

The deed recites that the vendor has placed the vendee in possession of the entire vended property and that part of the property was the subject of a deed of gift in favour of one Jwala Prasad but that the vendor subsequently cancelled it by executing a deed of annulment. The implication of these recitals is that the vendor is the absolute owner of the property in spite of the infructuous deed of gift referred to.

One of the clauses of the sale-deed provided that

"If, God forbid, the whole of the property transferred, or any portion thereof, goes out of the possession of the vendee on account of any transfer or incumbrance etc., by her, or by her ancestors, or by any person who claims to be the owner of the property, on the basis of any law, custom or *shastra*, the vendee shall have a right to recover his consideration money along with damages and costs from the property transferred or from other moveable or immoveable property of hers."

The vendee was resisted in taking possession of the property to which the deed of gift and the deed of annulment already referred to related. The vendee and the vendor both instituted proceedings for recovery of the property, covered by them; but they were unsuccessful. Thereupon, the plaintiff-respondent brought the present suit for recovery of a proportionate amount of the consideration paid under the sale-deed.

The defence was that no warranty of title was given by the vendor to the vendee and that the plaintiff was not entitled to recover a proportionate part of the consideration paid under the sale-deed. There were other defences also, which it is not necessary to mention for the purposes of this appeal.

The Court of first instance dismissed the plaintiff's claim, as already stated, holding that the covenant, contained in the sale deed, did not entitle the plaintiff to a proportionate amount of the consideration. The lower Appellate Court has taken a contrary view on that question and has held, in addition, that there is an implied warranty of title under s. 55 (2) of the Transfer of Property Act.

The learned Counsel for the defendant-appellant argues: (1) that the implied covenant of title in terms of s. 55 (2) of the Transfer of Property Act is excluded by the express covenant, contained in the deed and relied on by the plaintiff, and (2) that the plaintiff-respondent is bound to have the sale transaction rescinded, as provided in the covenant. According to this contention the only remedy which the plaintiff-respondent has under the covenant referred to is to restore to the vendor so much of the vended property as came into his possession under the sale-deed and then claim refund of the consideration of the sale-deed. The express covenant undoubtedly entitles the vendee, on being dispossessed from part of the property sold, to recover the whole of the consideration, and the fact that he can do so by sale of the vended property clearly indicates that the vendee should treat such property as belonging to the vendor. Such a procedure clearly implies annulment of the sale. It is contended that the warranty of title and the vendee's remedy in case of a breach thereof being thus provided for, he cannot avail of the implied warranty under s. 55 (2) Transfer of Property Act, or claim damages on its breach. We are of opinion that the covenant in question is an enabling clause, intended for the benefit of the vendee, and confers a right, which he would not otherwise possess, and which he can exercise in addition to any right which

the law gives him. There is nothing in the sale-deed which excludes an implied warranty of title, contemplated by s. 55 (2), Transfer Property Act, nor is there anything in the sale-deed which limits the plaintiff's remedy to the rescision of the contract referred to in the covenant in question. In this view, the plaintiff respondent is entitled to damages for breach of the implied warranty of title. As a measure of such damages, the lower Appellate Court has decreed to him a proportionate part of the price, having regard to the value of the property which the plaintiff could not recover and the value of the property in his possession. No question has been raised as regards the amount of damages awarded by the lower Appellate Court being excessive.

The result is that the appeal fails and is dismissed with costs.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

Application in First Appeal No. 284 of 1930.

October 23, 1931.

PULLAN AND NIAMAT ULLAH, JJ.

Lala JANKI DASS AND ANOTHER—APPELLANTS—APPLICANTS

versus

Rai Bahadur Lala SHEO PRASAD AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLI, r. 5—Appeal from preliminary decree—Power to stay execution of final decree—Inherent powers of Court.

The Appellate Court has ample power under s. 151, Civil Procedure Code, to order stay of execution of a final decree in a mortgage suit during the pendency of an appeal from the preliminary decree.

Messrs. *S. K. Dar, Panna Lal, Gopi Nath Kunzru, Vishwa Mittra* and *U. S. Gupta*, for the Applicants.

Dr. *M. L. Agarwala*, Dr. *K. N. Katju* and Mr. *Banke Behari*, for the Respondents.

Order.—This is an application for stay of execution of a final decree passed in a suit based on a mortgage. A preliminary decree had been previously passed. The mortgagor preferred a first appeal to this Court impugning the correctness of the preliminary decree. In the meantime an application was made by the mortgagee to the Court of first instance for the preparation of a final decree. The mortgagor then made an application to this Court praying for stay of the proceedings in the Court of first instance for the preparation of the final decree. It was held by a learned Judge of this Court that proceedings for the preparation of a final decree could be taken pending an appeal from the preliminary decree. A final decree has since been passed by the Court of first instance, and the present application is for stay of execution of the final decree.

A preliminary objection has been taken by the learned Advocate for the mortgagee (opposite party) that this Court has no power to order the stay of the execution of the final decree, which is not itself under appeal. It is contended that, in so far as the appeal pending in this Court is from the preliminary decree, which is not itself capable of execution, no order for stay of execution can be passed under O. XLI, of the Code of Civil Procedure. The contention is so far correct that an order for stay of execution of the final decree cannot be passed under O. XLI of the Civil Procedure Code; but the powers of this Court as regards stay of proceedings pending in the Court below are not exhaustively defined by O. XLI of the Civil Procedure Code If, having regard to the ends of justice it is expedient that the execution of the final decree should be stayed pending the appeal from the preliminary decree, this Court has got ample power to stay under s. 151, Civil Procedure Code It cannot be denied that any interference with the preliminary decree in the appeal therefrom will have the effect of the final decree being vacated and that if execution of the final decree is allowed to proceed, rights may come into existence before the disposal of the appeal from the preliminary decree. In order to avoid possible complications, we think it is necessary in the ends of justice that the execution of the final decree be stayed pending the appeal from the preliminary decree. It may be, and generally is, expedient that proceedings for the preparation of the final decree should not be stayed pending an appeal from the preliminary decree, because the mere passing of a final decree will not, in any way, affect the rights of the parties to the appeal from the preliminary decree. On the other hand, if the preliminary decree is affirmed on appeal, some further time will be needed for proceedings leading to the final decree.

We are clearly of opinion that this Court has power under s. 151 of the Civil

Procedure Code, to order stay of execution of a final decree during the pendency of an appeal from the preliminary decree. We hold that the preliminary objection has no force, and is accordingly overruled.

As regards the merits, it is contended on behalf of the mortgagees (opposite parties) that the value of the mortgaged property is very much less than the decretal amount and that any delay in having the property sold is likely to raise the mortgage-money without any chance of its recovery in full from the mortgaged property. It is not disputed that the mortgagees' remedy under O. XXXIV, r. 6, Civil Procedure Code, is barred. It is also admitted that the value of the property is less than the decretal amount. In these circumstances, it is obvious that the mortgagees are not likely to obtain satisfaction of the mortgage money from any property other than the mortgaged property. The applicants (mortgagors) should indemnify the mortgagees against possible loss which may be consequent on the order of stay. We are of opinion that the equitable course is to order the stay of execution of the final decree on the applicants (mortgagors) furnishing security to the extent of one year's interest on the decretal amount at the rate of interest laid down in the decree. Such interest comes to Rs. 8,000. Accordingly we allow this application on condition of the mortgagor-applicant's furnishing security for Rs. 8,000 to the satisfaction of the lower Court within three months. If security is not furnished within the aforesaid period, execution of the final decree shall proceed.

A. *Application allowed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1861 of 1928.
November 7, 1930.

SULAIMAN, J.

Pandit GOBIND RAM—PLAINTIFF—APPELLANT

versus

JUGAL KISHORE AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (I of 1901), s. 165—Suit for profits—Co-sharers collecting profits themselves—Lambardar's right to prescribed dues—Liability for negligence—Interest prior to suit.

The duties of *lambardar* are not confined to the realization of rents and distribution of the profits. Therefore, in a suit for profits he is entitled to his prescribed dues even though the co-sharers were making collections directly. [p. 76, col. 2.]

Where the co-sharers are allowed by arrangement to make their own collection no question of the negligence of the *lambardar* arises if the total amount of rents is not collected. [p. 76, col. 2.]

In a suit for profits interest *pendente lite* is discretionary. But the plaintiff should ordinarily be allowed interest on excess collections, prior to the suit at 1 per cent. per mensem. [p. 77, col. 1.]

Second Appeal from the decision of the District Judge, Jhansi, dated 17th April 1928.

Mr. *K. N. Laghate*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit by a co-sharer for accounts against the other co-sharers including the *lambardar* under s. 165 of the old Agra Tenancy Act. Only four points are urged in the grounds of appeal. The first is that as the *lambardar* was not realising the rents and distributing the profits but the co-sharers were making collection directly, the *lambardar* should not have been allowed the *lambardar's* remuneration at 5 per cent. This point has no force. The duties of the *lambardar* are manifold and are not confined to the realisation of rents and distribution of the profits So long as he holds the office he is entitled to his prescribed dues.

The second point is that the decree should have been based on a gross rental against the *lambardar*. When it was conceded that by arrangement the co-sharers were allowed to make their own collection, no question of the negligence of the *lambardar* arose if the total amount of rents were not collected. In this suit it was unnecessary to go into the question of any alleged negligence of the *lambardar*. As regards the co-sharers the lower Appellate Court has acted rightly in allowing these co-sharers who had made collection to appropriate the full amount of their shares of profits according to the gross rental and account for the surplus only.

The third point urged is that the interest *pendente lite* should have been allowed at 12 per cent. and not at 6 per cent. The matter was discretionary and I am unable to interfere in the exercise of the discretion by the lower Appellate Court.

The fourth point is that interest should have been allowed before the suit. The Assistant Collector in making the calculation took into account the excess rents realised but did not calculate interest on the sum up to the time of the suit. He however granted future interest at Re. 0-8 0 per cent. per mensem This presumably *pendente lite* and future interest. In the

grounds of appeal before the lower Appellate Court the plaintiff urged that the lower Court in not allowing any interest or interest *pendente lite*, was wrong. Apparently the plaintiff urged not only that the rate of interest was too low but that interest previous to the suit should be allowed, though it was vaguely put. The judgment of the learned Judge shows that he has applied his mind only to the question of *pendente lite* interest. I think there is no reason why the plaintiff should not get interest on the excess collection prior to the suit. The rate of interest should be at one per cent. per mensem as mentioned in s. 225 of the Agra Tenancy Act.

I accordingly allow this appeal in part and modifying the decree of the lower Appellate Court increase the amount decreed by allowing interest at one per cent. per mensem simple on the excess amount calculated from the dates of the expiry of the *Fasli* years during which they fell due. The office will have to calculate this amount and put it in the decree. I direct the parties to receive and pay costs in proportion to their success and failure.

A. *Appeal partly allowed.*

ALLAHABAD HIGH COURT.

Execution First Civil Appeal No. 118 of 1930.

December 18, 1930.

MUKERJI AND BENNET, JJ.

THE COLLECTOR OF ETAWAH AS MANAGER OF COURT OF WARDS OF HARDOI STATE—DECREE-HOLDER—APPLICANT

versus

BINDRABAN—JUDGMENT-DEBTOR—OPPOSITE PARTY.

Court Fees Act (VII of 1870), Sch. I, Art. 1—Decree directing mesne profits to be settled in execution—Application for final decree—Mesne profits disallowed—Appeal—Court-fee payable.

Where a suit for recovery of possession was decreed and in respect of mesne profits the Court ordered that "the amount will be settled in the execution department" and an application for final decree was made but the same was disallowed on the ground that the judgment did not direct payment of mesne profits and the plaintiff thereupon preferred an appeal :

Held, that the appeal was not against an order in execution but from an order amounting to a decree and the appellant should pay *ad valorem* Court-fee on the amount of mesne profits which had been claimed by him and disallowed.

Execution First Appeal from the decision of the Subordinate Judge, Mainpuri, dated the 26th November, 1929.

Mr. *U. S. Bajpai*, for the Appellant.

Mr. *B. Malik*, for the Respondent.

Judgment.—This appeal has been filed as an appeal against an order made in execution of a decree. This seems to be wrong.

The appellant brought a suit for recovery of possession over three properties and he asked for mesne profits. The suit was decreed in respect of one of the properties and a certain order was passed in respect of mesne profits. It was to the effect. "The amount of mesne profits will be settled in the execution department."

The appellant made an application to the Court below for preparation of a final decree under the provisions of O XX, r. 12, (2) of the Civil Procedure Code. His application has been disallowed on the ground that the judgment did not direct payment of any mesne profits to the appellant. It is against this order that the present appeal has been filed.

The assessment of mesne profits is a proceeding in the suit and it has nothing to do with the execution department. When the mesne profits are assessed a final decree is to be passed under the provisions of the Civil Procedure Code already quoted. The law requires the plaintiff in a claim for mesne profits, to assess the amount of mesne profits and to pay Court-fee on that amount. When on a subsequent enquiry an assessment of mesne profits is made, if any further Court-fee is payable, it has to be paid. On payment of the Court-fee a regular decree comes into existence. The same rule would apply to the present case.

The appellant has valued his claim for mesne profits at Rs. 15,106-12-7. His right to this amount has been negatived. His appeal is, therefore, directed against what amounts to a decree and not an order in the execution department. We hold that an *ad valorem* Court-fee is to be paid on the above mentioned sum.

We have heard the Counsel for the parties and they accept our finding as to the liability of the appellant to pay Court-fee as correct. The learned Counsel for the appellant asks for six weeks' time to make good the deficiency. We grant the time. After the deficiency is made good, the parties will be entitled to have such documents as they think necessary for the determination of the case translated and printed. The appeal will be treated as a regular appeal.

Mr. Malik for the respondent asks for

costs. The question of costs will be determined when the matter is finally decided.

A. *Odrer accordingly.*

ALLAHABAD HIGH COURT.

First Civil Appeal No. 524 of 1927.
March 30, 1931.
PULLAN AND NIAMAT ULLAH, JJ.
SHEOBANS RAI—PLAINTIFF—APPELLANT
versus
SHAH MADHO LAL—DEFENDANT—RESPONDENT.

Usurious Loans Act (X of 1918), s. 2 (3)—Negotiable Instruments Act (XXVI of 1881), s. 79—Negotiable instrument—Usurious rate of interest—Power of Court to reduce rate.

Section 79, Negotiable Instruments Act, does not exclude the jurisdiction of the Court to reduce the rate of interest specified in a negotiable instrument, in the exercise of the powers conferred upon it by s. 2 (3), Usurious Loans Act.

First Appeal from the decision of the Additional Subordinate Judge, Agra, dated the 9th May, 1927.

Messrs. *S. K. Dar* and *N. P. Asthana*, for the Appellant.

Dr. *K. N. Malaviya*, for the Respondent.

Judgment.—This is a plaintiff's appeal arising out of a suit brought by him for recovery of Rs. 10,616 on foot of a promissory-note, dated 8th March, 1925, executed by the defendant-respondent in lieu of Rs. 7,000 advanced in cash by the plaintiff. The interest stipulated in the promissory-note was at the rate of 30 per cent. per annum.

The only defence which it is necessary to take notice of for the purpose of the appeal has reference to the high rate of interest. The defendant pleaded that the rate of interest agreed on was excessive and that it was a fit case in which the Court should reduce it to a reasonable rate. The lower Court has decreed the suit, except so far that the interest has been reduced from 30 per cent. to 24 per cent.

The plaintiff has appealed claiming the interest at the contractual rate, while the defendant has preferred cross-objection praying for further reduction in the rate of interest. We have heard the learned Counsel on both sides, and are clearly of opinion that no interference is called for.

It has been argued by the learned Advocate for the plaintiff-appellant that s. 79 of the Negotiable Instruments Act is mandatory and that a Court has no power to reduce the rate of interest entered in a promissory note. We are unable to accede to this contention The Negotiable Instruments Act must be read with other enactments passed subsequent thereto. If under the Usurious Loans Act, which was passed after the Negotiable Instruments Act but before the promissory-note in question was executed, the Court has a discretion to reduce interest in a proper case; there is nothing in s. 79 of the Negotiable Instruments Act which excludes such a discretion. The Usurious Loans Act, s 2 (3), is applicable to all suits for the recovery of loans advanced after the commencement of that Act. It is quite general, and includes not only suits based on bonds but also on negotiable instruments. We are clearly of opinion that s 79 does not exclude the jurisdiction of the Court conferred on it by the Usurious Loans Act

The lower Court has found that 30 per cent. simple interest agreed to by the defendant was unreasonable in the circumstances in which the parties were at the time the loan was advanced. Nothing has been shown to us to justify the view contrary to that of the Court below in that respect. The rate of interest which has been allowed by the Court below is *prima facie* reasonable. We hold that the appeal and the cross-objection should both be dismissed. Accordingly the decree appealed from is upheld. The appeal and the cross-objection are dismissed with costs.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

First Civil Appeal No. 561 of 1927.
June 30, 1931.
SEN AND BAJPAI, JJ.
HON'BLE RAJA MOTI CHAND C. I. E. AND ANOTHER—DEFENDANTS—APPELLANTS
versus
THE BRITISH INDIA CORPORATION LTD. CAWNPORE—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS

Transfer of Property Act (IV of 1882), ss. 51, 52, application of—'Active prosecution', meaning of—Lis in mortgage suit, what is—Mortgage security, extent of continuance of.

The 'active prosecution' within the meaning of s. 52, Transfer of Property Act, must be deemed to continue so long as the suit is pending in appeal since the proceedings in the Appellate Court are merely a continuation of those in the suit. *Gobind Chunder Raj* v. *Guru Churn Kurmokar* (1), referred to. [p. 81, col. 1.]

In a mortgage suit the *lis* continues even after the final decree and subsists during the pendency of proceedings in execution. *Parsotam Narain* v. *Chhedda Lal* (2), *Sahib Chandra* v. *Lachmi Narain* (3) and *Surjiram Marwari* v. *Berhamdeo Persad* (4), referred to. [p. 81, cols. 1 & 2; p. 82, col. 1.]

The mere fact that a judgment has been obtained on a mortgage does not extinguish the debt and the mortgage continues as a lien till it is satisfied or the judgment is barred by the statute of limitation. *Bhawani Koer* v. *Mathura Prasad* (5), *Drake* v. *Mitchell* (6) and *Surjiram Marwari* v. *Barhamdeo Persad* (7), referred to. [p. 82, col. 1.]

Section 51, Transfer of Property Act, cannot be taken advantage of by a person to whom s. 52 of the Act applies. [p. 83, col. 2.]

First Appeal from the decision of the Subordinate Judge, Naini Tal, dated the 6th October, 1927.

Messrs. *B. E. O'Conor*, *P. L. Banerji* and *Govind Das*, for the Appellants.

Dr. *K. N. Katju*, for the Respondents.

Judgment.—This appeal arises out of a suit brought by the British India Corporation Ltd., Cawnpore, against Raja Moti Chand and Lala Gokul Chand, defendants first party, and Lala Lalta Prasad, Jhabu Lal and Shri Kishen Chand, defendants second party. The defendants first party will for convenience's sake in this judgment be called as Raja Moti Chand and the defendants second party as Lalta Prasad. The plaintiffs prayed that (1) a decree be passed against the defendants declaring the proprietary right of the plaintiffs in the plaint properties and declaring that the said properties are not affected by a mortgage executed by Lalta Prasad in favour of Moti Chand on the 15th of May 1909 and are not saleable in execution of the decree obtained by Raja Moti Chand against Lalta Prasad; (2) it be declared that the sale in favour of Raja Moti Chand in November 1925 is null and void and ineffectual as against the plaintiffs; (3) an order of the 24th of December 1926 passed by the Court of the Subordinate Judge and Deputy Commissioner of Naini Tal be set aside. The Court below has passed a decree in favour of the plaintiffs against the defendants for the property claimed on payment of Rs. 8,000. Raja Moti Chand has filed the present appeal against the said decree.

It appears that on the 15th of May 1909 Lalta Prasad executed a simple mortgage in favour of Raja Moti Chand, hypothecating among other properties "one bungalow with *pacca* houses and *sisam* trees etc., within the enclosure mortgaged, boundaries given, situate in *Mohalla* Kathgodam, District Naini Tal, purchased under the sale-deed executed and got registered on the 22nd of October 1885". The exact area of this land is not given in the mortgage-deed, but from other documents it appears that the area is 6¼ *bighas* and it has not been contended before us by any party that the area was anything else. Raja Moti Chand brought a suit in the Court of the Subordinate Judge of Aligarh upon the basis of this mortgage and obtained a simple money decree on the 15th of April 1915. On the 19th of July 1915, First Appeal No. 225 of 1915 was filed in the High Court by Raja Moti Chand in which he claimed that he should have been given a mortgage-decree. On the 14th of December 1917, the High Court accepted the appeal of Raja Moti Chand and gave him a preliminary mortgage decree, and the decree was made final on the 23rd of December 1918. This decree was transferred to Naini Tal for execution, and on the 24th of November 1925, the property mentioned above was purchased by Raja Moti Chand. The sale was confirmed on the 24th of December 1925 and the sale certificate was obtained on the 29th of May 1926. Raja Moti Chand was evidently obstructed in obtaining delivery of possession by the British India Corporation, but on the 24th of December 1926, the Subordinate Judge of Naini Tal passed an order directing delivery of possession to Raja Moti Chand against the British India Corporation, and this last order has given the plaintiffs the cause of action to maintain the present suit. It may be mentioned here that in the mortgage litigation the British India Corporation was not a party and the entire proceedings connected with that litigation were conducted against Lalta Prasad (defendants second party alone) till we come to the time when the British India Corporation offered obstruction to Raja Moti Chand in his attempt to obtain possession.

We now propose to trace the title to this property, and the earliest that we can go is the year 1885. On the 22nd of October 1885, one Mrs. Purcell sold this property which was described as" the house situated on the south of the Railway Station at Kathgodam, Kumaun District, consisting of four large rooms, four small rooms, two verandahs and its compound" to the Right Reverend Bishop and Vicar Apostolic of Patna for a sum of Rs. 6,000. On the 30th of March 1892, one Frederic Edward George Matthews, acting as the General Attorney of the Bishop, sold the same to Lala Lalta Prasad. On the 20th of June 1917, Lalta Prasad and his two sons Jhabu Lal and Shri Kishan Chand sold the

Moti Singh, and in this sale deed the property is described as having an area of 6¼ *bighas*. It might be mentioned that before this the mortgage in favour of Raja Moti Chand had been effected and Moti Singh obviously purchased this property with the burden of the mortgage in favour of Raja Moti Chand. Moti Singh sold the property on the 7th of February 1919 to Mr. J. E. da Fonseca, Managing Proprietor of the Naini Tal Motor Transport Company Limited, and in this document also the property is described as having an area of 6¼ *bighas*. On the 1st of March 1920, the Naini Tal Motor Trasport Company obtained a lease from the Secretary of State for India for land measuring 8 *bighas* and odd for 30 years on an annual rental of Rs. 102. It has been found by the Court below that these 8 *bighas* and odd include an area of 6¼ *bighas* which is the subject of dispute in the present litigation. We have considered the evidence and are satisfied that this finding is correct. The Naini Tal Motor Transport Company subsequently went into liquidation, and the Official Liquidator of the Naini Tal Motor Transport Company sold this property to the British India Corporation on the 26th of July 1921. On the 17th of August 1921, the High Court at Fort William, Calcutta, ordered that the sale to the British India Corporation of the movable and immoveable properties as also of the good will of the business of the Naini Tal Motor Transport Company completed on the 26th day of July 1921 be confirmed. The British India Corporation have now enclosed the entire 8 *bighas* 11 *biswas* of land covered by the lease of the 1st of March 1920 and have made certain additions to the old buildings. The above statement of facts which are practically admitted will indicate the nature of the title advanced by the two contending parties, and we have got to adjudicate upon their rights The Court below has passed a declaratory decree in favour of the plaintiffs against the defendants with reference to the property claimed subject to a payment of Rs. 8,000 to Raja Moti Chand. The plaintiffs are satisfied with this decree; but Raja Moti Chand in this appeal impugns this decree and contends that he has an indefeasible title to the property under his purchase In the Court below, it was argued on behalf of the Raja that he was entitled to the entire area of 8 *bighas* odd and to all the buildings that had been subsequently added as accretions to the original security, but in this Court Mr. Peary Lal Banerji on behalf of the appellants has definitely abandoned this position and his prayer is that he should be given possession over land measuring 6¼ *bighas* and the buildings that stood thereon at the time of the mortgage and the sale and, if some portions of the old constructions have been demolished and new constructions erected instead, then he should get possession over such new constructions, or some other suitable orders passed which might adjust the equities between the parties. We shall decide the present appeal upon the basis of the position that has been taken before us by the learned Advocate for the appellants.

The third issue before the Court below was:

"What are the existing boundaries and area of the land mortgaged in 1909?"

and the finding upon this issue is in the following words:

"During the hearing of the suit I made an inspection of the locality, and the result of my inspection is embodied in a note dated the 8th July, 1927 (page 13 of our record) A plan was prepared by an *Amin*, who proved it in Court. I find that the area which I have shaded blue in the *Amin's* map (Ex. B) is that which was mortgaged in 1909. The area is 6 *bighas* 3 *biswas* and the boundaries are as shown in the said map".

This finding has not been attacked by either party and we must take it that the present area of the mortgaged land is 6 *bighas* 3 *biswas* and the same has been demarcated by the Court below in the *Amin's* map referred to above.

The fourth issue in the Court below was:

"Which or which portions of the existing buildings stand outside the "boundaries referred to in Issue No. 3?

and the finding thereon was as follows:—

"The map (Ex. B) also shows the existing buildings which stand outside the limits referred to in the last issue. The big new Workshop, the Engineering office and the Store are entirely outside the mortgaged area"

This finding is based upon evidence and upon the Judge's inspection note and is not seriously challenged by either party. The fifth issue was:—

"Are any portions of the existing buildings unaffected by the mortgage,"

and the decision thereon was:—

"The buildings referred to under Issue No. 4 are in any case unaffected by the mortgage. The extra land which was obtained on lease cannot be regarded as "accruing" to the mortgaged area."

In view of the position taken by Mr. Banerji, it is not necessary for us to examine the legality or propriety of this finding and we must accept it as correct. From the evidence of Mr. Vaughan it appears that there were formerly 4 main rooms and 4 bathrooms in the main building, a verandah in front and a small verandah behind. In

1915, the front *verandah* was closed and a room made and about the same time another room was made by closing the back *verandah*. These alterations were made during the subsistence of the mortgage before it was put in suit, and it is contended that the mortgagee is entitled to these either as accessions or as substituted security, unless his right to them is barred by some rule of law. From Moti Singh's evidence it appears that Mr. Fonseca built a room adjoining the bungalow and a long office and a kitchen. This room adjoining the bungalow, the long office and the kitchen were built after 1919 *i. e*, after the final decree obtained by Raja Moti Chand, and we shall have to consider whether the Raja can lay claim to these constructions.

The first contention that has been advanced on behalf of the appellants is that the plaintiffs being purchasers *pendente lite* could not set up their title by purchase as against the claim of the appellant mortgagee under the decree. It is quite clear that apart from certain complications, which we shall notice later on, Moti Singh who is in a certain sense the predecessor of the present plaintiffs purchased the property on the 20th of June, 1917, during the pendency of the mortgage suit initiated by the appellants. It may be noted here that the Court below is in error when it says "After he (Moti Singh) purchased the property, an appeal was preferred to the High Court and the decree was given against the property." It is conceded that the appeal in the mortgage suit was filed on the 19th of July, 1915, and Moti Singh's purchase was made on the 20th of June, 1917, during the pendency of the appeal in the High Court which was decided on the 14th of December, 1917. The provision of law which has been relied upon by the appellants is contained in s. 52 of the Transfer of Property Act. The *active prosecution* in this section must be deemed to continue so long as the suit is pending in appeal since the proceedings in the Appellate Court are merely continuation of those in the suit. [See the case of *Gobind Chunder Roy* v. *Guru Churn Kurmokar* (1)] Further in a mortgage suit the *lis* does not terminate with the preliminary decree but must be deemed to continue at least till the passing of the final decree *vide Parsotam Narain* v. *Chhedda Lal* (2) and *Shib Chandra* v. *Lachmi Narain* (3)]. It is obvious, therefore, that at least up till the 23rd of November, 1918, when the final decree in the mortgage suit was passed the property could not be transferred or otherwise dealt with by any party to the suit or his representative so as to affect the rights of any other party thereto under any decree or order which might be made therein. The sale by Lalta Prasad to Moti Singh on the 20th of June, 1917, could not in any way affect the rights which Raja Moti Chand obtained under his decree.

The question that immediately arises is: what are the rights which Raja Moti Chand obtained under the decree and the auction sale, and to what extent are the plaintiffs affected by them? On the 24th of November, 1925, Raja Moti Chand purchased one bungalow with *pukhta* houses and *sisam* trees etc. within the enclosure mortgaged (boundaries given) situate in Kathgodam, District Naini Tal, acquired under sale-deed dated and registered on the 22nd of October, 1885. It may be mentioned that neither the British India Corporation, nor the Secretary of State for India nor the Naini Tal Motor Transport Company, nor Moti Singh were parties either to the mortgage suit of Raja Moti Chand or to the execution proceedings connected with the mortgage suit. We shall for the time being exclude out of our consideration the Secretary of State for India but from what we have said above it is clear that every one of these persons is bound by the final decree obtained by Raja Moti Chand on the 23rd of November 1918, so far as they are the successors in-interest of Lalta Prasad. This follows from the text of s. 52 of the Transfer of Property Act of 1882 before its amendment. The amending Act of 1929 has not introduced a new rule of law in the following explanation appended to s. 52:—

"For the purposes of this section the pendency of a suit or proceeding shall be deemed ... . to continue until ..... the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained."

but has put the impress of Legislature upon certain judicial pronouncements in which it had been held that in a mortgage suit the *lis* continued even after the final decree and subsisted during the

(1) 15 C. 94.

(2) 29 A. 76 at p. 80; 3 A. L. J. 675; A. W. N. (1906) 283.

(3) 119 Ind. Cas. 612; 33 C. W. N. 1091; A. I. R. 1929 P. C. 243; Ind. Rul. (1929) P. C. 316; 30 L. W. 476; (1929) M. W. N. 653; 50 C. L. J. 502; 51 A. 686; 56 I. A. 339; 32 Bom. L. R. 6 (P. C.).

pendency of proceedings in execution: see the case of *Surji Ram Marwari* v. *Berhamdeo Persad* (4). In the case of *Bhawani Koer* v. *Mathura Prasad* (5) Mookerjee, J., observes as follows:—"It is quite clear in the first place that the mere fact that a judgment has been obtained on a mortgage does not extinguish the debt and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Statute of Limitations This view is supported by the decision of Lord Ellenborough in *Drake* v. *Mitchell* (6), namely, that a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party. This principle has been recognized in cases of the highest authority which will be found reviewed in the judgment of this Court in *Surjiram Marwari* v. *Barhamdeo Parsad* (7). It follows consequently, that the fact that the defendant obtained a decree on his mortgage did not extinguish his security." Under s. 89 of the Transfer of Property Act (IV of 1882) when an order absolute under that section for sale of the mortgaged property was obtained the security was extinguished and, therefore, there are cases including decisions of the Privy Council which lay down that after an order absolute if the property should not be redeemed, "the matter passes from the domain of contract to that of judgment" *Sunder Koer* v. *Rai Sham Kishen* (8), *Het Ram* v. *Shadi Ram* (9) and *Mairu Mal* v. *Durga Kunwar* (10). These cases are no longer law in view of the repeal of s 89 of the Transfer of Property Act and the enactment of O. XXXIV of the Civil Procedure Code of 1908. This matter has been clearly brought out in the decision of *Sukhai* v. *Ghulam Sattar Khan* (11) and, therefore, we think that the principle of law enunciated by Mr. Justice Mookerjee in *Bhawani Koer's case* (5) is sound. The result is that the British India Corporation, so far as they are the representatives of Lalta Prasad, are bound by the auction sale of the 24th November, 1925. Two consequences follow from this: (*a*) The British India Corporation have lost their right to redeem Moti Chand's mortgage and (*b*) Raja Moti Chand has acquired an indefeasible title as against them. Indeed the British India Corporation have never offered to redeem and we are inclined to hold that they are aware that they have no right to redeem. The auction sale is clearly binding upon the British India Corporation in so far as they are the successors-in-interest of Lalta Prasad.

Raja Moti Chand's purchase included the building and such rights in the land as Lalta Prasad possessed. We have now to see what rights Lalta Prasad possessed in the land which has now been found to have an area of 6 *bighas* 3 *biswas* as marked in the *Amin's* map by the Court below. Mrs. Purcell sold to the Bishop of Patna and the Bishop of Patna sold to Lalta Prasad and Lalta Prasad mortgaged to Moti Chand. There is no suggestion that the right in the land which was dealt with by these transactions was anything but proprietary right, it is true that Moti Singh says that he used to pay Rs. 3 yearly rent to Tahsil, but we have no other material on the record from which we could come to the conclusion that Mrs. Purcell, the Bishop of Patna or Lalta Prasad had not permanent rights in the land but only limited rights terminable at the option of a superior proprietor. It has been argued by Dr. Katju who appeared on behalf of the respondents, that on the 1st of March, 1920, that Naini Tal Motor Transport Company obtained a 30 years' lease (renewable again after the lapse of 30 years) from the Secretary of State for India, and these rights could in no event be sold, for he says that, as these lessee rights were acquired after the final decree, there is no equity in favour either of the mortgagee or of the purchaser of the Court auction to have such acquisitions taken away from the person who paid for them and attached to the property covered by the decree, and he relies upon the cases of *Haradhan Chakravarti* v. *Hargobind Dutta* (12) and *Mysore Kopniah Sirananjiah* v.

(4) 2 O. L. J. 288.
(5) 7 O. L. J. 1 at p. 30.
(6) (1803) 2 East 251; 7 R. R. 449.
(7) 2 O. L. J. 202 at p. 214.
(8) 34 C. 150 at p. 161; 34 I. A. 9; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75 (P. C.).
(9) 45 Ind. Cas. 798; 40 A 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 Cr. L. J. 188; (1918) M. W. N. 518; 20 Bom L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.).
(10) 55 Ind. Cas. 969; 42 A. 364; (1920) M. W. N. 338; 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W. 529; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 32 C. L. J. 121; 47 I. A. 71; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.).
(11) 65 Ind. Cas. 151; 43 A. 469; (1921) M. W. N. 445; 14 L. W. 162; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 Bom. L. R. 590; A. I R. 1922 P. C. 11; 48 I. A. 465 (P. C.).
(12) 63 Ind. Cas. 552; 6 P. L. J. 347; 2 P. L T 665.

Sithay Gouder (13). Even if we were to agree that there can be no accession to the mortgage security after the passing of the final decree, we are of the opinion that the action of the Naini Tal Motor Transport Company in obtaining a lease from the Secretary of State for India does not enlarge their proprietary interest, acquired by them under the sale-deed dated the 7th of February, 1919. As we said before there is no material on the record from which we can gather that Lalta Prasad had limited rights in the land and, if, therefore, the Naini Tal Motor Transport Company in a spirit of caution or under the stress of certain unexplained circumstances took certain proceedings to ensure the continuance of their possession this did not enlarge their title acquired under the purchase dated 7th February, 1919, or confer upon them an independent title. It may be mentioned here that the Naini Tal Motor Transport Company paid no premium to the Secretary of State for India but only agreed to pay a yearly rent of Rs. 202 and executed a building lease upon certain terms. The buildings which they have constructed outside the mortgaged area, will, as has been conceded by the learned Advocate for the appellants, belong to the British India Corporation. There is thus no hardship cast upon them.

The Secretary of State for India was no party to either to the mortgage suit or to the execution proceedings and is not the successor in-interest of Lalta Prasad and is of course not bound in any way by the decision of the suit.

Our conclusion, therefore, is that Raja Moti Chand is entitled, unless barred in some other way, to the land marked in the *Amin's* map by the Court below We have now to see what rights he has in the buildings. By parity of reasoning and in view of our findings it follows that Raja Moti Chand is entitled to obtain possession over the residential bungalow exclusive of the room adjoining the bungalow and long office and a kitchen, unless some other principle of law stands in his way.

It was finally argued before us on behalf of the respondents that we should not interfere with the decree of the Court below by reason of the fact that s. 51 of the Transfer of Property Act is applicable to the facts of the case, and that provision of law gives an option to the British India Corporation, and the Court below has given effect to that option correctly. On the other hand, it was argued on behalf of the appellants that s. 51 cannot be taken advantage of by a person to whom s. 51 applies. This contention is founded upon the principle enunciated by a Division Bench of this Court in *Mohammad Shafiq Ullah Khan* v. *Mohammad Sami Ullah Khan* (14) by which we are bound. But we are of the opinion that the plaintiff respondent is not entitled to the benefit of s. 51, and in our view s. 51 works out in a way different from the way in which the Court below has worked it out. It runs as follows :—

"When the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted thereform by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee at the then market value thereof, irrespective of the value of such improvement."

It is obvious that the British India Corporation are the transferees of immoveable property and the person subsequently evicted therefrom and Raja Moti Chand is the person having a better title within the meaning of the section. The consequence, therefore, is that the British India Corporation have a right to require Raja Moti Chand either to have the value of the improvement estimated and paid to them or to ask Raja Moti Chand to sell his interest in the property to the British India Corporation at the then market value thereof irrespective of the value of such improvement. Upon this reading of the law it is clear that the British India Corporation can put Raja Moti Chand upon election, and it is for Raja Moti Chand to decide whether he will pay up the British India Corporation or whether he will sell his own interest to the British India Corporation. The Court below, however, without putting Raja Moti Chand upon an election has compelled him to sell his interest to the British India Corporation, and therein we think it has fallen into an error, but we think that there is no occasion for s. 51 to come into play at all. So far as the 'improvements' are concerned, there has been no improvement in the land according to our view and so far as the buildings are concerned, we have already held that Raja Moti Chand will not be entitled to the new room adjoining the

(13) 70 Ind. Cas. 367; 41 M. L. J. 490; (1921) M. W. 510; 14 L. W. 449.

(14) 123 Ind. Cas. 101; (1930) A. L. J. 57 at p. 60; A. I. R. 1929 All. 913; Ind. Rul. (1930) All. 357; 52 A. 139.

bungalow, the long office and the kitchen built by Mr. Fonseca after 1919. Moreover, it is not made out by the evidence on the record that the British India Corporation believed in good faith that they were absolutely entitled to the immoveable property in question. No body on their behalf has entered into the witness-box to state that they made any enquiries and that the result of those enquiries was that the corporation was lulled into a sense of security. Neither the recitals contained in sale-deed of 26th July, 1926, nor the bald statement of Moti Singh Bhat that he had no information of any incumbrance can be of any avail to the plaintiff-respondent. Moreover we are not impressed by the statement of Moti Singh. Section 51 of the Transfer of Property Act is, therefere, inapplicable. Our conclusion finally is that there is nothing in law which would stand in the way of Raja Moti Chand's claiming possession over the land marked in the *Amin's* map and over the residential bungalow. Here his right ceases. He has no right to the lands outside this area and to the room adjoining the main building, the long office and kitchen built after 1919.

The result is that we allow this appeal, set aside the decree of the Court below and substitute therefor a decree declaring the proprietary right of the plaintiffs over (1) the property mentioned in schedule A, (excluding therefrom the land marked blue in the *Amin's* map and the residential bungalow) and (2) the end-room adjoining the main building, the long office and the kitchen which were built after 1919. It is also declared that the properties that have been secured to the plaintiffs by our decree are not affected by the mortgage and sale in favour of Raja Moti Chand. The order of the 24th of December, 1926, passed by the Court of the Subordinate Judge and Deputy Commissioner of Naini Tal, so far as it affects the properties decreed to the plaintiffs, is set aside.

The plaintiffs have succeeded to some extent but have lost to a greater extent, and we think that the proper order to make on the question of costs is that the plaintiffs will get one third of the taxable costs from the defendants first party, and the defendants first party will get two-thirds on their taxable costs from the plaintiffs in both Courts. Defendants second party will bear their own costs which they have incurred.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 77 of 1928.

October 29, 1930.

SEN AND NIAMAT ULLAH, JJ.

BHOLA NATH-SHANKAR DAS—

PLAINTIFF—APPELLANT

versus

LACHMI NARAIN AND OTHERS—

DEFENDANTS—RESPONDENTS.

Trade union—Not registered under Companies Act—Whether unlawful—Suit for declaration of illegality—Maintainability—Combination among traders resulting in injury to others—Whether actionable—Companies Act (VII of 1913), s. 4 (2)—Specific Relief Act (I of 1877), s. 42.

A trade association is not unlawful merely because it has not been registered in conformity with the provisions of s. 4 (2), Companies Act. [p. 85, col. 2; p. 86, col. 1]

A suit for a declaration that an association is not a corporate unit inasmuch as it has not been registered in accordance with the provisions of the Companies Act is not maintainable. [p. 86, col. 2.]

Though a combination of two or more persons for the purpose of injuring a man in his trade is unlawful, and if it results in damage to him, is actionable, if the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues, provided the purpose is not effected by illegal means. *Hilton* v. *Eckersley* (1), *Rogers* v. *Rajendro Dutt* (2), *Fraser & Co.* v. *Bombay Ice Manufacturing Co.* (3), *Mogul Steamship Co.* v. *McGregor* (4), *Mulcahy* v. *Reg.* (5), *Limby* v. *Gye* (6), *Allen* v. *Flood* (7), *Quinn* v. *Leathem* (8), *Stevenson* v. *Newnham* (9), *Temperton* v. *Russell* (10), *South Wales Minor's Federation* v. *Glamorgam Coal Co. Ltd.* (11), *Conway* v. *Wade* (12), *Hodges* v. *Webb* (13), *Larkin* v. *Long* (14), *Ware & De Freville, Ltd.* v. *Motor Trade Association* (15), *Reynolds* v. *Shipping Federation Ltd.*(16) and *Sorrell* v. *Smith* (17), referred to. [p 90, col. 1]

Second Appeal from the decision of the District Judge, Farrukhabad, dated the 14th of September, 1927.

Dr. *K. N. Katju*, and Mr. *R. C. Ghatak*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

Judgment.—This is an appeal by the plaintiffs from the decree of the learned District Judge of Farrukhabad reversing the decision of the Subordinate Judge of the same district in a suit in which the following reliefs were claimed:—

"(*a*). It may be declared that the Committee of the defendants is unlawful according to law. The principle on which they are working is against law and no British subject is bound by it nor are they competent to offer obstructions in the business of the plaintiffs.

(*b*). A perpetual injunction may be issued to the defendants restraining them from doing the acts mentioned in para. 3 of the petition of plaint; and

(*c*). Rupees 1,000 as damages caused to the plaintiffs from the acts of the defendants may be awarded from the defendants."

Plaintiffs are members of a firm of commission agents who carry on business at Fatehgarh under the name and style of Bhola Nath Shankar Das. The defendants are 17 in number and are members of an association unincorporated and unregistered, which is located in Lindsayganj market at Farrukhabad and is called Anaj Behohar Sabha. It is said that this case is an instance in point of trade union outrages; and although the association has no legal recognition as a jural unit, its number and the compact of its members give weight to its concerted action and are, according to the plaintiffs, a source of danger to the public. The plaintiffs do not attribute unlawfulness to the association merely on the score that it is an unregistered body but they stoutly contend that its objects and methods are unlawful—the chief object of the association being to corner a monopoly and to drive out all rivals from the field by recourse to unfair competition.

The heads of charges enumerated in para. 3 of the plaint are as follows:—

(1) That no one can open a shop in Bazar Lindsayganj without the permission of this Committee.

(2) The permission for opening a shop is given in the month of *Kuar* and *Phagun*.

(3) If any one carries on business or opens a shop without the permission of the Committee, no one can sell goods to him or purchase goods from him.

(4) If anyone who has not opened a shop wants to purchase goods directly, he cannot do so without the medium of any such shop-keeper whom the Committee might have permitted to open a shop.

(5) That weighmen who have obtained a license from the Municipal Board and who are themselves the owners of the *Phars* (the open space in front of each shop) or who have taken *Phars* on rent cannot sell the goods to or weigh the goods of the persons not permitted by the Committee to make the purchase.

(6) If any weighman or shop-keeper sells goods to or purchases from any such person not allowed by the Committee, then penal orders are passed against him, such as fine, suspension of all business and purchase and sale.

The plaintiffs further complained that the association was oppressive in the treatment of its constituents inasmuch as it made unlawful gains by arbitrarily levying perquisites like the following:—

(*a*) Twelve annas per cent. commission fee.

(*b*) Four annas per cent. brokerage.

(*c*) One pice per rupee per *Parcha*.

(*d*) One anna six pies per cent for *Gaushala* and *Ramlila*.

(*e*) Two *chhattaks* of grain per maund for *Karda*.

(*f*) Four *chhattaks* of grain per cart for *Larka*, and

(*g*) Two *chhattaks* of grain per maund for *Palladar*.

The plaintiffs further alleged that they had entered into a contract with a third party to supply 500 bags of poppy seed. For the due performance of this contract they had contracted to purchase the stock from a number of persons at Lindsayganj. The defendants intervened and prevented the owners of the stock from selling the poppy-seed to the plaintiffs The result was that the plaintiffs next tried to make purchases outside Lindsayganj and entered into contract with certain *arhatias* at *Ghatia Ghat*. Here also the defendants intervened and by their obstructive tactics prevented certain persons from selling the goods to the plaintiffs.

The suit was contested by all the defendants except two, namely, defendants Nos. 14 and 15 The defence amounted to a traverse of the material statements contained in the plaint The Court of first instance repelled the contentions of the defendants, decided all the issues in favour of the plaintiffs and decreed the plaintiffs' claim for the declaratory relief and injunction as asked for and for Rs. 500 as damages

The lower Appellate Court has reversed this decision. Hence this appeal.

It has been argued that the plaintiffs were entitled to a declaration that Anaj Beohar Sabha was an unlawful association inasmuch as it had not been incorporated and registered as required by s. 4 (2) of the Indian Companies Act. The number of its members exceeds 20 and it may be assumed that the object of the association is gain or profit. The Sabha not having been registered under s. 4 (2) of the Indian Companies Act (Act VII of 1913) it can have no legal recognition as a jural unit and it cannot sue or be sued as a corporate body nor can it enter into a contract as such. But while taking a stock of its disabilities, we are not prepared to hold that a trade association is unlawful merely be-

cause it has not been registered in conformity with the provisions of the Indian Companies Act. We are further of opinion that it will be nothing short of an abuse of the provisions of s. 42 of the Specific Relief Act to entertain a suit for a declaration of what appears to us to be a self evident proposition that the Committee is not a corporate unit because it has not been legally constituted. The British Indian Courts have no general powers to make a declaratory decree outside the limits formulated by s. 42 of the Specific Relief Act and the said section cannot be utilised with the object of enunciating a truism.

It has next been argued that the agreement, whereby the members of the Sabha are held together, is in defiance of the provisions of ss. 23 and 27 of the Indian Contract Act In *Hilton* v. *Eckersley* (1) Baron Alderson is reported to have said:—

"*Prima facie* it is the privilege of a trader in a free country, in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice."

The question is whether the defendants have crossed the line which the law permits. This border line is not in all cases capable of very sharp definement and is a fruitful source of aggressive claims and subtle defences. It was ruled by the Privy Council in *Rogers* v. *Rajendro Dutt* (2):—

"That it is essential to an action in tort that the act complained of should, under the circumstances, be legally wrongful as regards the party complaining, that is, it must prejudicially affect him in some legal right; merely that it will, however, directly do a man harm in his interests, is not enough."

The matter, we are now considering was in issue before the Bombay High Court in *Fraser & Co.* v. *Bombay Ice Manufacturing Co.* (3) the facts of which were parallel and the principle involved not dissimilar and the Court held that an agreement between manufacturers, not to sell their goods below a stated price, to pay profits into a common fund and to divide the business and profits in certain proportions is not avoided by s. 27 of the Indian Contract Act and cannot be impeached as opposed to public policy under s. 23 of the Act. We are clearly of opinion that the constitution of the committee and its objectives do not offend against the provisions of ss. 23 and 27 of the Indian Contract Act. It is patent that the case of the plaintiffs is founded upon tort and not upon contract. Where the claim is founded upon a tort alleged against the defendant, ss. 23 and 27 of the Indian Contract Act do not apply. The grievance is that the defendants by their organised and concerted action have by rule and level been crippling the plaintiffs in their trade and that they have been prevailing upon their constituents to obey their edicts to cut off the supply of materials from the plaintiffs as also the flow of customers. We cannot forget the emphatic statement of Bowen, L. J , that

"no action at common law will lie or ever has lain against any individual or individuals for entering into a contract merely because it is in restraint of trade."

[*vide Mogul Steamship Co*, v. *Mc Gregor* (4)]

It is unfortunate that s 27 of the Indian Contract Act has been moulded upon the New York Draft Code and seriously trenches upon the liberty of the individual in contractual matters affecting trade. We are, however, of opinion that s. 27 does not support the plaintiffs' pretension. A combination amongst the traders of a particular locality is not actionable *per se* merely because it brings profits to them and indirectly hurts a rival in trade.

It has been argued that the demands made by the defendant company are of the nature of arbitrary perquisites and operate oppressively against the plaintiffs if they do not respond to the demands made by the defendants. These demands are seven in number and have already been referred to in our judgment. The Court of first instance held that these demands were arbitrary perquisities. The lower Appellate Court did not agree with this view:—

"Payment on account of commission agency and brokerage prevails everywhere. Item (c) also is of a piece with the purchase of a peculiar brand of paper for writing petitions in Courts; and one pice, per rupee, is a very small amount. Payments made for *Gaushala* and *Ram Lila* certainly entail a loss on the ultimate customer but no one grudges it. I do not wish to lay down that there is any religious consideration in it, but from a humanitarian point of view a payment for *Gaushala* is not an evil. In the Western Presidency they take it in the name of '*Pinjrapole*'. This idea itself is a laudable one because it prevents cruelty to animals Items (*e*), (*f*) and (*g*) are allowed everywhere. Instead of sifting the grain and throwing out the dust from it, it is much better to make an uniform allowance for it Similarly the other two items are also reasonable ones. It, therefore, cannot be said that the aims and objects of the association are unlawful".

(1) (1856) 6 El. & Bl. 47; 25 L. J. Q. B 199; 2 Jur. (N. S) 587; 4 W. R. 326, 26 L. T. (O. S.) 314; 106 R. R. 507.

(2) (1859) 13 Moo. P. C. 209; 3 L. T. 160; 9 W. R. 149.

(3) 29 B. 107; 7 Bom. L. R. 107.

(4) (1889) 23 Q. B. D. 598 at p. 619.

Without pausing to consider whether any particular item had a peculiar sanctity upon humanitarian grounds, we are clearly of opinion that the findings arrived at by the learned District Judge on this part of the case are reasonable and proper and are not open to any attack or criticism on any ground of law. We must, therefore, accept the finding that the so-called perquisites are neither arbitrary nor oppressive.

It was next contended that the plaintiffs were the victims of an unlawful conspiracy on the part of the defendants who intermeddled with and systematically prevented the due performance of contracts by third parties in favour of the plaintiffs This part of the plaintiffs' case mainly rested upon oral evidence. The lower Appellate Court discarded the statements of Madan Lal, Ajudhi, son of Khanjan and Babu Ram Sarup on the ground that they were pure hearsays and disbelieved Behari and Ajudhi, son of Paramsukh. As to Madho Ram, it observed as follows:—

"He gave direct evidence. He stated that the Committee people did tell him that if he weighed plaintiffs goods, his market would be stopped. This statement is highly damaging to the defendants. But in cross-examination this witness stated as follows :—

If we do not agree to what the Committee says the Committee men will neither sell to nor purchase goods from us.

There is no other pressure. By turning us from the market I mean that the Committee-*walas* will not sell to or purchase goods from us. If we had not cared whether the 12 Committee-*walas* sold or purchased goods to or from us, we could have weighed goods to the plaintiffs."

From this, it would appear that the Committee people did not interfere with the freedom of this witness, and what they told him was that they would withdraw their custom. This is hardly a form of pressure that can be called threat or coercion Noor Mohammad was the witness who attempted to prove the whole of the plaintiffs' case but he made his position clear in cross examination.

He stated that the members of the Committee had told the weighmen that the market would otherwise be closed for them. By it they meant that the Committee people would not purchase goods from them He further stated that the weighmen who did not mean to deal with the Committee peoplecould weigh goods for the plaintiffs.

After commenting upon this evidence, the Court below came to the following conclusion;—

"From the evidence of these witnesses it is not proved (*a*) that no one is entitled to open a shop without the leave of the Committee (*b*) that no one is entitled to deal with a shop-keeper who opens a shop without their permission, (*c*) that no outsider is allowed to deal with a shop-keeper who opens a shop without their permission and (*d*) that no weighman is allowed to deal with an outsider".

The Court further finds that the rule about the election of the members twice a year, once in *Kuar* and once in *Phagan* does not entail the consequence that every one is compelled to become a member.

The lower Appellate Court winds up its analysis of evidence with the following remarks:—

"There can be no doubt then that there is some sort of pressure brought to bear on members of the association, be they capitalist (the traders) or be they the labourers (weighmen)..... ..... Such of those traders who are members of the Committee and who wished to deal with non-members are told by the Committee that if they so wish they have to cease to become members Similarly such of the weighmen who are members of the weighmen's association (part of the Traders' Association) and who wish to weigh for non-members are told that if they so wish they have to cease to become members and are further told that the patronage of the members of the Traders' Association shall be withdrawn from them .....From the evidence discussed above it would appear that this capitalistic combination and combination of labour puts before its members a choice between two alternatives They put this question to the members:

Do you wish to deal with outsiders and thus be obliged to cease to be members of the association, or do you wish to continue to be members and cease dealings with outsiders ?' Considering the many advantages by remaining as members of the Sabha as detailed in the evidence of Lachmi Narain, defendant witness, the secretary of the Sabha, they choose the second alternative and refuse to deal with non-members. If they choose the other alternative they are first fined and then, if necessary, boycotted. The question is whether this is illegal.

After discussing the evidence, the Court dealt with the case in its legal aspect and answered the question in the negative. We agree with the view.

Dealing with the plaintiffs' claim for damages the Court next proceeded to examine whether the defendants had procured certain breaches of contract with third parties for supply of goods to the plaintiffs. As to this, the Court observes as follows:—

"The plaintiffs have given details of these several purchases but with the exception of one purchase, they have not been able to prove any other. On the other hand, the defendants have produced those persons whom the plaintiffs alleged to have been their vendors and these persons have denied that they entered into any contract of sale of goods. The plaintiffs' case, therefore, has not been proved."

As regards one of the purchases referred to above, it is to be observed that the Court

did not intend to find and as a matter of fact did not find that the defendants procured a breach of the contract. There is no room for cavil or criticism in the finding of the Court below which appears to us to be perfectly clear and legitimate:—

"The question in other words is whether the defendants actually asked the vendors of the plaintiffs not to deliver goods to plaintiffs."

My answer is 'no'. I have already found that what the association did was that it distinctly told the plaintiffs' vendors that if they supplied goods sold to the plaintiffs they would cease to be members of the association. It must, therefore, be said that there was no absolute negation in this case There was no conspiracy on the part of the association to compel the plaintiffs' vendors not to supply goods to the plaintiffs. Now there is a great deal of difference between a third person asking a party to a contract to break the contract and a third person telling the same party to contract:

"You may supply goods to the plaintiffs if you wish, but if you do so we will fine you, we will boycott you and we will turn you out of the association. And this latter act was all that the defendants did."

Upon these findings, the Court below came to the conclusion that there was no cause of action for a suit for damages or injunction against the defendants. We agree with this view. The following passage from Erle on Trade Union, page 12 will bear quotation:—

"Every person has a right under the law as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising thereform, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the third party obstructed, be a violation of this prohibition."

We are of opinion that what is wrong in the case of an individual continues to be a wrong if committed by an association of individuals by preconcert or conspiracy and that a *conspiracy* consists in the agreement of two or more persons to do an unlawful act by unlawful means. This was the view taken in *Mulcahy* v. *Reg* (5). We agree with this view.

We do not think that any useful purpose will be served by embarking on a critical examination of the authorities dealing with the law relating to actions for conspiracy. While the cases have a common denominator, the case law on the subject is very vast and the features of each case vary with the kaleidoscopic turn of circumstances. We shall however indicate the principles laid down in the important and oftcited cases.

In *Lumley* v. *Gye* (6) it was held that an action would lie for malicious procurement of the breach of any contract, if by the aforesaid procurement, damage was intended to result and did result to the plaintiff. Crompton, J., observed:

"Where two or more parties were concerned in inflicting such injury, an indictment or a writ of conspiracy at common law might perhaps have been maintainable and where a writ of conspiracy would lie for an injury inflicted by two, an action on the case in the nature of conspiracy will generally lie; and in such action on the case, the plaintiff is entitled to recover against one defendant without proof of any conspiracy, the malicious injury and not the conspiracy being the gist of the action".

In the great case of *Allen* v. *Flood* (7), it was decided that an act lawful in itself is not converted by a malicious or bad motive into an unlawful fact, so as to make the doer of the act liable to civil action; and, therefore, where the appellant had violated no legal right of the respondent, done no unlawful act and used no unlawful means in procuring the respondent's dismissal, his conduct was not actionable, however, malicious or bad his motive might be." According to Lord Watson, there are only two grounds of legal liability (1) If a person knowingly and for his own ends induces the commission of an actionable wrong; and (2) where the act induced is within the right of the immediate actor but may be to the detriment of a third party and the inducer procured his object by the use of illegal means directed against the third party.

Lord Macnaghten expressed his opinion in *Quinn* v. *Leathem* (8), that if all matters of merely passing interest be eliminated, *Allen* v. *Flood* (5) had merely repeated what had been laid down in *Stevenson* v. *Newnham* (9), namely, that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent

In *Mogul Steamship Co.* v. *McGregor* (4), it was held by the majority of the Judges that the association being formed by the defendants with the view of keeping

(5) (1868) 3 H. L. 306 at p. 317; 15 W. R. 446

(6) (1853) 2 El. & Bl. 216; 22 L. J. Q. B. 463; 17 Jur. 827; 1 W. R. 432; 118 E R 749.

(7) (1898) A C. 1; 67 L. J. Q. B. 119; 77 L. T. 717; 46 W. R 258; 62 J. P. 595.

(8) (1901) A.C. 495; 70 L. J. P. C. 76; 85 L. T. 489; 50 W. R. 139; 65 J. P. 708; 17 T. L. R. 749.

(9) (1853) 13 C. B. 285; 22 L. J. C. P. 110; 17 Jur. 600; 93 R. R. 532.

the trade in their own hands and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable Bowen L. J. enunciated the law in the following terms. Page 614 *

"There seems to be no burdens or restrictions in law upon a trader which arise merely from the fact that he is a trader and which are not equally laid on all other subjects of the Crown. His right to trade freely is a right which the law recognises and encourages, but it is one which places him at no especial disadvantage as compared with others. No man whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation obstruction and molestation are forbibdden; so is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it."

Again, at page 617*:—

"The truth is that the combination of capital for the purposes of trade and competition is a very different thing from such a combination of several persons against one, with a view to harm him, [as falls under the head of indictable conspiracy. There is no just cause or excuse in the latter class of cases. There is such a just cause or excuse in the former".

We have no hesitation in holding that this view does not militate against the provisions of s. 27 of the Indian Contract Act and that the basic principle of the two is not divergent.

In *Temperton* v. *Russell* (10), Lopes L. J., observed:—

"I will state shortly what I believe to be the law on the subject. The result of the authorities appears to me that a combination of two or more persons to induce others not to deal with a particular individual, or enter into contract with him, if done with the intention of injuring him is an actionable wrong if damage results to him thereform."

The same rule was laid down in *Quinn* v. *Leathem* (8) which has already been referred to Lord Macnaghten observed *Quinn* v. *Leathem* (8)

"Speaking for myself, I have no hesitation in saying that I think the decision in *Allen* v. *Flood* (7) was right, not on the ground of malicious intention—that was not I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action and that it is a violation of legal right to interfere with contractual relations recognised by law if there is no sufficient justification for the interference ..... The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition and that it is founded in good sense .... A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours but it is a very different thing (as Lord Fitzgerald observes) when one man has to defend himself against many combined to do him wrong."

(10) (1893) 1 Q. B. 715; 62 L. J. Q. B. 412; 4 R. 376; 69 L. T. 78; 41 W. R. 565; 57 J. P. 676.

*Page of (1889) 23 Q. B. D. [—*Ed.*]

Lord Brampton with his characteristic force and clearness expresses himself as follows:—

"Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful, if done separately without conspiracy may, with conspiracy become dangerous and alarming just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison."

In *South Wales Minor's Federation* v. *Glamorgan Coal Co, Ltd* (11), it was held that procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right. According to Lord Lindley malice was not the gist of the action.

Where the word "malice" has been used in some of these cases, it must be held to connote no more than an intention to commit an unlawful act without reference to spite or ill-feeling.

Conway v. *Wade* (12) and *Hodges* v. *Webb* (13) are not very helpful cases since they turned more particularly upon a construction of certain words in s. 3 of Trade Disputes Act of 1906. But the last mentioned case is relevant in so far that it was held therein that in the absence of conspiracy or unlawful combination, a firm or even emphatic statement by one person that unless the person whom he is addressing consents to the adoption of a particular course which he can lawfully take, the speaker would do that which he was lawfully entitled to do, was not a threat for which the speaker could be held liable at law.

In *Larkin* v. *Long* (14) Lord Atkinson is reported to have observed:—

"The fact that members of a trade union are merely acting in obedience to a rule of their union believed by them to be for their benefit is no defence to an action for the breach of any contracts they have entered into and still less is it a defence to the wilful and malicious infringement in combination of legal right of personal freedom of action which they claim for themselves, but which others are entitled to quite as fully and as absolutely as they are."

In *Ware & De Freville, Ltd.*, v. *Motor Trade Association* (15) the finding was that the evidence produced by the plaintiffs was quite insufficient to establish the case of a

(11) (1905) A. C. 239; 74 L. J. K. B. 525; 92 L. T. 710; 53 W. R. 593, 21 T. L. R. 441.

(12) (1909) A. C. 506; 78 L. J. K. B. 1025; 101 L. T. 248; 53 S. J. 754; 25 T. L. R. 779.

(13) (1920) 2 Ch. 70; 89 L. J. Ch. 273; 123 L. T. 80; 36 T. L. R. 311.

(14) (1915) A. C. 814; 84 L. J. P. C. 201; 113 L. T. 337; 59 S. J. 455; 31 T. L. R. 405.

(15) (1921) 3 K. B. 40; 90 L. J. K. B. 949; 125 L. T. 265; 65 S. J. 239; 37 T. L. R. 213.

conspiracy to injure. The following observation finds a place in the judgment :—

"The decisions in *Mogul Steamship Co, Ltd.*, v. *McGregor* (4), *Allen* v. *Flood* (7) and *Quinn* v *Leathem* (8) are all in agreement to this extent, that a combination of persons to do some act, the object of which is to injure some third person is wrongful and actionable; so too is a combination of persons to do some act by unlawful means which will have the effect of injuring some third person."

If there is a combination made and threats used for the legitimate protection of trade interests, no action would lie.

In *Reynolds* v. *Shipping Federation Ltd.*, (16). It was held that where an agreement is entered into, not from a malicious desire to inflict loss on an individual or class of individuals, but from a desire to advance the business interests of employers and employed alike by maintaining the advantages of collective bargaining and control, it was not unlawful and no action for conspiracy was maintainable by the plaintiff.

"The agreement or combination was not against a particular individual but merely operated to exclude such individuals as might not from time to time satisfy a qualification which was within the reach of any one who desires employment"

In *Sorrell* v. *Smith* (17) it was ruled that a combination of two or more persons for the purpose of injuring a man in his trade is unlawful and if it results in damage to him is actionable If the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues, provided that the purpose is not effected by illegal means. Viscount Cave, L C. observed:

There is some authority for the view that what is unlawful in two is not lawful in one, and that the circumstance that two or more persons combine to cause the injury, while it may be very relevant, as evidence of the purpose and, as an aggravation of the damages, is not itself an essential element in the cause of action."

There exists no uncertainty as to the legal principles regulating the rights of the parties to this action and the following propositions may be taken to be the settled law :—

(1) Every person has a right to a free course of trade and to conduct his business upon his own lines even though it results in an interference with the business of another person to his detriment.

(2) If a person or a combination of persons *unlawfully* procure a breach of contract, the matter is actionable, provided that damage accrues therefrom.

(3) Malice in the sense of spite or ill-feeling is not the gist of the action. An act that is legal in itself does not become illegal because it is prompted by an indirect or sinister motive.

(4) Even though the dominating motive in a certain course of action may be the furtherance of one's business or of one's interest, one is not entitled to interfere with another man's method of earning his living by illegal means Illegal means may either be means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual.

(5) An unlawful interference with the business of another person with intent to hurt that person is actionable provided that damage results from interference. A lawful interference by unlawful methods with the same object and producing similar results is equally actionable.

We have set out in detail the findings of the learned Judge and his reasons in support thereof. It is perfectly clear that the defendants did not unlawfully or by illegal means procure any breaches of contract in favour of the plaintiffs There was no conspiracy on the part of the defendants to compel the plaintiffs' vendors not to supply goods to the plaintiffs. A certain amount of pressure was brought to bear upon their constituents, the object of which was that if the latter wished to continue to be members of the association they had to obey the edicts of the association and to cease to deal with outsiders. These persons had a choice of action. They were not the victims of any coercion on the part of the defendants. Where a person has a choice of one or other of two courses with their attendant advantages or disadvantages, coercion is not necessarily one of the elements involved in the transaction. There was no organised conspiracy on the parts of the defendants to do harm to the plaintiffs. The association of the defendants was formed with the primary object of keeping the trade in their own hands and not with the intention of ruining the trade of the plaintiffs. The association, therefore, was not unlawful and there was no cause of action for a claim founded upon conspiracy. The plaintiffs are, therefore, not entitled to the relief claimed.

(16) (1924) 1 Ch. 28.
(17) (1925) A. C. 700.

We accordingly dismiss this appeal with costs, including in this Court fees on the higher scale.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

Criminal Reference No 695 of 1930.
Connected with No. 700 of 1930.
February 23, 1931.

GRIMWOOD MEARS, C. J. and SEN, J.

JOTI PRASAD GUPTA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Salt Act (XII of 1882), s. 9 (a)—*Penal Code (Act XLV of 1860), ss. 46, 117—General Clauses Act (X of 1897), s. 26—Abetment of offence under Salt Act—Conviction under s. 117, Penal Code—Legality—Offences under Special Act and general law—Punishment.*

A person guilty of abetment of an offence under s. 9 (*a*) of the Salt Act may be convicted and sentenced under s. 117 of the Penal Code where it is proved that the act amounted to an abetment of the commission of an offence by the public generally or by any number or class of persons exceeding ten. [p. 96, col. 2.]

Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the Legislature to exclude it. [p. 93, col. 2]

Under the General Clauses Act, s. 26, where an act is punishable under a general Statute, the offender could be proceeded with under either or both but could not be punished twice for the same act or omission which constitutes the offence. *Emperor* v. *Mohan Lal* (1), dissented from, *Proceedings of the High Court dated 22nd February 1876* (5), *Queen* v. *Ramchandrappa* (7), *Kumuda Prasad Mozumdar* v. *Emperor* (8), *Bhaldeandra Trimbak* v. *Emperor* (11), relied on. *Chandi Prasad* v. *Abdul Rahman* (2), *Ram Nath* v. *Emperor* (3), *Emperor* v. *Abdul Hamid* (4) and *Segu Baliah* v. *Ramesameah* (12), referred to. [*ibid.*]

Order on reference submitted by the Sessions Judge of Meerut, as per his letter No. 478—III, dated the 10th October, 1930.

Dr. *K. N Katju* and Messrs. *P. L. Banerji, R. C. Mital, K. D. Malaviya* and *Vishwa Mittra*, for the Applicant.

The Government Advocate, for the Crown.

Judgment.—The person concerned in this criminal reference is one Joti Prasad Gupta, an Advocate of this Court, practising at Meerut. On the 13th of April 1930, he made a speech on the Barafkhana ground at Meerut before an audience consisting of about ten thousand persons in which he urged them to break the Salt Law. He also sold certain packets of contraband salt said to have been manufactured at Ghaziabad He was prosecuted under s. 9 (*a*) of the Salt Act (Act XII of 1882) and under s. 117 of the Indian Penal Code before a Magistrate First Class and was convicted of both the offences. He was sentenced to six months' rigorous imprisonment under the former section and to eighteen months' rigorous imprisonment under the latter section. The sentences were directed to run consecutively.

Before the Magistrate Joti Prasad Gupta "took no part in the proceedings". He refused to say anything in his defence and declined to produce any evidence on his behalf.

He preferred no appeal against his conviction or sentence.

On the 24th of September, 1930, an application was presented in the Court of the learned Sessions Judge of Meerut by Mr. Baij Nath, President of the Meerut Bar Association in which he urged that Joti Prasad Gupta had been wrongly convicted under s 117 of the Indian Penal Code and that his conviction and sentence under that section ought to be set aside and should be substituted by a conviction and sentence under s. 9 (*c*) of the Indian Salt Act. The contention advanced was that where provision had been made in cl. (*c*) of s. 9 for the punishment of abetment of offences under cls. (*a*) and (*b*) of the said section, it would be illegal to convict a person under s 117 of the Indian Penal Code. Reliance was placed upon a decision of the Chief Court of Oudh in *Emperor* v. *Mohan Lal* (1) In this case the Chief Court sustained the contention which was put forward, set aside the conviction and sentence under s. 117 of the Indian Penal Code and substituted for it a sentence of six months' rigorous imprisonment under s. *c*) of the Salt Act. In view of the importance of the question at issue, the learned Sessions Judge has referred this case and the connected case to this Court for a clear pronouncement. The case had been argued at great length before us by Dr. Katju in support of the reference and by Mr. Uma Shankar Bajpai for the Crown who opposes the reference.

Dr. Katju in support of his contention, has relied upon the decision of the Oudh Chief Court in *Emperor* v. *Mohan Lal* (1), *Chandi Prasad* v. *Abdul Rahman* (2), *Ram Nath* v. *Emperor* (3), *Emperor* v. *Abdul*

(1) 128 Ind. Cas. 221; A. I. R 1930 Oudh 497; 7 O. W. N. 895; 32 Cr. L. J. 104; (1930) Cr. Cas. 1161.

(2) 22 C. 131.

(3) 84 Ind. Cas. 714; 22 A. L. J. 1166; L. R. 6 A. 25 Cr.; 26 Cr. L. J. 362; A. I. R. 1925 All. 230; 47 A. 208.

Hamid (4) and a number of English authorities which have been considered by Mr. Justice Das in the last mentioned case. He has drawn our attention to s. 11 of the Act and contends that the offence under the Salt Act is one of a very special nature for which a Special Tribunal has been appointed under the Act and a special procedure provided Of the cases cited by him, the case of *Emperor* v. *Mohan Lal* (1) is directly in point and the facts of this case are parallel to the facts of the case now before us. Considerable emphasis has been laid in this case upon the fact that an act in contravention of the Salt Law is an offence under the Indian Salt Act, but is not an independent offence under the Indian Penal Code. Similarly the abetment of offences under ss. 9 (*a*) and (*b*) of the Salt Act is a substantive offence under s. 9 (*c*) of the said Act and punishment has been provided in the said Act for the abetment of the offences under ss. 9 (*a*) and 9 (*b*) We may note in passing, that before the Chief Court, it was

"agreed on both sides that the act for the abetment of which these persons were convicted is not a separate offence under the Indian Penal Code, but it is an offence exclusively under the Indian Salt Act, 1882."

From this, the learned Judges of that Court concluded that

"it is to the former class of cases to which the provisions of s. 26 of the General Clauses Act apply, but the present case is of the latter class."

They further held that the principle of interpretation of Statutes in such circumstances is *generalia specialibus non derogant*. They held, therefore, that where an act was an offence under a special law and the offence could be punished under that special law, the general law would not apply and this was the principle laid down in s. 5 of the Indian Penal Code. In their view, s. 9 (*c*) embraced all abetments coming under the definition of 'abetment' in the Indian Penal Code, no matter how serious the character of the abetment. They observed that, if for the same act a person could be punished under s 117 of the Indian Penal Code, and also be punished for the same Act under s. 9 of the Salt Act, this would lead to undesirable and absurd results. They, therefore, held that where an act was an offence under a special or local law for which punishment had been provided for in the special or local law, but the act in question had not been treated as a separate and independent offence under the Indian Penal Code and no punishment had been separately provided for in that Code, the offence was exclusively punishable under the special or local law and not under the general criminal law.

(4) 68 Ind. Cas. 945; 2 Pat. 134; 3 P. L. T. 585; (1922) Pat. 274; 4 U. P. L. R. (Pat.) 79; 23 Cr. L. J. 625; A. I. R. 1923 Pat. 1; 1 Pat. L. R. 199 (F. B.).

The learned Government Advocate does not agree to the correctness of the data which appear to have been agreed to or assumed before the Chief Court. The position calls for a detailed and careful examination.

Laws regulating the manufacture of salt, appear to have been made at a very early period of the British rule in this country. We emphasise the fact that Act XII of 1882 did not for the first time declare certain acts done in contravention of that Act or of any rule made thereunder to be offences which were punishable by fine or imprisonment for non-payment of fine. Similar provisions were made in ss. 4 and 7 of Act XIV of 1843 which was applicable to the North Western Provinces of the Presidency of Bengal. Section 4 ran thus :

"And it is further enacted that from and after the 1st day of September, 1843, the manufacture of alimentary salt throughout the North Western Provinces of the Presidency of Bengal without the express sanction of the Government is prohibited; and that any person engaging in the manufacture of such salt, or preparing or causing to be prepared works for the manufacture of such salt without such sanction and all *zemindars* or other proprietors of land, or their agents conniving at such illicit manufacture, shall on conviction by the Magistrate, within the limits of whose district the offence may have occurred, be punished by a fine not exceeding Rs. 500, and, on non-payment of such fine by imprisonment not exceeding six months with or without hard labour, and that all works at which such manufacture was often conducted, or which have design for such manufacture shall be destroyed, and any salt which may be manufactured or stored thereat shall be seized and confiscated."

Section 7, *inter alia*, provided for the offence of abetment and was expressed in following words:—

"And it is further enacted that all persons evading or attempting to avade the payment of the duties imposed by this Act, and all persons *aiding* or *abetting* such attempts or evasions or in any manner acting in contravention of the Act, or of any order made and issued under the provisions thereof and all *zemindars* and other proprietors of land or their agents, who shall wilfully connive at such attempts or evasions or aid such acts shall on conviction by the Magistrate within the limit of whose district the offence may have occurred, be punished by a fine not exceeding Rs. 500 and on non-payment thereof by imprisonment not exceeding six months with or without hard labour."

The infraction of the Salt Law and the abetment of certain offences under the Salt Law were, therefore, offences under Act XIV of 1843 and were punishable with fine or with imprisonment for non-pay

ment of fine. Under Act XII of 1882 they continued to be offences, but the sentences provided for the offences are slightly different as would appear from the following text of s. 9 of the Act:—"Whoever commits any of the following offences (*viz*):—(*a*) does anything in contravention of this Act or of any rule made hereunder; (*b*) evades payment of any duty or charge payable under this Act or any such rule; or (*c*) attempts to commit or abets within the meaning of the Indian Penal Code, the commission of any of the offences mentioned in cls. (*a*) and (*b*) of this section, shall, for every such offence, be punished with fine which may extend to Rs. 500, or with imprisonment for a term which may extend to six months, or with both."

The general criminal law of the land is to be found in Act XLV of 1860, which received the assent of the Governor General in Council on the 6th of October, 1860. It has been provided in s. 40 of the Indian Penal Code that the word "offence" in s. 117 of the Code denotes a thing punishable under this Code or under a special or local law as hereinafter defined. This provision was not to be found in the Penal Code as originally enacted but was introduced for the first time under Act XXVII of 1870. The effect of this section is to make every thing punishable under a special law an *offence* within the meaning of the Indian Penal Code. The object of the amendment was to enlarge the scope of the Indian Penal Code by making offences under a special law also offences under the Indian Penal Code. The result, therefore, was that offences under the Excise Act (Act XII of 1896), under the Indian Post Office Act (Act VI of 1898), under the Explosive Substances Act (Act VI of 1908) or the Police Act (Act V of 1861) or under the Registration Act, became also offences under the Indian Penal Code. In these Acts, the abetment of certain offences has been provided for as a substantive offences. We refer to s. 59 of the Excise Act, to s. 70 of the Post Office Act, s. 12 of the Explosives Act, s. 6 of the Explosive Substances Act, s. 82 of the Registration Act and s. 36 of the Police Act. If, therefore, we read s. 40 in conjunction with the relevant penal sections of the special or local Acts, the following facts will have to be deduced: (1) that all acts or omissions in contravention of special or local Acts which are punishable under the said Acts, fall under the definition of 'offences' in the Indian Penal Code; (2) that all abetments of offences which are offences under the special or local Acts and are punishable under the said Acts, also fall under the definition of 'offences' in the Indian Penal Code.

In this connection, s. 40 of the Indian Penal Code should be read in conjunction with ss 2 and 5. Section 2 expressly provides that every person shall be liable to punishment under this Code *and not otherwise* for every act or omission contrary to the provisions thereof of which he shall be guilty etc. The effect of s. 5 is to qualify the general repeal indicated in s. 2, by expressly declaring that offences defined and provided for by special and local laws continue to be offences and are punishable as such. Section 5 clearly declares that the Indian Penal Code is not intended to repeal, vary, suspend or affect any of the provisions of any special or local law. The one enactment has not the effect of repealing the other. The two co-exist without conflict. In order to leave no doubt on this point the law on the subject has been declared by the express provision of s. 26 of the General Clauses Act which provides that where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence. It is clear, therefore, that where an act is punishable under a special law and also under a general Statute, the offender could be proceeded with under either or both but could not be punished twice for the same act or omission which constituted the offence. Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the Legislature to exclude it. We accept the following statement of law in Halsbury's Laws of England (Vol. XXVII, page 168):—

"The general law of the country is not altered by special legislation made without particular reference to it, though a Statute passed for a particular purpose must *so far as that purpose extends* override general enactments".

It was so held by the Madras High Court so far back as 1876 *Proceedings of the High Court dated 22nd February 1876* (5). "The ordinary criminal law is not excluded by Regulation VII of 1817 or of Act XX of 1860 (*vide* s. 20). The permission of the

(5) 1 M. 55.

Board of Revenue or of the Committees is required only for the procedure prescribed in the special Acts, and these special provisions cannot be taken out of the Acts, and applied as a restriction to the ordinary operation of the Criminal Law. In *Queen* v. *Hassin Ali* (6) it was held by Turner J. that on the same facts *the conviction and sentence* under s. 27 of the Cattle Trespass Act (Act I of 1871) and s. 169 of the Indian Penal Code was illegal. The convictlon and sentence under s. 27 were quashed but the conviction under s. 169 was maintained but the sentence was reduced.

In *Queen* v. *Ramchandrappa* (7), it was held that the provisions of the Indian Penal Code were not in conflict with those of the special law, and effect might therefore, be given to both. It was observed in passing that in ordinary cases *where there were no aggravating circumstances*, the Village Munsif or Civil Court would act discreetly in employing the special powers conferred on it under s. 15 (6) and s 16 (3) of Regulation IV of 1816, but if a charge was instituted in a Criminal Court under the Indian Penal Code, it must be dealt with by that Court. In *Kumuda Prasad Mozumdar* v. *Emperor* (8), a Bench of the Calcutta High Court took much the same view as was taken in the last mentioned case that ordinarily it was desirable that when an Act or omission was made penal by two Acts, one general and the other special, the sentence should be passed under the special Act. The learned Judges referred to the rule quoted by Lord Esher in *Lee* v. *Danger* (9):

"If one statute made the doing of an Act felonious and a subsequent Act makes it only penal, the latter is considered as the virtual repeal of the former."

After quoting this passage they made the following observation relating to this rule :

"We are not, however, disposed now to lay down broadly in this country, that in every case a special penal law repeals by implication a previously existing general law relating to an offence of the same nature, and in this case it is not necessary for us to do so. If we were to do so, we might infringe the rule of interpretation in s. 36 of the General Clauses Act. We are not also disposed to accept Mr. Roy's contention that the penal provisions of the Indian Railways Act areself-contain edandthe punishment for acts and omissions regarding a Railway Administration in India must be inflicted under this Act only. The penal provisions in the Act are not obviously exhaustive and there is nothing in the Act itself or any other enactment in force in India which excludes the operation of the general laws in force as to offences which are not punishable under the Act."

We are entirely in accord with the view set out above.

Our attention was called to the legal maxim referred to in the judgment of the Chief Court and to a number of English authorities which have been dealt with in the judgment of Mr. Justice Das in *Emperor* v. *Abdul Hamid* (4). We may mention at once that we consider that very different conditions prevail in the two countries Here in this country, where we have got definite statutes, we have to follow the same. The rules of the Common Law of England or the legal maxims embodying certain judicial principles, however wholesome they may be, cannot be engrafted upon the Indian Penal Code. In order to consider whether or not the offences referred to in s 9 of the Indian Salt Act, are, upon the fulfilment of certain conditions, offences under s. 117 of the Indian Penal Code, we have to consider s. 9 of the Salt Act and read the same in conjunction with ss. 2, 5, 40 and 117, of the Indian Penal Code.

Considerable emphasis has been laid upon the fact that acts or omissions which amount to a criminal offence under the Salt Act have not been incorporated into the body of the Indian Penal Code as separate or distinct offences. We agree that it is so, but we are clearly of opinion that this makes no difference. It would have made the Indian Penal Code extremely cumbrous if the offences under the various special and local Acts were included as separate offences under the Indian Penal Code and punishments separately provided for them in the said Code. To avoid repetition, provisions have been made in the Indian Penal Code with reference to offences generally and distinct punishment has been provided for them in ss. 109 to 117 of the Indian Penal Code. Where abetments of offences under the special or local Act satisfy the conditions of ss. 109 to 117, all the ingredients constituting an offence are complete, and there does not appear to be any reason why a person against whom all the ingredients of these offences are present should not be convicted under those sections. It would, of course, be improper if for the same Act a person were to be convicted twice, *i. e.*, once under the special law and again under the Indian

(6) 5 N. W. P. 49.
(7) 6 M. 249.
(8) 11 C. W. N. 100.
(9) (1867) 2 Q. B. 337 at p. 348; 61 L. J. Q. B. 780; 66 L. T. 548; 40 W. R. 469; 59 J. P. 678.

Penal Code. But it is perfectly clear that, although in view of s. 26 of the General Clauses Act he could be prosecuted and convicted both under the special enactment and also the general law, he could be punished *only once* either under the former or the latter.

Act XII of 1882 is not a self contained Act. The offences enumerated therein are not exhaustive. The number of offences under the Salt Act becomes enlarged having reference to the provision of s. 40 read with ss. 2 and 5 of the Code which we have already referred to. The offences mentioned in s. 9 of Act XII of 1882 were not new offences. They were offences under the Salt Act of 1843 When the Penal Code was amended in 1870, the ambit of s. 117 became enlarged so as to include within its scope the offences under s. 9 of of the Salt Act. The result was that where an offence under s. 9 (*a*) by the public .....generally or by a number of persons exceeding ten was abetted, it satisfied all the conditions of an offence under s. 117 of the Indian Penal Code.

Dr. Katju has relied upon the judgment of Das, J., in *Emperor* v. *Abdul Hamid* (4) in which that learned Judge ruled that no person could be convicted under s. 141 of the Indian Penal Code for an offence in contravention of ss. 30 and 30 (*a*) of the Police Act (Act V of 1861). We may mention here that the view of Das, J, was not shared by his two colleagues on the Bench. The learned Judge was of opinion that the offence in question was a new offence and not an offence under the general law. He relied upon a number of English authorities including a passage from Hawkins' Pleas of the Crown, Book II, page 25, s. 4 which ran as follows :—

"Also where a Statute makes a new offence which was in no way prohibited by the Common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt or information, etc., without mentioning an indictment, it seems to be settled to this day that it would not maintain an indictment, because mentioning the other methods of proceeding seem impliedly to exclude that of indictment."

Reliance was also placed upon the judgment of Lord Herschell, L. C. in *Institute of Patent Agents* v. *Joseph Lockwood* (10). Following that decision, Mr. Justice Das observed as follows :—

"Here also for the first time a new offence has been created. But for the enactment treating that offence, the respondent has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature having created that new offence has prescribed the punishment for it, namely, a penalty of Rs. 200. If, as the Lord Chancellor pointed out, the mode of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offence, can it be doubted for a single moment that the proper procedure was to proceed under the Act and not by indictment under the general law? In my opinion, the respondent could not be convicted under the Penal Code for an offence committed under the Police Act."

It is to be observed that s. 26 of the General Clauses Act was not brought to the notice of the learned Judge.

It is further to be added that the Salt Act (Act XII of 1882) does not provide for a distinct procedure for trial of offences under that Act.

Section 11 of the Salt Act does not provide for or prescribe any rules of procedure. It provides that the case cannot be instituted except on the complaint of a particular officer and also prescribes a period of limitation for such complaint. It also provides that offences under the Act were triable by Magistrates exercising powers not less than those of a Magistrate of the Second Class. The procedure to be followed for trial of cases under the Act is the Code of Criminal Procedure. We have already noticed that the offences under ActXII of 1882 were not new offences; nor could the offences under the Act be restricted to those enumerated in s. 9 of the Act. The case of Abdul Hamid was decided by Mullick and Coutts, JJ, on different lines. They were of opinion that Abdul Hamid could not be convicted under s. 141 of the Indian Penal Code because there was no evidence that he was aware that any breach of the notification had been committed. The Patna case was considered by a Bench of the Bombay High Court in *Bhalchandra Trimbak* v. *Emperor* (11). We are in accord with the view expressed by the learned Judges, at pages 439 and 443.*

Dr. Katju also referred to *Ram Nath* v. *Emperor* (3). Babu Ram Nath who was a practising *Mukhtar* at Agra was convicted by a First Class Magistrate under s. 465 of the Indian Penal Code read with s. 114 of the same Code and sentenced to undergo one year's simple imprisonment. The offence alleged against him was that

(10) (1894) A. C. 347 at p. 261; 63 L. J. P. C. 74; 21 R. (Ct. of Sess) 61; 31 Sc. L. R. 942; 2 Sc. L. T. 166.

(11) 123 Ind. Cas. 497; A. I. R. 1929 Bom. 433; 31 Bom. L. R. 1151; Ind. Rul. (1930) Bom. 209; 31 Cr. L. J. 495; 54 C. 35.

*Pages of A. I. R. 1929 Bom.—[*Ed*].

he abetted the false personation of a voter named Hari Shankar. It was contended on his behalf that his conviction under s. 465 of the Indian Penal Code was illegal and that he should have been convicted under s. 171 (*f*) of the same Code. Effect was given to this contention and it was ruled that where there were two provisions, one specific and the other general, the specific provision ought to be applied in preference to the general one. The learned Judge observed :

"If this view be correct, the offence committed must be treated as one under s. 171 (*f*) of the Indian Penal Code in preference to s. 465."

No reasons have been given for this view and no authorities cited. The case moreover is distinguishable, because the offence did not fall under the two enactments. *Chandi Prasad* v *Abdul Rahman* (2), appears to have been a special case. The learned Judges were of opinion that the Municipal Act was intended to be complete in itself as regards offences committed against the Municipal Commissioners and there was no indication in the Act to make a delinquent also liable to punishment under the Indian Penal Code. In the present case, we have got to consider whether there is anything in the special Act, *viz.*, Act XII of 1882 to exclude the operation of the general criminal law as contained in the Indian Penal Code. Such an intention cannot be presumed. The intention can be inferred either from express words of the text or by necessary implication. It could never have been the intention of the Legislature to repeal offences providing for heavier punishments merely by reason of the fact that a minor penalty had been provided for in this special Act. If we hold otherwise, the result would be that many offenders must escape punishment under the Indian Penal Code, because a minor penalty for those offences had been provided by special enactment. Offences of abetment under the Indian Penal Code are of various character and punishments have been provided for, which vary in degree according to the nature and character of the crime. These various forms of abetment have not been provided for either in the Salt Act or any other special or local enactments. They fall as we have shown under the general law.

In 42 Ind. Cas. 608 [*Segu Baliah* v. *N. Ramasamiah* (12)], the same set of acts constituted an offence under s. 43 of the Provincial Insolvency Act (Act III of 1907) and also under ss. 421 and 424 of the Indian Penal Code. It was argued that s. 43 virtually repealed ss. 421 and 424 of the Indian Penal Code. It was held in this case that where a special enactment dealt with an offence similar to an offence dealt with by a general enactment, it did not follow that the provisions of the general enactment had been repealed to that extent. The Calcutta case of Chandi Prasad was cited but was not followed. It is pointed out that s. 26 of the General Clauses Act was not brought to the notice of the learned Judges There appears to be very good reason for it, because s. 26 did not apply to a case where the offences charged were not under two separate enactments, but were two separate offences under the same enactment.

Upon a consideration of the text of the various Statutes before us and the authorities dealing with the same, we unhesitatingly come to the conclusion that a person guilty of abetment of an offence under s. 9 (*a*) of the Indian Salt Act may be convicted and sentenced under s. 117 of the Indian Penal Code where it is proved that the Act amounted to an abetment of the commission of an offence by the public generally or by any number or class of persons exceeding ten. We hold, therefore, that Joti Prasad Gupta has been properly convicted and sentenced under s. 117 of the Indian Penal Code.

Dr. Katju has urged a plea for the reduction of sentence. This point is not covered by the reference. Joti Prasad Gupta has preferred no application to this Court for reduction of sentence. The plea of reduction has not been urged by Dr. Katju on instructions received from Joti Prasad Gupta. We consider that the offence committed by him was of a serious character. In view of all the circumstances, we refuse to interfere with the sentence.

The result is that we reject the reference.

A. *Reference rejected.*

(12) 42 Ind. Cas. 608.

PRIVY COUNCIL.

Appeal from the Oudh Chief Cou .
December 15, 1931.

VISCOUNT DUNEDIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

MOHAMMAD EJAZ HUSAIN AND ANOTHER —APPELLANTS

versus

MOHAMMAD IFTIKHAR HUSAIN AND OTHERS—RESPONDENTS.

Muhammadan Law—Guardianship—Mother—Right to refer to arbitration dispute relating to immovable property of minor children—Family arrangement.

Under the Muhammadan Law the mother as the *de facto* guardian of her minor children is not competent to enter on their behalf into an agreement to refer to arbitration disputes relating to the distribution of their father's estate so as to make the award binding upon them as to their share in such immovable property. She is equally incompetent to agree to the disposal of her infant children's share in any part of the immovable property of their father by adopting an award made on a reference made by her and by calling the transaction a family arrangement. *Imambandi* v. *Mutsaddi* (1), applied. *Mohsi-ud-Din Ahmad* v. *K. Ahmad* (2), referred to. [p. 100, cols. 1 & 2.]

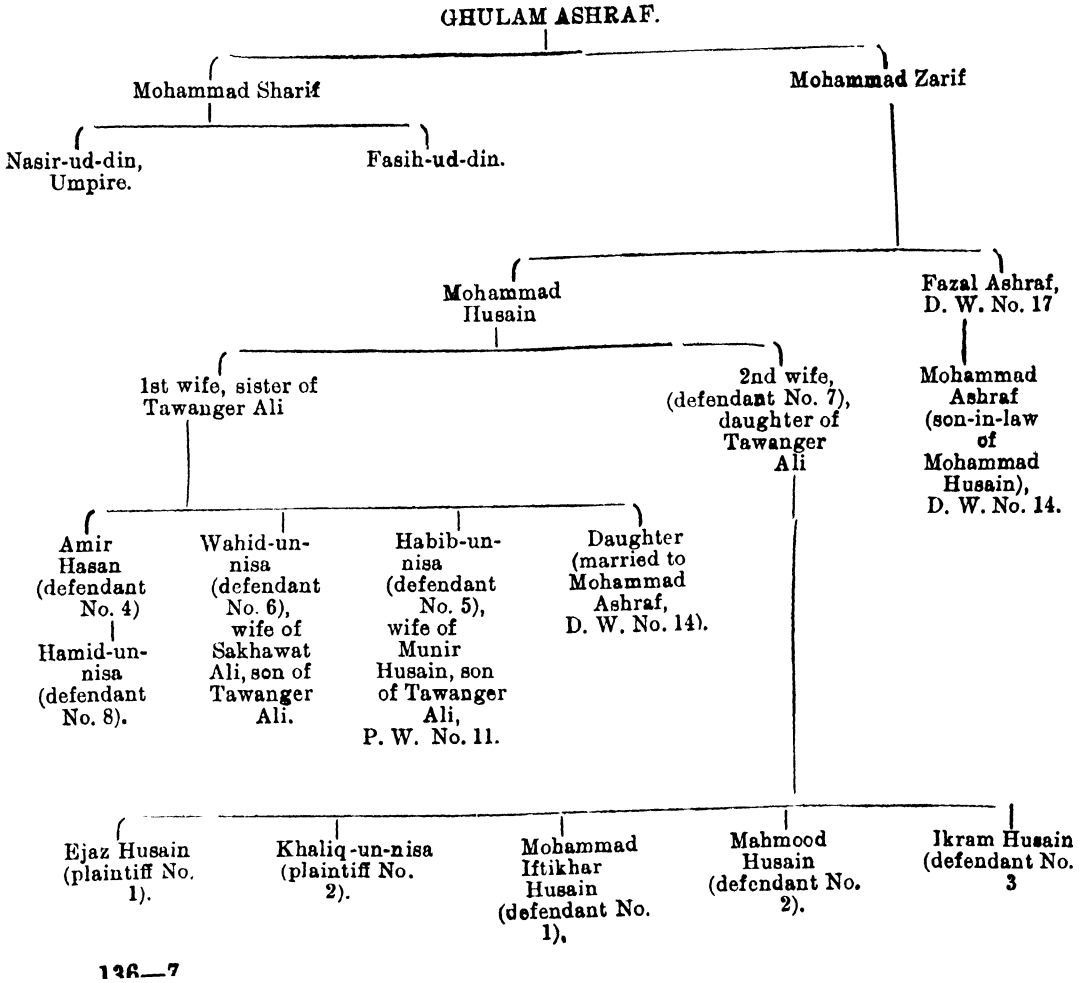
Messrs. *E. B. Raikes, K. C.* and *A. P. Pennell*, for the Appellant.

Messrs *S Hyam* and *J. M. Pringle*, for the Respondents.

Sir Lancelot Sanderson.—This is an appeal by the plaintiffs in the suit against a judgment and two decrees of the Chief Court of Oudh, dated the 18th October, 1928, which reversed the decree of the Sub-ordinate Judge, dated the 17th January, 1928, as amended by his order dated the 8th March, 1928.

The suit was brought by Mohammad Ejaz Husain and his sister Khaliq-un-nisa against their full and half-brothers and sisters, their mother Faiyaz un-nisa and Hamid-un-nisa, the wife of Amir Hasan, the defendant No. 4.

The relationship betweeen the parties to the suit appears from the pedigree which was attached to the judgment of the Chief Court, and which is as follows:—



The suit was brought for a declaration that an agreement dated the 25th March, 1912, and an award dated the 2nd April, 1912, were null and void and inoperative and for a partition of certain properties alleged to have been the properties of the plaintiffs' father, Mohammad Husain.

The learned Subordinate Judge, who tried the suit, made a decree in the plaintiffs' favour: this decree was subsequently amended on an application for review, and it was thereby directed that the plaintiffs should get from the defendant No 4 (*i. e.*, Amir Hasan) a 21-104th share, first, out of the sum of Rs. 25,526, being the capitalised value of a factory, and, secondly, a declaration of their rights to that extent out of the property No. 10 of the plaint List A, in so far as it was left:—

". . . after meeting claims of the original owners and the acquisition by the Improvement Trust, and also out of the property No. 20 of the list, which is a family graveyard. Possession over the share-out of the property No. 10 can be obtained only after redemption of the mortgage assigned to the defendant No. 4 (*vide* Ex. 11), the trust compensation money being taken to have satisfied *pro rata* a part of this mortgage-debt.

"Plaintiffs shall further get interest on the amount under the first head at the rate of Rs. 12 per cent. per annum from 4th March, 1912, to the date of realisation Costs on parties. A preliminary decree for partition to be prepared in those terms."

From this decree both Amir Hasan, defendant No. 4, and the plaintiffs appealed to the Chief Court of Oudh.

The learned Judges of the Chief Court allowed the appeal of Amir Hasan and dismissed the appeal of the plaintiffs. The result was that the plaintiffs' suit was dismissed, the Chief Court directing that the parties should bear their own costs in both Courts.

These are the decrees from which the plaintiffs have appealed to His Majesty in Council.

Amir Hasan has died since the decree of the chief Court was made, and his representatives are now on the record, and they are the only respondents contesting this appeal.

The material facts are as follows.—

Mohammad Husain, the father of the plaintiffs and of the defendants Nos. 1 to 6, died on the 4th March, 1912.

On the 25th March, 1912, an agreement of reference to arbitration was executed by Amir Hasan (the fourth defendant), his two sisters (defendants Nos. 5 and 6), and Faiyaz-un-nisa (defendant No. 7), who was the surviving widow of Mohammad Hussain, and the mother of the plaintiffs and the defendants Nos. 1, 2 and 3.

The plaintiffs and the defendants Nos. 1, 2 and 3 were minors at the date of the agreement, and their mother purported to execute the agreement for herself in person and as guardian in the capacity "of the real mother" on behalf of the plaintiffs and her other minor children. By the said agreement all matters in dispute were referred to two arbitrators and an umpire, who were named in the said agreement.

One of the issues raised at the trial was as follows:—

"(1) Did Mohammad Husain constitute the defendant No. 7 as guardian of the person and property of plaintiffs as well as of defendants Nos. 1 to 3. If so, with what effect"

This issue was answered in the negative by the learned Subordinate Judge, and his decision in this respect was approved by the Chief Court.

It has not been argued before the Board that these findings were wrong, and the appeal must, therefore, be decided upon the assumption that Faiyaz un-nisa was not appointed by Mohammad Husain guardian of the person and property of the plaintiffs.

Further, it is to be noted that at the date of the said agreement Faiyaz-un-nisa had not been appointed guardian of the person and property of her minor children by the Court.

On the 3rd of April, 1912, the arbitrators with the concurrence of the umpire, made their award in writing. They decided:—

"(1) That the properties acquired by the deceased in the name of his wife, Faiyaz-un-nisa, defendant No 7, belonged to her as her separate properties and that she was entitled to those properties; (2) that the properties acquired by the deceased in the name of Amir Hasan, defendant No. 4, were his separate properties and that he was entitled to them; (3) that the factory known as the Victor Ice and Flour Mills, situate at Bagh Sherjang, City Lucknow, was given at Amir Hasan by the deceased during his lifetime and the same belonged to him, and (4) that the remaining properties should be distributed among the several heirs according to their legal shares under the Muhammadan Law."

The award was carried out and acted upon until the filing of this suit.

On the 18th July, 1912, Faiyaz-un-nisa filed an application in the Court of the District Judge of Lucknow under s. 10 of the Guardians and Wards Act (VIII of 1890), praying for a certificate of guardianship of the person and property of her minor children, including the plaintiffs.

On the 18th September, 1912, the certificate was issued.

The plaintiff, Mohammad Ejaz, attained his majority on the 21st October, 1923.

The plaintiff, Khaliq-un-nisa, attained her majority on the 8th October, 1925.

The suit was instituted on the 20th October, 1926, just within three years from the date on which the first plaintiff attained his majority.

In the suit many issues were raised, but it is not necessary to refer to them all. Both the Courts in India held that the properties acquired by Mohammad Husain in the names of Faiyaz-un-nisa and Amir Hasan belonged to the two last-mentioned persons respectively, and on these matters they agreed with the decision of the arbitrators. No question arises in this appeal with respect to these properties.

It is material, however, to note that at the time of the arbitration the interest of Faiyaz-un nisa and that of her minor children were not identical with respect to the properties standing in her name, for if the arbitrators had come to the conclusion that Faiyaz un-nisa was holding these properties *benami* for her husband, as alleged, the minor children would have been entitled to their respective shares therein.

Both Courts in India decided the issue as to the factory known as the Victor Ice and Flour Mills in the plaintiffs' favour. Disagreeing with the award in this respect, they held that the alleged oral gift of the factory by Mohammad Husain to Amir Hasan had not been established. The concurrent findings in respect of this issue have not been disputed in this appeal. It must, therefore, be taken for the purposes of this appeal that the said factory was part of the estate of Mohammad Husain at the date of his death and that, subject to the question hereinafter to be considered, the plaintiffs, as two of his heirs, are entitled to their respective shares in the said factory.

There is no dispute as to the shares to which the plaintiffs are entitled in the properties of their father, *viz.*, 14-104ths in respect of the first plaintiff, and 7-104ths in respect of his sister, the second plaintiff.

The main issue raised in the Court of the Subordinate Judge was whether Faiyaz-un-nisa, acting on behalf of her minor children, the plaintiffs, was competent to refer to arbitration the matter of the division of the assets of Mohammad Husain and questions connected therewith, and consequently whether the plaintiffs were bound by the award.

The Subordinate Judge decided this issue in favour of the plaintiffs, on the ground that Faiyaz-un-nisa, the mother of the plaintiffs, had no authority to refer, so as to bind the plaintiffs.

He was of opinion that otherwise the award did not appear to be perverse, unfair or influenced by any corruption or misconduct of the arbitrators.

The learned Judges of the Chief Court agreed with the conclusion of the Subordinate Judge on this issue and held that the agreement to refer to arbitration executed by Faiyaz-un-nisa on behalf of her minor children could not be considered binding on them and that the award, if looked at from that point of view, must be held to be an inoperative document.

The learned Judges of the Chief Court however, were of opinion that the scheme of distribution promulgated in the award, and which the learned Subordinate Judge had found to be in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrators, and which had been followed without any objection whatever for a long period extending over fourteen years, could well be recognised as a family settlement, and they stated that they were extremely reluctant to disturb the arrangement arrived at so far back as April, 1912.

Their Lordships appreciate the reluctance felt by the learned Judges, in view of the time which had elapsed since the arbitration and award. But the plaintiffs, on the death of their father, became entitled to their respective shares in his estate, and in view of the findings of both Courts in India it must now be taken that the above-mentioned Ice and Flour Factory was part of the immoveable property of Mohammad Husain, in which the plaintiffs were entitled to share, and yet by the award it was allotted to Amir Hasan as being his own property. The award in this respect, when carried out, amounted to an alienation of the plaintiffs' shares in that property, to which being infants they could not consent, and unless Faiyz-un-nisa, their mother, had authority to act on their behalf and was competent to enter into the alleged arrangement by which the said alienation was effected, the infant plaintiffs' shares in the said property could not be affected.

The learned Judges held that Faiyaz-un-nisa, although she was at the time of the agreement the "*de facto*" guardian of the plaintiffs, who were then minors, had no power to deal with their property, and consequently that she had no authority to enter on their behalf into the agreement to refer the disputes to arbitration, which, if acted upon, would necessarily affect the immoveable property of the infant plaintiffs.

If Faiyaz-un-nisa was not competent to deal with the immoveable property of the plaintiffs, by referring the disputes relating to the distribution of their father's estate to arbitration, and if the award made on such arbitration was not binding on the plaintiffs, it is difficult to see how Faiyaz-un-nisa could be competent to effectuate that distribution and to make the provisions of the award binding upon the infant plaintiffs merely by calling that which was contained in the agreement and the award a family arrangement.

Their Lordships are of opinion that if Faiyaz un-nisa was not competent to enter into the agreement of reference so as to bind the plaintiffs, who were minors at the time, with respect to their share in the immoveable property of their father, it must follow that she was equally incompetent to agree to the disposal of the infant plaintiffs' share in any part of the immoveable property of their father by adopting the award and by calling the transaction a family arrangement.

It is therefore necessary to consider the question whether Faiyaz un-nisa had authority to enter into the agreement of reference on behalf of the plaintiffs who were minors at the time.

It has already been stated that Faiyaz-un-nisa was not appointed guardian of the person and property of the minor children by Mohammad Husain, and that at the date of the agreement of reference she had not been appointed guardian by the Court.

At the time, therefore, of the agreement to refer she was not the legal guardian of her infant children, but merely the custodian of them. The provisions and principles of the Muhammadan Law which govern this matter were stated in the judgment of Mr. Ameer Ali when delivering the decision of this Board in *Imambandi* v. *Mutsaddi*, (1). At page 83* the following passage is to be found: -

"It is perfectly clear that under the Muhammadan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni Law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant The term '*de facto* guardian' that has been applied to these persons is misleading; it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous, and the judgment of the Board in *Mata Din* v. *Ahmed Ali* (2) clearly indicated it."

At pages 84 and 85* there are other material passages, which are as follows:—

"As already observed, in the absence of the father, under the Sunni Law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian for the protection and preservation of the infant's property devolves on the Judge as the representative of the Sovereign: Baillie's Digest (Ed. 1875), p. 689; Hamilton's Hedaya vol. 4, bk 52, c. 7, p. 555 No one else has any right or power to intermeddle with the property of a minor except for certain specified purposes, the nature of which is clearly defined. But the powers of even the *de jure* guardians are confined within legal limits. For example, whilst an executor-guardian (*wasi*) may sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss, dealings with his immovable property are subjected to strict conditions; Baillie's Digest, page 687.

* * * * *

"When the mother is the father's executrix or is appointed by the Judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant."

Mr. Ameer Ali then referred to certain exceptions provided for the protection of a minor child who has no "*de jure*" guardian, which were classified under three heads: it is clear that the present case does not fall within any of the stated exceptions.

The decision in the above-mentioned case was acted upon by Teunon and Beachcroft, JJ. in *Mohsiuddin Ahmed* v. *K. Ahmed* (3) the head-note of which is as follows:—

"The mother, as the *de facto* guardian of minors, is not competent, under the Muhammadan Law, to enter on their behalf into an agreement to refer to arbitration any dispute, even where there is no *de jure* guardian of the minors, such agreement being one which will necessarily, if acted upon, involve dealings with the immovable properties of the minors."

"*Imambandi* v. *Mutsaddi* (1) referred to.

Adopting the principles of Muhammadan Law as stated by this Board in *Imambandi* v. *Mutsaddi* (1) their Lordships have no doubt that the Courts in India were right in holding that Faiyaz-un-nisa had no

(1) 47 Ind. Cas. 513; 45 I. A. 73 at p. 83, 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330, 28 C. L. J. 409; 23 C. W. N. 50; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518 (P. C.).

(2) 13 Ind. Cas. 976; 39 I. A. 49; 16 C. W. N. 336; 11 M. L. T. 145; (1912) M. W. N. 183; 2 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 C. C. 49; 34 A. 213; 23 M. L. J. 6 (P. C.).

(3) 57 Ind. Cas. 945, 47 C. 713; 26 C. W. N. 246.

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authority to enter into the agreement of reference on behalf of the plaintiffs, who were minors at the time, so as to make the award binding upon them as to their share in the immoveable property of their father.

They are also of opinion that Faiyaz un-nisa had no power or authority to enter into an arrangement whereby the plaintiffs' share in the immoveable property of their father would be affected, in view of the fact that at the time of the said agreement she was not their legal guardian, and she cannot be clothed with the necessary authority by calling the transaction a family arrangement.

Their Lordships' attention was drawn by learned Counsel for the respondents to several reported cases: in their opinion it is not necessary to deal with them in detail. It is sufficient to say that none of them covered the point which is now under consideration.

Reliance was placed by the learned Counsel for the respondents upon the fact that on the 18th September, 1912, Faiyaz-un-nisa was appointed by the Court guardian of the person and property of the minors, including the plaintiffs, and that, therefore, it should be taken that the Court, by appointing Faiyaz-un-nisa guardian, must have approved the arrangement evidenced by the agreement of reference and the award. There is, however, no evidence that the District Judge was made aware of the said arrangement. Indeed, it was admitted that if an application had been made to him before the agreement to refer was executed, and if he had been informed that the interest of the mother with regard to some of the properties was not identical with that of the minors, as was the fact, the Judge would in the ordinary course have appointed some person, other than the mother, as guardian of the minors. It is obvious that the District Judge did not consider the question which is now before their Lordships, and the mere fact that the Court subsequently found the mother a fit person to act for the minors would not validate the arrangement, which in its inception was invalid.

A further point was raised by the learned Counsel for the respondents, *viz*, that the plaintiff Ejaz Husain could not maintain the suit because he had ratified the alleged family arrangement as to part of the estate allotted to him by the award.

It appears that certain mortgage deeds had been executed in favour of Mohammad Husain and these were included in the shares awarded to the plaintiff and his brothers. A suit on the mortgages was instituted on the 13th October, 1922, by Iftikhar Husain after attaining majority, and his three brothers, of whom Ejaz Husain was one, as minors, under the guardianship of their mother.

A preliminary decree was obtained on the 11th October, 1923, and an application was made for a decree absolute on the 22nd September, 1924, and the decree was made absolute on the 1st November, 1924—Ejaz Husain was of age when the application for decree absolute was made, and signed it as a major.

Their Lordships do not consider that this is sufficient to prevent Ejaz Husain from maintaining the present suit. Proceedings in the mortgage suit had been begun when he was a minor, and when the time came for application for a decree absolute the mother had no longer any authority to act for him, as he had attained majority, and Ejaz being a party to the suit his signature to the application was necessary to bring the proceedings to a conclusion in the interest of all concerned.

The learned Counsel for the plaintiffs contended that they were entitled to an account of and a share in all the profits made by Amir Hasan in respect of the Ice and Flour Factory.

Their Lordships are unable to accept this contention.

It appears that Amir Hasan managed the business of the factory in his father's lifetime and continued so to do after his death. The old factory has gone, most of the machinery being worn out, and modern factories were erected by him in its place. These and other facts stated by the learned Subordinate Judge, which need not be mentioned in detail, are sufficient to show that this is not a case for mesne profits. The rights of the plaintiffs in this respect are fully met by the allowance of interest at the rate of 12 per cent. per annum made by the Subordinate Judge. It is worthy of note that the plaintiff-appellants in their case did not ask for mesne profits, but submitted that the decree of the learned Subordinate Judge should be restored, and that Rs. 25,000, the amount fixed by the Chief Court, should be substituted for Rs. 25,526, which was the sum decreed by the learned Subordinate Judge as the capitalised value of the factory.

For the above-mentioned reasons their Lordships are of opinion that the appeal must be allowed, the decrees of the Chief Court dated the 18th October, 1928, must be set aside, and the decree of the Subordinate Judge dated the 17th January, 1928, as amended by the order of the 8th March, 1928, be restored, but that the sum of Rs. 25,000 be substituted for the sum of Rs. 25,526 mentioned in the said decree of the Subordinate Judge.

The respondents, the heirs of the deceased respondent, Sheikh Amir Hasan, must pay the costs of the plaintiffs of this appeal, and of the appeals to the Chief Court. Their Lordships will humbly advise His Majesty accordingly.

A. *Appeal allowed.*

Solicitors for the Appellant:—Mr. *J. E. Lambert.*

Solicitors for the Respondent:—Messrs. *Barrow, Rogers & Nevill.*

PRIVY COUNCIL.

Appeal from the Calcutta High Court.

December 15, 1931.

VISCOUNT DUNEDIN, LORD BLANESBURGH AND SIR JOHN WALLIS.

RAJKUMAR SEN CHOWDHURY AND OTHERS—APPELLANTS

versus

RAM SUNDAR SHAHA AND OTHERS—RESPONDENTS.

Commission for examination of witnesses—Unnecessary protraction, an abuse to be checked—Contract Act (IX of 1872), s. 11—Unsoundness of mind—Mere loss of memory distinguished—Medical evidence, value of—Execution of deeds—Executant not understanding details—Validity of deed.

Unnecessary protraction of examination of witnesses on commission which enormously increases the costs of litigation without any corresponding benefit to the parties should be checked and it is within the powers of the High Courts to direct an enquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals. [p. 102, col. 2.]

Loss of memory does not usually reach such a stage during the lifetime of the individual so as to unfit him for the management of his own affairs. [p. 105, col. 1.]

The fact that the medical history of a case was derived from an unreliable informant is an important factor which detracts from the weight of medical evidence. [p. 107, col. 2.]

In India as in England it is enough for the executant of a legal document to understand the nature of the transaction leaving the details to his lawyer. It is not necessary that he should understand all the terms of the document. [p. 106, col. 2.]

Messrs. *L. DeGruyther, K.C.* and *B. Dube, K. C.*, for the Appellant.

Messrs. *A. M. Dune, K. C.* and *J. M. Parikh*, for the Respondent.

Sir John Wallis—Disputes about the dispositions and contracts of people of advanced age and failing powers are always difficult cases to decide, and the difficulty is greatly increased when, as in the present case, the record has swollen to enormous size owing to the way in which the examination of the witnesses on commission was protracted, assuredly not in the interests of the parties. A scandalous instance of this abuse is to be found, as observed by the learned Judges of the High Court, in the examination of Ananda Roy, the principal witness for the plaintiffs, which takes up two hundred and twenty-six pages of the record, and contains twelve hundred and fifty questions and answers, most of which, as admitted at the trial by the Vakils on both sides were quite irrelevant to the suit.

In another appeal with an enormous record for the same High Court it was recently stated that the cross-examination on commission of a *purdahnashin* lady lasted for a hundred days. In their Lordships' opinion it is imperative that an abuse of this kind, which enormously increases the costs of litigation without any corresponding benefit to the parties, should be checked, and it would appear to be clearly within the powers of the High Courts to direct an enquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals.

The question in the present case is whether the plaintiffs are entitled to obtain specific performance of a registered *bainapatra* or agreement to sell the suit properties executed by Kali Narayan, the father of defendants Nos. 1 to 4, who have been brought on after his death with his other descendants in the male line as his legal representatives, and the main defence is that he was then of unsound mind for the purpose of making a contract, within the meaning s. 12 of the Indian Contract Act, as being at the time he made it "incapable of understanding it and of forming a rational judgment as to its effect upon his interests."

There were also allegations of conspiracy on the part of the plaintiffs as to which it was admitted at the hearing of the appeal in the High Court that there was no evidence.

The plaintiff's case, which has been accepted by the High Court is, on the face

of it, a perfectly straightforward one. They are traders who had made money, and coming to know in the middle of 1920 that the suit properties were for sale, they entered into negotiations for purchasing them. The properties consisted of two small *zemindaris*, one in the Dacca and the other in the Tipperah District, together with a five annas share of a *shikmi taluq* in one of these *zemindaris*, which Kali Narayan, the *zemindar*, had acquired, the remaining eleven annas belonging to the Majitpur Babus, who were the *shikmi taluqdars*. The Majitpur Babus were naturally anxious to regain the sole ownership of the *taluq*, and came forward with counter offers. Ananda Chandra Roy, an old friend of Kali Narayan, who was advising him about his affairs, was for asking thirty-five years' purchase, subject to certain deductions. This was apparently a very good price, and, probably, as usually happens, a little more than was hoped for. The offers of the plaintiffs and the Babus fell far short of this, and the negotiations went off. In October the properties were publicly advertised for sale, and in December the plaintiffs came forward with a new offer of thirty-two years' purchase. It was refused, and they were going away when Kali Narayan's wife suggested that they should increase their offer to thirty-three years' purchase. Kali Narayan accepted this offer subject to Ananda's approval, which the plaintiffs obtained. Ananda says he thought it a very good price, as it apparently was. A *bainapatra* or agreement to sell was then drawn up by Basanta, the estate lawyer, and was executed by Kali Narayan, who signed in eleven places. It was witnessed by Basanta, the estate lawyer, by Bhupati, Narayan's son, who was residing in the house, and now says he did not know what the deed was about, and by several other persons. It was then registered by the Registrar of Dacca, who came to the house and obtained Kali Narayan's admission of execution.

Coming to know of the *bainapatra*, the Majitpur Babus, in their anxiety to become the sole owners of the *taluq*, or possibly because they did not care to have mere traders as co-sharers, offered forty years' purchase, three of which were to go to the *almos* or estate servants for their part in bringing about the sale. With this incentive Kali Narayan's estate manager, Durga Sankar, and the estate lawyer, Basanta, exerted themselves to induce the plaintiffs to abandon the contract on terms, but without success. Roy, J., also surmises that it was thought that the plaintiffs, who were traders, ought to stand aside in favour of the Babus.

The plaintiffs' case is that this counter-offer was the sole reason why the transaction did not go through, and that to get out of their bargain the defendants falsely charged the plaintiffs with conspiracy and set up that Kali Narayan was an imbecile dotard when he signed the *bainapatra* and did not know what he was doing.

This contention of the plaintiffs receives some support from the fact that no suggestion of the kind was made during the negotiations after the *bainapatra*, and that the defendants confined themselves for a considerable time to an attitude of passive obstruction. When the plaintiffs after repeated applications for the particulars necessary for the sale deed, at the house in Dacca where Kali Narayan was then residing, served notices by registered post, upon Kali Narayan himself and on his manager, Durga Sankar, these notices were not accepted and were returned by the postal authorities to the senders. Early in January Kali Narayan went back to his home in Bandar and the plaintiffs went down and were refused admittance. On the 31st January, 1921, they went down again with a Pleader and tendered the balance of the purchase money, which was not accepted.

They saw Kumar Krishna, the principal defendant, and Durga Sankar, the manager, and were kept waiting for nearly an hour, when they left to catch their train. They had heard Kali Narayan and his wife talking upstairs, and called out to them as they were going away, but without result. They were not told that this defence was to be raised, or that a few days previously the Civil Surgeon of Dacca had been brought down to Narayangunje on two successive days and, to save time, being a busy man, had seen Kali Narayan in a boat in the river, and had certified that he was incapable of managing his own affairs and was not malingering or feigning loss of memory. An interview with Kali Narayan and his wife at this stage might have given the plaintiffs an opportunity of giving evidence contesting these conclusions, and it was not allowed to take place.

Eventually, on the 30th June, 1921, the plaintiffs filed the present suit against

Kali Narayan for specific performance in the Court of the First Subordinate Judge of Tipperah at Comilla setting out the contract and the efforts they had made to get the sale-deed executed. An application was then made on behalf of the defendant for the appointment of a guardian *ad litem*, on the ground that he was unable himself to defend the suit. The Subordinate Judge saw and questioned him and made the order, though he was not sure whether the confusion in Kali Narayan's answers was wilful or *bona fide*. After the guardian *ad litem* had filed a written statement and issues had been settled, the High Court set aside the order appointing a guardian *ad litem* and directed the Subordinate Judge to hold a judicial inquiry as to Kali Narayan's mental condition. Lieut.-Col. MacKelvie, who was the Civil Surgeon of Dacca, was examined for the defendant, and Dr. K. B. Narayan, Civil Surgeon of Tipperah, was examined on behalf of the plaintiffs, but before the inquiry was completed Kali Narayan died, in July, 1922, and the suit was continued against the present defendants as his legal representatives with substantially the same pleadings and issues.

The principal written statement is a very lengthy document, setting out as it does not only the defendants' contentions but also much of the evidence on which they intended to rely. Shortly, their story was that Kali Narayan had for many years been in his dotage and had left the management of his property to his sons, and that his favourite son-in-law, Satish Chandra, a *kabiraj* or doctor practising Hindu medicine at Dacca, who was on bad terms with the rest of the family, had by means of false allegations in a petition to the Sub-Divisional Officer, procured the removal of Kali Narayan from his own home at Bandar to Dacca and had got him to execute a registered Will in his favour, although he was then like an inert mass, and a mere puppet incapable of understanding what he was doing. Subsequently, Satish Chandra had conspired, it was alleged, with the plaintiffs and others to get a sale-deed in favour of the plaintiffs from Kali Narayan at a gross undervalue. It was further denied that Rs. 11,000 deposit mentioned in the deed had been received by Kali Narayan, and it was also alleged that Satish Chandra was to get Rs. 15,000 from the plaintiffs for his services in obtaining these properties for them at an undervalue. They also alleged that the *bainapatra* was bad for vagueness and uncertainty.

The following were the material issues :—

"5. Was Kali Narayan incompetent to enter into the contract referred to in the plaint? Was he incapable of understanding the terms and stipulation of the *bainapatra* or of forming a rational judgment as to its effect upon his interest at or before the time of its execution?

"6. Has the said *bainapatra* been secured by plaintiffs by undue influence, fraud and unfair means?

"10. Is the contract bad for vagueness and indefiniteness"

The Subordinate Judge found all these issues in favour of the defendants, gave the plaintiffs a decree for the return of their deposit of Rs. 11,000 with interest, and otherwise dismissed the suit.

The plaintiffs then appealed to the High Court at Calcutta, who allowed the appeal and decreed the suit.

At the hearing of the appeal it was admitted by the defendant's Counsel that there was no evidence on which a finding that the plaintiffs had been a party to any conspiracy could be based. This of itself greatly detracts from the weight of the Subordinate Judge's judgment. Further, he failed to see that, as admitted before their Lordships, if the principal witnesses for the plaintiffs are to be believed, and he did not find they were not, they abundantly established that Kali Narayan was of sound mind during his stay at Dacca, where the *bainapatra* was executed.

It has, however, been contended by Mr. DeGruyther for the appellants here that the learned Judges, in accepting the evidence of these witnesses, failed to attach sufficient weight to medical evidence, which he contends shows clearly that Kali Narayan was of unsound mind during the whole of his stay at Dacca, and that the witnesses who depose that he was not are unworthy of credit. That is really the question on which their Lordships are now called upon to decide after hearing it argued for several days and giving it their anxious consideration.

At the end of 1919 Kali Narayan was undoubtedly an old man, who had long been in bad health and had for several years left his sons to manage his affairs. He was no longer the man he was, but was depressed and his memory was bad. It was said by one of the medical witnesses that loss of memory in elderly people means incipient *senile dementia*, and in the case of Indians sets in at forty. Happily, even if this be so, it does not usually reach such a stage during the lifetime of the individual

as to unfit him for the management of his own affairs, especially if he is wise enough not to rely on his own judgment, but to act on the best advice available. This, the learned Judges have found, is precisely what Kali Narayan did in this transaction.

The defendants' case is that at this time he was an imbecile dotard, incapable of forming any judgment of his own, and that his wife and his son-in-law Satish Chandra were anxious to get him to Dacca to execute documents to the prejudice of his sons. The plaintiffs' case is that he wanted to make reasonable provision by Will for his daughters and daughters' sons, who would have taken nothing if he died intestate, and that he was also very anxious about the condition into which his affairs had been brought under his sons' management and the mortgages he had had to execute.

In Dacca he had an old friend, Ananda Chandra Roy, a successful lawyer who had retired from business and acquired *zemindary* property, and was admittedly one of the most influential men in Dacca. In December, 1919, Ananda received a letter signed by Kali Karayan, begging him to come to his assistance, as his sons were causing trouble and would not allow him to go to Dacca. Ananda, who was 75, could not go himself, but he obtained a *vakalat* from Kali Narayan and sent a Pleader to apply to Mr. Steeg, the Sub Divisional Officer at Narayangunje, for an order to produce Kali Narayan before him. Mr. Steeg made the order, and the sons, who were told of it, offered no active resistance, but are alleged to have been responsible for the fact that there were no bearers for the *dhooly* in which Kali Narayan's wife was to go with him. Kali Narayan did not allow this to stand in his way, but set off in his *palanquin*, leaving his wife to follow on foot. The Subordinate Judge regarded his exposing his wife to such an indignity as an act of madness, whereas the learned Judges as it appears to their Lordships with more reason, regarded it as a proof of his determination to get away and as a strong exercise of will power on his part.

Krishna Kumar, one of the sons and the principal defendant, followed behind to see where they were going, travelled on the same train to Dacca, and then returned to Bandar. If Kali Narayan had then been an imbecile dotard, he had only to call Mr. Steeg's attention to the fact. He did not do so, and Mr. Steeg, after seeing Kali Narayan in his *palanquin*, merely recorded that he was proceeding to Dacca. He waited at Narayangunje station for his wife and left for Dacca by a late train, arriving late at night. Before proceeding to his son in-law's house, he went to Ananda, thanked him for what he had done, and asked for his assistance in extricating his estate from its difficulties, which Ananda consented to do. He also spoke about a Will and, though Ananda told him there was no hurry about it, it is common ground that a few days after his arrival at Dacca he executed and registered a Will by which he left a legacy of Rs. 5,000 to his wife and made a modest provision for annuities to his daughters and daughters' sons. The Will also contained provisions of more doubtful wisdom that the estate was not to be handed over to his sons until eleven years after his death, and was in the meantime to be managed by his executors, his wife and another, who were to make the sons such allowances as they thought fit. Ananda says he was shown the draft will before execution and made certain corrections in it.

As regards the management of his estate during his own lifetime, Kali Narayan, under Ananda's advice, removed his sons from management and put in as manager Durga Sankar, whom Ananda had found for him, and appointed the Pleader, Basanta, as the estate lawyer, it being understood that Ananda himself was to be consulted in matters of importance Ananda says that this scheme was adopted after the sons had rejected an alternative scheme under which they were to be left in possession of part of the estate. Kali Narayan then directed that the sons were to live separately, each son receiving the apparently inadequate allowance of Rs. 6 a month, and gave notice that no credit was to be given to them. The defendants' case now is that, in taking these steps. Kali Narayan was a mere puppet in the hands of his son-in-law, Satish Chandra, and of Ananda, and was incapable, owing to his condition, of exercising any volition of his own. If this had really been the case, it is strange that they acquiesced without protest in the drastic action taken against them, as they undoubtedly did. Their lame explanation is that they were acting on the advice of a Pleader, who told them to keep quiet and do nothing beyond obtaining a medical certificate from an English doctor who had examined Kali Narayan as to the advisability of his going to Dacca for treatment a few days before he went there. The Pleader has not been called, and all that is proved

is that, after hearing of the registered Will, they obtained this medical certificate, no doubt for the purpose of using it to resist Probate. The certificate and the doctor's evidence will be considered later.

As to Ananda's part in these transactions, great as was his influence, it was perhaps not very wise of him, from his own point of view, as was proved by the event, to interfere in this way in his old friend's affairs; but that a man of his position and experience should have interfered in this way without authority in the affairs of an imbecile dotard in the hope of corrupt gain, as suggested by the defence, is as improbable as that Kali Narayan's sons should have acquiesced in his doing so.

Their Lordships have already stated and will not repeat the circumstances under which the *bainapatra* came to be executed. The defendants now go so far as to assert that they never knew of any proposal to sell these properties till afterwards, although negotiations had been going on for months, the plaintiffs had been down to Bandar to see the manager, Durga Sankar, and inspect the properties with a view to purchase, and they had been publicly advertised for sale. It is further proved that the defendants were frequently at the parents' home in Dacca, and no doubt whilst "keeping quiet," knew perfectly all that was going on. As already stated, the *bainapatra* was witnessed by one of the defendants, Bhupati, whom it was sought at the trial to represent as a simpleton. The fact that the manager, Durga Sankar, was absent on account of a funeral ceremony in his family when the bargain was finally struck and the deed executed is of no consequence, as the previous negotiations had been with him, and the price was approved by Ananda, on whom Kali Narayan relied. Comment has also been made on the fact that the plaintiffs did not call Satish Chandra, the son-in-law, who was included in their list of witnesses. One of the executors of the Will who was going to give evidence for the plaintiffs, had a conversation with Satish shortly before the trial, which left him under the impression that Satish thought the plaintiffs had a good case and would succeed. He would probably not have been sorry, having regard to the imputations which had been made against him. Nothing, however, was then said about his giving evidence himself. It was the interest of his wife's family to get out of the bargain, and he may have been reluctant actively to oppose them. The plaintiffs were probably wise in not calling him.

Witnesses have been asked if Kali Narayan could have understood all the terms of the *bainapatra*, but that was unnecessary. It was enough if he knew he was selling his property on terms approved by his protector Ananda by a document prepared by the estate lawyer. In India, as here, it is enough for the executant of a legal document to understand the nature of the transaction, leaving the details to his lawyer.

As to his state of mind at the time, the evidence of witnesses, which there is no reason to distrust, shows that during his stay in Dacca, though an infirm old man, he was not destitute of understanding, feeling or manners. The leading Indian doctor who attended him for rheumatism and heart disease says he saw him frequently, and noticed nothing wrong with his mind. When one of his daughters died, he felt it so deeply that he insisted on moving to another house. His wife had an apoplectic fit, and, when she had got over it, a choleraic attack. He was so grateful to the doctor who cured her that he insisted on giving him a dinner, and himself came down and observed the courtesies usual on such occasions. When there was an election of the Legislative Council he went to the voting place and recorded his vote. He inquired where the mark was to be made, and the polling officer saw nothing wrong with him. The defendants' story that at this time he was paralysed and unable to move is clearly disproved by this evidence. Lieut. Col. Newman, who examined him subsequently for the purpose of these proceedings, on behalf of the defendants, says that he saw him on a few occasions when attending his wife, and that he seemed morose and scarcely spoke to him, but he was then in great trouble and there was the difference of language. There is no doubt he then suffered from time to time from severe attacks of *angina pectoris*, and it is not unlikely, that owing to their anxiety to help Kali Narayan himself and his family to escape from what they were told was an unconscionable bargain, there was much exaggeration in their evidence.

Their Lordships agree with the learned Judges that the evidence as to Kali Narayan's stay at Dacca goes to show that he was of sound mind when the *bainapatra*, was executed, and that, as already shown,

this conclusion is strongly supported by the defendants' own conduct down to the time when the present dispute arose.

They will now proceed to consider the medical evidence, on which the defendants mainly rely. In 1918, Dr. Sankar granted a certificate in support of an application for Kali Narayan's examination on commission in a suit in which he was plaintiff, on account of his state of health. The certificate states, among other things, that he was suffering from loss of memory, but does not suggest that he was unfit to give evidence. It is said, however, that his deposition shows that his mind was failing. The question in dispute was whether he had agreed himself to accept the defendant as a tenant. He denied that he had done so, but admitted in cross-examination that his memory was bad, and the suit appears to have been compromised. In their Lordships' opinion, this proves nothing. What is much more important is that Dr. Sankar, who gave evidence for the plaintiffs on commission in April, 1922, was not prepared to say that Kali Narayan was incapable of managing his own affairs when he went to Dacca in December, 1919. He said he had seen him several items after granting the certificate—he could not say how often—whenever he went to the house. Questioned as to Kali Narayan's mental condition at this time, he said that all he could remember was that he was suffering from loss of memory and could not say if it had got worse. It was subsequently stated by Krishna Kumar, the principal defendant, in his cross-examination at the trial, that Dr. Sankar was Kali Narayan's medical attendant at this time and saw him twice a week and had also seen him in consultation with one of the leading doctors in Dacca who has not been called, so that he had every opportunity of judging whether Kali Narayan was then an imbecile dotard incapable of managing his own affairs It should be added that Dr. Sankar was present at the examination in January, 1922, and confirmed the Civil Surgeon's conclusions.

Next comes Dr. Pringle, who in November, 1919, examined Kali Narayan as to the advisability of his going to Dacca for treatment. On December 17th, after the execution of the Will in Dacca, the defendants obtained a certificate from him to be used in resisting Probate. Their Lordships attach little or no weight to this certificate or to Dr. Pringle's evidence, as he had not examined Kali Narayan as to his mental condition, and the statements in the certificate appear to have been based largely upon what he was told by the defendants.

Of much greater importance were the certificates and evidence of Lieut.-Col. Newman and of Lieut.-Col. Mac Kelvie, who succeeded him as Civil Surgeon of Dacca, both members of the Indian Medical Service. Their Lordships desire to make it clear at the outset that they see no reason to question either the truthfulness or the general competence of these officers.

It has been argued for the plaintiffs that Kali Narayan's condition may have got worse after the execution of the *bainapatra* on December 19th, 1920. There is less force in the suggestion as regards Colonel Newman's examination at the end of January, 1921, than as regards Colonel MacKelvie's examination in April, 1922. There is, however, a much more important factor detracting from the weight of their evidence, and that is the extent to which the medical history of the case, which must have influenced them very much, was derived from an unreliable and interested informant, Kali Narayan's grandson Sachindra, the fifth defendant, who was in practice at Narayangunje as a *kabiraj* or Hindu doctor. It appears from Colonel MacKelvie's notes that it was reported to him by Sachindra that Kali Narayan was irritable, threw away food and plates, did not sleep, passed urine and fæces in bed, could not recognise sons and grandchildren; also threw cups and glasses and assaulted Sachindra, and also beat his wife. Colonel MacKelvie inserted in his certificate, at the request of the estate manager, a statment that he was satisfied that Kali Narayan had not been shamming in his answers, to meet any suggestion from the plaintiff's side that he was making himself out to be more stupid than he really was, in order to get out of the contract. Cross-examined as to this, he explained that he had come to the conclusion that Kali Narayan was suffering from a definite form of insanity, *senile dementia*, which barred shamming, and he admitted that the plate-throwing, wife beating and like things reported to him were considered by him in coming to the conclusion that Kali Narayan was suffering from *senile dementia*, and that they were some of the important features in the case. This they undoubtedly were, if true, such conduct being among the signs of advanced

senile dementia given in the text-books. The witnesses who speak to them are the son, Krishna Kumar, and a servant of the estate, whose evidence in other parts of the case is clearly unworthy of credit. On the other hand, Dr. K. B. Narayan, Civil Surgeon of Tipperah, who examined Kali Narayan for the plaintiffs a few days earlier, and recorded his questions and answers, and had not this misleading history of the case before him, came to the conclusion that Kali Narayan had made up his mind to say "I do not recollect" to certain questions which mostly concerned his property and its management, and that his memory was not so bad as he made it out to be. Colonel Newman's notes are not in evidence, and it is not possible to say what Sachindra told him, but the certificate itself shows that he was improperly informed that Kali Narayan had without the knowledge of his heirs executed a contract to sell property at a price much below its market value, which was calculated to mislead him.

The two learned Judges of the Calcutta High Court, who from their intimate acquaintance with Hindu modes of life are in a better position than their Lordships to draw the proper inferences as to some matters of conduct arising in the case, have given forcible reasons in separate but concurring judgments for holding it proved by reliable evidence and by inferences arising from the conduct of the defendants themselves that Kali Narayan at the time he executed the *bainapatra* was not an imbecile dotard incapable of sufficiently understanding what he was doing, and their Lordships are not prepared to say they were wrong in acting upon this evidence rather than on medical opinion possibly influenced by all sorts of unproved allegations going to show that he could not have at the time in question been sufficiently able to understand what he was doing. In these circumstances, their Lordships are unable to differ from the conclusion of the learned Judges that the defendants have failed to establish the main defence they set up.

As to the further defence that the contract itself is bad for uncertainty, they entirely agree with the learned Judges that there is no substance in it. They are, therefore, of opinion, that the appeal fails and should be dismissed with costs, and they will humbly advise His Majesty accordingly.

A. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Watkins & Hunter.*

Solicitors for the Respondents.—Messrs. *Stanley Johnson & Allen.*

PRIVY COUNCIL.

Appeal from the Oudh Chief Court.

January 18, 1932.

LORD BLANESBURGH, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

SATGUR PRASAD—APPELLANT—DEFENDANTS

versus

Mahant HAR NARAIN DAS—PLAINTIFF—RESPONDENT.

Vendor and purchaser—Sale void for undue influence and fraud—Vendor's right to mesne profits from date of sale—Vendee's possession, whether wrongful—Contract Act (IX of 1872), s. 65—Trusts Act (II of 1882), s 88—Principles of equity—Practice—Privy Council—Concurrent findings.

Where a person occupying a fiduciary position obtains a conveyance of immoveable property by undue influence and fraud if there is no proof of undue delay on the part of the vendor in bringing a suit to set aside the deed and there is no difficulty of putting the parties back in the position which they occupied, the vendor should have an account of the rents and profits of the properties from the date on which possession was obtained by the vendee, the latter being entitled to credit in the account for all payments made by him to the vendor. Interest should also be allowed at the usual rate on both sides of the account. [p. 110, col. 2; p 111, col. 1.]

In such a case though before the institution of the suit the defendant could have made a valid transfer to an innocent purchaser, it by no means follows from this that as between him and the person he had defrauded his possession was not wrongful. To admit of such an assertion would be to allow him to take advantage of his own wrong, which no Court of equity will permit. [p. 110, col. 1.]

The words 'when a contract becomes void' in s. 65, Contract Act, are sufficient to cover the case of a voidable contract which has been avoided and the said section will apply to such a case. [*ibid.*]

Regarding the transaction as one that has passed out of the realm of contract, it would be covered by s. 88, Trusts Act. [*ibid.*]

Apart from either of these statutory provisions the vendor is entitled to claim mesne profits in such cases upon general principles of equity. *Reg.* v. *Saddlers Co.* (4), *Dally* v. *Wonham* (5), *Mulhallen* v. *Marum* (6), *Tyrrel* v. *Bank of London* (7) and *Erlanger* v. *New Sanbrero Coy.* (8), referred to. [p. 110, cols 1 & 2]

Concurrent findings will not be disturbed unless it is shown that there has been a miscarriage of justice, or the violation of some principle of law or procedure. This does not necessarily imply that their Lordships make the findings their own, for, almost *ex hypothesi*, they have not considered them in detail: but only that where matters of fact have been fairly tried by two local Courts, which are often in a better position to conclude upon them than the Board, and the same conclusion has been reached by

both, it is not in the public interest that the facts should again be examined in the ultimate Court of Appeal. [p. 109, cols. 1 & 2.]

Appeal from the judgment of Oudh Chief Court dated the 2nd May 1928.

Messrs. *Upjohn, K. C., De Gruyther, K. C.* and *L. M. Jopling*, for the Appellant

Messrs *A. M. Dunne, K.C., B. Dube, K C, W. Wallach* and Sir *Tej Bahadur Sapru*, for the Respondent.

Sir George Lowndes.—These are consolidated cross-appeals against a decree of the Chief Court of Oudh dated the 2nd May, 1928. The appellant in the one case, Satgur Prasad was the principal defendant in a suit instituted on the original side of the Chief Court, which was decided against him both by the trial Judge and the Court of Appeal. In the other the plaintiff, Mahant Har Narain Das, is the appellant raising subsidiary questions on which the Court of Appeal had decided against him.

The main issue in the suit was as to the validity of a deed, dated the 25th November, 1924, by which the plaintiff purported to make over a valuable estate and other property to the defendant-appellant subject to certain conditions. The object of the suit was to set aside this deed on the ground that it was procured by undue influence and fraud. There are concurrent findings of both the Courts in India that this has been established, and they are undoubtedly findings of pure fact. It is not disputed that if they are to stand the appellant cannot escape the decree which has been passed against him.

The practice of this Board with regard to concurrent findings of fact is well established. Such findings will not be disturbed unless it is shown that there has been a miscarriage of justice, or the violation of some principle of law or procedure. *Maung Tha Hnyeen* v. *Maung Pan Nyo* (1), *Rani Srimati* v. *Khajendra Narayan Singh* (2) per Lord Lindley at p. 131* cited and followed in *Robins* v. *The National Trust* (3)

This does not necessarily imply that their Lordships make the findings their own, for, almost *ex hypothesi*, they have not considered them in detail: but only that where matters of fact have been fairly tried by two Local Courts, which are often in a better position to conclude upon them than this Board, and the same conclusion has been reached by both, it is not in the public interest that the facts should again be examined in the ultimate Court of Appeal.

Nothing has been suggested, during a two-days' argument for the defendant-appellant, which would bring the case within the principles so laid down, the learned Counsel confining themselves to a searching criticism of the reasons assigned by the learned Judges in the Courts below for the conclusions to which they had come. Their Lordships think that no useful purpose would be served by following their argument through the somewhat unsavoury details so disclosed. They will only record their opinion that no sufficient reason has been shown for disturbing the concurrent findings to which they have referred to.

The cross-appeal of the plaintiff raises a question of greater difficulty. Under the decrees of both Courts he is entitled to possession of all the properties sued for. The details were set out in three schedules annexed to his plaint. These are embodied in the decree of the trial Judge, which in this respect was confirmed by the Court of Appeal.

He also claimed by his plaint mesne profits accruing during the possession of the defendant-appellant (hereinafter for convenience referred to as the defendant),* the amount of which he estimated at five lakhs of rupees. There seems to have been no discussion upon this question in the trial Court, the learned Judge merely reciting an agreement of the parties that the issue as to the defendant's liability to account should be left to be dealt with in execution proceedings, which their Lordships understand to be in accordance with the usual practice.

In the Court of Appeal, however, it was urged on behalf of the defendant that the account should only go from the date of suit (the 21st February, 1927), and not from the date when the defendant got possession, *i. e*, approximately the 25th November, 1924. The learned Judges of the Appellate Court accepted this contention, assigning as their reason for so doing

"that the document of the 25th November, 1924, was only voidable at the option of the plaintiff, and the plaintiff did not exercise that option earlier than the date of the suit."

(1) 27 I. A. 166; 28 C. 1; 2 Bom. L. R. 985; 4 C. W. N. 808; 7 Sar. 786 (P. C.).

(2) 31 I. A. 127; 31 C. 871; 9 C. W. N. 74; 8 Sar. 635 (P. C.).

(3) (1927) A. C. 515; 96 L. J. P. C. 84, 137 L. T. 1; 71 S. J. 158; 43 T. L. R. 243.

*Page of 31 I. A.—[*Ed*].

*NOTE—There were two other defendants to the suit but neither of them has appeared on the present appeal.

It is against this finding only that the cross appeal of the plaintiff has been pressed, and it is contended on his behalf that, having regard to the conclusion, now established, that the deed under which the defendant got possession was procured by undue influence and fraud, the plaintiff is entitled to the account which he has claimed.

The defendant supports the finding of the Court of Appeal on this question. Mesne profits, it is said, under the definition contained in s. 2 (12) of the Civil Procedure Code, can only be awarded for the period during which the defendant was in wrongful possession, and until the plaintiff elected to avoid the contract under which possession was made over to him, his possession was not wrongful.

But in the first place their Lordships are unable to regard the deed of the 25th November, 1924, merely as a contract voidable at the option of the plaintiff, but good until avoided. It was in effect a conveyance, under which the title to the properties passed to the defendant, and which had to be formally set aside. Before the institution of the suit the defendant could no doubt have made a valid transfer to an innocent purchaser, but it by no means follows from this that as between him and the person he had defrauded his possession was not wrongful. To admit of such assertion would be to allow him to take advantage of his own wrong, which no Court of equity will permit.

If the matter could be regarded as one of contract, their Lordships think that it would fall within the terms of s. 65 of the Contract Act, which provides that "when a contract becomes void"—and their Lordships would have no difficulty in holding these words sufficient to cover the case of a voidable contract which had been avoided—"any person who has received any advantage under such contract is bound to restore it to the person from whom he received it, or make compensation therefor.

Regarding the transaction, however, as one that has passed out of the realm of contract, it would seem to be met by s. 88 of the Trusts Act, which has always applied to the Province of Oudh. Both Courts in India have found that the defendant stood in a fiduciary relation to the plaintiff, and that he procured the conveyance by taking advantage of this relationship. He would, therefore, be bound under the terms of the section to hold any advantage so gained for the benefit of the plaintiff.

But apart from either of these statutory provisions, their Lordships think that the plaintiff is entitled to succeed in his claim upon general principles of equity. So it is stated in Kerr on Fraud and Mistake (6th Edition, 469), dealing with the doctrine of *restitutio in integrum*, that

"a party exercising his option to rescind is entitled to be restored as far as possible to his former position."

For this proposition there is ample authority. In *Reg* v. *Saddler's Co.* (4), Lord Blackburn says :—

" Fraud, as I think, renders any transaction voidable at the election of the party defrauded; and if, when it is avoided, nothing has occurred to alter the position of affairs, the rights and remedies of the parties are the same as if it had been void from the beginning."

In *Dally* v. *Wonham* (5) where a purchase by the agent of a vendor was set aside upon much the same grounds as here, the vendor-plaintiff was given an account of rents and profits received by the defendant, from the date of the conveyance, the defendant being allowed credit in the account for all moneys properly expended by him on repairs and lasting improvements, and all sums paid to the plaintiff on account of an annuity which was, as in the present case, part of the consideration for the conveyance.

In *Mulhallen* v. *Marum* (6) the Lord Chancellor (Lord Lyndhurst), in setting aside a lease which had been obtained by fraud and undue influence, said :

"I shall give an account against the defendant from the time of filing the bill, but not before on account of the delay."

In this case eleven years had elapsed since the date of lease before the bill was filed.

Reference might also be made to the form of decree proposed by Lord Westbury, L. C. in *Tyrrel* v. *The Bank of London* (7) and to *Erlanger* v. *New Sanbrero Coy.*, (8).

Their Lordships think that in the case now before them, where there is no difficulty in putting the parties back in the position which they occupied respectively on the 25th November, 1924, and where there is no proof of undue delay on the part of the plaintiff in bringing his suit, he should have an account of the rents and profits of the immoveable properties from that date, the defendant being entitled to credit in the

(4) (1862) 10 H. L. Cas 404 at p. 420; 32 L. J. Q. B. 337; 9 Jur. (N. S.) 1081; 9 L. T. 60; 11 W. R. 1004.

(5) (1863) 33 Beav. 154; 32 L. J. Ch. 790; 8 Jur. (N. S.) 980; 9 L. T. 75; 11 W. R. 1090.

(6) 3 Dr. & War 317.

(7) (1862) 10 H. L Cas. 26; 31 L. J. Ch. 369; 8 Jur. (N. S.) 849; 6 L. T. 1; 10 W. R. 359.

(8) (1878) 3 A. C. 1218; 39 L. T. 269; 26 W. R. 65.

account for all payments made by him to the plaintiff. Interest should be allowed at the usual rate upon both sides of the account.

For the reasons given their Lordships will humbly advise His Majesty that the appeal of Satgur Prasad should be dismissed, and that of Mahant Har Narain Das allowed; and that the decree of the Chief Court of Oudh dated the 2nd May, 1928, should be varied by substituting for the words "date of the suit" the words "twenty-fifth of November, 1924", and by adding after the words "possession by him" the words "the defendant appellant being entitled to credit in the account so to be taken for all sums paid by him after that date to the respondent No. 1, and interest being allowed at the usual rate on both sides thereof." In other respects the decree of the Chief Court will stand.

The appellant, Satgur Prasad, must pay the costs of Mahant Har Narain Das before this Board.

A. *Decreed accordingly.*

Solicitors for the Appellant:—Messrs. *Barrow Rogers & Nevill.*

Solicitors for the Respondent:—Messrs. *Hy. S. L. Polak & Co.*

PRIVY COUNCIL.

Appeal from the Madras High Court.

January, 12, 1932.

VISCOUNT DUNEDIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

KADIYALA VENKATA SUBAMMA AND ANOTHER—APPELLANTS

versus

KATREDDI RAMAYYA AND OTHERS—RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 4, 12, 59, 90—Title of executor, whether vests before grant of probate—Sale by executor before getting probate, validity of—Interpretation of Statutes—Reference to repealed sections.

Under the Probate and Administration Act, 1881, the estate of a testator vests in the executor and the executor has the power to dispose of the estate from the date of the testator's death, even though probate has not been obtained. [p. 113, col. 1.]

Under the English Law the title of an executor is derived from the Will and not from the probate though it is probate alone which authenticates his right, and the Indian Legislature has not departed from this principle in the Probate and Administration Act, 1881. [*ibid.*]

Section 12, Probate and Administration Act, does not imply that before probate the executor has no title but is only intended to simplify the proof of his title as dating from the testator's death by authenticating the Will against all the world. *Administrator-General of Bengal* v. *Pren Lal Mullick* (3) and *Mirza Kurratulain* v. *Peara Saheb* (4), distinguished. [p. 112, col. 2; p. 113, col. 1.]

It is not proper to attribute a meaning to a section based on a corresponding section in a repealed Act.

Messrs. *E. B. Raikes, K. C., K. V. L. Narasimham* and *Lakshiname Rao*, for the Appellants.

Mr. *P. V. Subba Rao*, for the Respondents.

Sir George Lowndes.—The appellants are beneficiaries under the Will of one Madduru Venkata Subanna, who died on the 5th January, 1917. He was a Hindu residing at Pedakapavaram, in the Kistna District of Madras. The respondent, Madduri Gangamma, is his widow, and was appointed (as is now admitted) executrix according to the tenor of the Will, but has not obtained probate. The other respondents are a minor son, adopted by the widow and various persons interested in the properties of the testator under alienations made by the widow purporting to act as his executrix.

The suit out of which the appeal arises was instituted by the appellants to enforce their right to particular parcels of land which they alleged had been allotted to their shares under a family arrangement made shortly after the testator's death, or in the alternative for partition of the estate without regard to the alienations, which, it was contended, the executrix had, in the absence of probate, no power to make, and which were further charged as fraudulent.

The trial Judge held against the appellants as to the family arrangement, and this is no longer in dispute. He was of opinion, however, that the alienations were incompetent, and he accordingly passed a preliminary decree in the appellants' favour, declaring the rights of the parties, and appointing a Commissioner to carry out the partition and to assess mesne profits. The Commissioner duly reported to the Judge, and eventually a final decree was made.

Appeals and cross-objections were filed against both these decrees by some of the respondents, and on the hearing in the High Court the following question, upon which the decision of the appeals turned, was referred to a Full Bench, *viz.*:—

"Whether an executor appointed by Will made in the *muffassal* of the Presidency has vested in him the estate of a testator and has all the powers of an executor as set out in the Probate and Administration Act, even though such executor does not obtain probate of the Will, or whether his powers, unless he obtains probate, are only those of a mere manager as held in respect of executors previous to the Probate and Administration Act."

The reference was heard by the Chief Justice and two puisne Judges, who re-

corded their opinion that—

"In case of Hindu Wills to which the Hindu Wills Act does not apply the estate vests in the executor (who accepts office) from the date of the testator's death, and that the provisions of the Probate and Administration Act are applicable, even though probate has not been obtained."

The appeals then came on again before the referring Judges who by their order of the 9th December, 1925, set aside the decree of the trial Judge and remanded the suit for disposal on the basis of their judgment, with directions, to try the question of the *bona fides* of the widow's alienations, and for that purpose to ascertain what debts were outstanding at the death of the testator.

From this order of remand the appellants have brought their appeal to His Majesty in Council, and the sole matter for the consideration of the Board is whether the judgment of the Full Bench, upon which the order under appeal rests, should be upheld.

The Hindu Wills Act (XXI of 1870) has no application to the present case, but the greater part of the Probate and Administration Act (V of 1881) applies to the Wills of Hindus generally, and it is upon the terms of this Act that the result of the appeal turns.

The authorities have been discussed at length by Kumaraswami Sastri, J., who delivered the judgment of the Full Bench, and their Lordships think that nothing can be added by them to his careful examination of the case law on this subject. They will, however, refer later on to two decisions of the Board which have been relied upon by the appellants.

There has been a divergence of opinion between the High Courts of Madras and Bombay on the one hand, and of Calcutta on the other. It is the view of the former that has now prevailed, and their Lordships think that it is undoubtedly the right one.

The provisions of the Act directly in point are the first part of s. 4 and sub-ss. (1) and (2) of s. 90, which run as follows:—

"Section 4. The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such."

"Section 90. (1) An executor or administrator has, subject to the provisions of this section, power to dispose, as he thinks fit, of all or any of the property for the time being vested in him under s. 4.

"(2) The power of an executor to dispose of immovable property so vested in him is subject to any restriction which may be imposed in this behalf by the Will appointing him, unless probate has been granted to him, and the Court which granted the probate permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order. . . ."

The reasoning of the Calcutta decisions as to the meaning of s. 4 was based largely on the preamble, which showed that the object of the Act was to provide for grants of Probate and Letters of Administration, and upon the heading of Chap. II, in which the section occurred, "of grant of Probate and Letters of Administration," and it was thought to follow from this that "executor" in s. 4 could only mean an executor to whom probate had been granted.

This argument was elaborated before their Lordships, and reference was made to other sections of the Act which, it was urged, contained the same implication, particular reliance being placed upon ss. 12 and 59.

With regard to the first branch of the argument, their Lordships note that the wording of the opening paragraph of s. 4 is identical with that of s. 179 of the Succession Act of 1865, which occurs in a chapter bearing the same heading as that of Chap. II of the Act of 1881. But so far as their Lordships are aware, it has never been held that s. 179 of the Act of 1865 applies only to an executor who has proved the Will.

Section 12 of the Probate and Administration Act no doubt implies that until probate is granted the Will is not "established," and it validates all intermediate acts of the executor. It is contended for the appellants that this necessarily leads to the inference that before probate there is no valid Will and no authority in the executor. This was the view taken by West, J. in *Fatima* v. *Shaik Essa* (1), but which failed to find acceptance on appeal [*Shaik Moosa* v. *Shaik Essa* (2)]. It is, their Lordships think, based upon a misconception of the object of the section. Before the grant, it is obvious that in every case where either the Will itself, or anything done under it by the executor, is challenged, proof of execution and capacity on the part of the testator, and of the appointment of the executor, would be required. The object of the section is only to get rid of this multiplication of proofs. Probate once granted authenticates the Will against all the world; it affords a ready means of proof of the contents of of the Will (See ss. 41 and 91 of the Evi-

(1) 7 B. 266, 7 Ind. Jur. 535.
(2) 8 B. 241; 8 Ind. Jur. 571.

dence Act); and it is a complete answer by the executor to any challenge of his authority as such. The provisions of the section do not, in their Lordships' opinion suggest that before probate the executor had no title, but are only intended to simplify the proof of his title as dating from the testator's death.

Section 59 merely amplifies the position by making probate conclusive of the executor's representative title against debtors of the estate, and provides for their indemnification on making payments to him. This again is only a matter of simplification of proof, with the necessary corollary protecting debtors who have paid on the faith of the probate.

There can be no doubt that in England the title of an executor is derived from the Will and not from probate, though it is probate alone which authenticates his right (See Williams on Executors, 12th edition, page 1226). Section 12 of the Probate and Administration Act is a reproduction of s. 188 of the Succession Act of 1865, and it has always been recognised that the latter Act was largely based on English Law. It is not suggested that this doctrine is for any reason inapplicable to the Wills of Hindus, and their Lordships think that the material parts of ss. 4, and 90. which are set out above, afford a strong indication in themselves that the Legislature intended to adopt it.

Section 4 makes no reference to probate, nor does the definition of "executor" in s. 3 (again a reproduction from the Act of 1865) suggest that probate is any part of his title: he is merely the person to whom the testator has confided the carrying out of his dispositions.

So, too, s. 90 (2) clearly conceives of an executor not clothed with probate being able to dispose of the property "vested in him under s. 4." It makes such power subject to any restriction imposed by the Will "unless probate has been granted," in which case the Court may relieve him from the restriction. In view of the terms of this section their Lordships think it would be impossible to hold that before probate nothing vested in the executor, and that he had no power of disposal at all.

Reference was made in argument to the terms of the original s. 90, which was repealed in 1889, when the present section was substituted. It may well be that upon the old section the argument on behalf of the appellants would have had more force, but their Lordships have to interpret the Act as it has stood since 1889, and they cannot attribute to s. 4 a meaning based on the reading of the repealed section.

It only remains to consider whether the two decisions of this Board, to which allusion was made above, afford any support to the appellants.

In *The Administrator-General of Bengal* v. *Pren Lal Mullick* (3), the executors of a Hindu testator, whose Will was governed by the Hindu Wills Act of 1870, after obtaining probate, transferred to the Administrator-General "all estates, effects and interest vested in them by virtue of the probate." Such a transfer was authorized in the case of "any private executor" by s. 31 of the Administrator-General's Act, II of 1874. The majority of the Judges before whom the case came in the Calcutta High Court held that the executors of a Hindu Will, governed by the Act of 1870, were not within the purview of the section, and this was the only question before the Board.

The judgment was delivered by Lord Watson, who in dealing with various portions of the Succession Act which were incorporated in the Hindu Wills Act, says:—

"It is sufficient for the purposes of this case to refer to two of these clauses Section 181 is to the effect that probate can be granted only to an executor appointed by the Will. Section 179 provides that the executor or legal administrator, as the case may be, of a deceased person shall be his legal representative for all purposes, and that all the property of the deceased person shall vest in him as such."

He continues as follows, and it is this passage which is principally relied on in the present appeal:—

"It is not disputed that the immediate effect of the Act of 1870 was to place a Hindu executor who was in a position, and chose, to take advantage of its provisions, on precisely the same footing as the executor of an Anglo-Indian testator, in so far as concerns the taking out of probate, and the vesting in him of the estate of the deceased. The Will of the late Nundo Lal Mullick was executed in August, 1889 and his executors therefore, on their obtaining probate became immediately vested, by force of Statute, with the whole estates which belonged to him at the time of his decease."

The question now before their Lordships, *viz*, as to the effect of the words of s. 179 (reappearing in the present case as s. 4 of the Probate and Administration Act) *unaccompanied by probate*, was clearly not under the consideration of the Board in the case cited, as the authority to transfer under s. 31 of the Administrator-General's Act

(3) 22 I. A. 107; 22 C, 788; 6 Sar. 603 (P. C.).

was expressly dependent upon the grant of probate and their Lordships have no doubt that the words used by Lord Watson were not intended to have the wider significance which the appellants seek to attribute to them.

In *Mirza Kurratulain* v. *Peara Saheb* (4) the question considered by the Board was one of estoppel, affecting a Muhammadan Will of which probate had been granted. Here again, therefore, the contention now raised as to the effect of ss. 4 and 90 of the Act of 1881 standing alone, did not arise, and the only support that the appellants claim from it is derived from two sentences in the judgment which will be found on pages 256 and 257. The first of these speaks of 'the title thus conferred upon every executor who has obtained probate," and the second, of the trusteeship for the purposes of the Will" "created.....by the Will established by the probate." Their Lordships are unable to treat these isolated quotations as affording any support to the argument of the appellants. There is, they think, nothing in the judgment of Sir Arthur Wilson, read as a whole, to suggest that the vesting under s. 4 or the power of disposal under s. 90, is dependent upon the grant of probate.

For the reasons given their Lordships are of opinion that the order of remand made by the High Court on the 9th December, 1925 was right, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the respondents of the appeal.

A. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Douglas Grant & Dold.*

Solicitors for the Respondent.—Messrs. *Harold Shephard.*

(4) 32 I. A. 244; 33 C. 116; 7 Bom L. R. 876; 9 C. W. N. 938; 1 C. L. J. 594; 15 M. L. J. 336; 2 A. L. J. 758; 8 Sar. 839 (P. C.).

PRIVY COUNCIL.

Appeal from the Madras High Court.

July 28, 1931.

LORD BLANESBURGH, LORD ATKIN AND SIR LANCELOT SANDERSON.

THE RIPON PRESS AND SUGAR MILL COMPANY, LIMITED, —APPELLANTS

versus

V. GOPAL CHETTI AND OTHERS —RESPONDENTS.

Companies Act (VII of 1913), ss. 162 (vi), 174, 176—Winding-up of solvent company—Grounds for winding-up—'Just and equitable rule', application of—Appeal in name of company against winding-up order—Wishes of contributories, weight of—Duty of Official Liquidator—Court's power to remove Official Liquidator

The fact that a Managing Director has a preponderating voice in the company by reason of his owning or controlling a large number of shares or that the dividends have not been paid regularly is by itself no reason for winding-up a company. [p. 119, col. 1.]

To justify a winding-up order on the 'just and equitable rule it is necessary to prove a lack of confidence in the conduct and management of the company's affairs by the Directors. [p. 120, col. 1.]

An order for winding up a company even if not justified may be maintained on the ground of lapse of time and intervening events. [p. 120, cols. 1 & 2.]

An *ultra vires* transaction on the part of Directors is of itself not sufficient reason for a winding-up order since other remedies are available to aggrieved share-holders. [p. 122, col. 2.]

Where the Directors of a company intend to appeal against a winding-up order they should prefer the appeal in the company's name even though an Official Liquidator has in the meanwhile been appointed by the Court. If the majority of the contributories concur in the filing of such appeal the appeal is in truth that of the contributories. [p. 120, col. 2.]

In the winding up of a solvent company the Court as well as the Official Liquidator should have particular regard to the wishes of the contributories in all matters affecting them as a class. [p 122, col. 2.]

An Official Liquidator must maintain a position of complete impartiality between all persons involved in the winding-up. Where this is not done the Judge in charge of the winding-up may remove such Liquidator and appoint in his place a person from whom an attitude of unqualified detachment can be expected.

Appeal by special leave, from a judgment of the High Court, Madras, on its Appellate Side, dated the 13th November 1924, reversing the judgment of Mr. Justice Kumaraswami Sastri on the Original Side dated the 3rd November, 1922.

Mr. *K. V. L. Narasimham*, for the Appellant.

Mr. *W. H. Upjohn*, *K. C.* (with him Mr *K. J. Rustomji*, for the Respondent, Official Liquidator.

Lord Blanesburgh.—This is an appeal from a judgment and decree of the High Court of Judicature at Madras dated the 13th November, 1924, reversing a judgment and order, dated the 3rd

November, 1922, of a single Judge of the same High Court in its Ordinary Original Civil Jurisdiction. These orders were made in the matter of a petition presented to the Court on the 1st May, 1922, for the compulsory winding-up of the appellant company. By the order of the 3rd November, 1922, Mr. Justice Kumaraswami Sastri dismissed the petition with costs. On appeal his order was discharged by that of the 13th November, 1924, and the compulsory winding-up of the company was thereby decreed. This appeal from that order reached the Board for hearing more than six years after it had been made. Its discharge accordingly involved the supersession of all proceedings in a liquidation which as a result of it had then been in operation for more than eight years. To this fact are attributable the grave difficulties which have confronted the Board in disposing of the appeal.

The company was constituted in 1882 for the purpose (1) of erecting a cotton-pressing factory at Raichur in Hyderabad, and (2) of erecting a sugar factory at Hospet in the Madras Presidency of British India. It was registered in Madras solely because part of its business was to be carried on in British India. But for the Hospet project it would have been registered in the Nizam's Dominions. And the Hospet factory did not materialise. It was definitely abandoned as a project in 1909. The company has never done any business in British India. Its sole activities have been centred at Raichur in connection with the factory which in due course was erected there. The fact that the fixed property of the company and its business have thus been in one jurisdiction and its place of incorporation and statutory obligations in another has always been a source of difficulty. It hampered the company in its competition with local rivals: it exposed it to the risk of double taxation: its accounts were necessarily kept at Raichur in the local vernacular, and the compilation of the annual statements at Bellary from these materials in a form to meet the requirements of the Statute law of British India must always have been difficult and never quite satisfactory. It is unfortunate that in the liquidation no allowance appears so far to have been made for, or consideration given to, these difficulties inherent in the situation.

The company was not a private company, but its share-holders were never numerous. Its articles of association were those of Table-A of the Act of 1882, with modifications introduced which did not affect its status as a public company. It had a nominal capital of Rs. 1,25,000, divided into 250 shares of Rs. 500 each. Of these, 200 shares were issued at the time of its formation, Rs. 250 being then called up on every share. This paid-up capital sufficed for the establishment of the Raichur factory. The 200 shares with Rs. 250 paid up were in May, 1922, in the hands of 24 holders or sets of holders.

The original articles of the company, cls. 7 and 8, provided for the appointment of named persons, as secretaries and treasurers at an allowance of 5 per cent. on nett profits, and as agents in charge of the factories at a like allowance. Between 1905 and 1909 K. Venkata Rao, of whom much will be heard in the sequel—it is around him that the whole controversy has raged—had become one of the two agents.

In 1909 and 1910 the original offices of secretary and treasurer and agent were abolished, and by special resolutions of the company, passed and confirmed unanimously on the 7th and 28th of May, 1910, cls. 7 and 8 of the company's articles of association were cancelled, and it was resolved that, in lieu thereof, the firm of K. U. S. Ramachander & Co. should be appointed treasurers of the company on condition of their retaining the company's moneys without interest, and lending moneys to the company without interest whenever required.

In view of the allegations of the petition with reference to this arrangement—operative, as it was, for so many years—it is convenient to note, in passing, the deliberation with which it was made—the special resolution of May superseding with a technical amendment an earlier special resolution adopted with similar unanimity in April, 1910 It is material also to note that under the arrangement the firm was called upon to discharge the duties which had theretofore devolved upon the secretary, treasurer and agent combind, and that in any advantage that might accrue to it from the fact that, like a banker, it was not required to pay interest on the company's balances, was to be found the only counterpart for the 10 per cent. on profits which, under the superseded arrangement, had to be found by the company.

The firm K. U. S. Ramachander & Co. was the family firm of Venkata Rao. From 1910 and earlier he had been at its head. In 1922 he was 73 years of age. It is im-

possible to read the record without seeing that, even at a later date, he remained a man of outstanding ability and strong personality. From 1910 his was undoubtedly the predominant influence in the firm, although he was only one of nine members, as also in the directorate of the company, although the evidence is clear to show that no duly qualified share-holder who desired a seat on the Board was ever excluded therefrom. His influence, real, and, for anything that appears, thoroughly well-deserved, was not, at all events, unwelcome. Everything points to the conclusion that the share-holders, for benefits resulting to them therefrom, were well content to leave the management of the company's affairs in Venkata Rao's hands.

At all relevant times a large number of shares in the company stood registered in his own name, and in the names of his firm and of different individual members of his family, some of them members of the firm. But the number which at any time he really controlled is left in complete uncertainty. His own personal holding was never large. He complains in his evidence that members of his family had become, prior to the date of the petition, at variance with him. The petitioners have put in the minutes of a meeting of the 23rd June, 1917 (Record Part II, page 7), at which K. Ramachander, his eldest son, is found voting against him in favour of a larger dividend. Indeed, their Lordships can find nothing in the record to show that if at any time any disagreement with Venkata Rao's action or policy had existed amongst the share holders, it would not have found effective expression as, for the moment at all events, it did, at the meeting of the 21st August, 1921, to which reference will presently be made. The proceedings of the share-holders up to that date do not indicate that as the petition suggests they were there merely to register Venkata Rao's decrees. They do show that up to 1921 there was never any serious disagreement amongst them.

The first trace of conflict originates with a resolution proposed by Venkata Rao as an extraordinary resolution at a general meeting of the company held on the 6th August of that year. The resolution, in effect, was that in view of the complete abandonment of the Hospet venture and of difficulties resulting from its British Indian incorporation, the registration of the company should be transferred to Hyderabad. The proposal, as might, perhaps, have been expected from what has been already said, was accepted unanimously at that meeting. But Sabapathi Rao, a share holder, a Vakil of 30 years of age, who now becomes as prominent in the drama as Venkata Rao himself, although the holder of a single share only, and with therefore, it might perhaps have been supposed, no very extensive interest in dividends, detected in the resolution or thought or said that he detected a subtle device on the part of Venkata Rao to make the recovery of dividends more difficult. Accordingly, at the meeting held on the 27th August, 1921, to confirm the resolution, he proposed an amendment to the effect that the company should be wound up voluntarily. And his amendment was carried by a bare majority of the members present, and Venkata Rao's original resolution was therefore lost, although the amendment was not, of course, affirmatively effective.

From this incident must be dated the movement, such as it was, headed by Sabapathi Rao, culminating in the petition and ultimately in the winding-up order which is now under review.

The petition, as has been said, was presented on the 1st May, 1922. There were six petitioners. Sabapathi Rao is one; his brother, Lakshmikantha Rao, holding two shares, is another; a third has since died; and a fourth, Sidbasappa, sold his 21 shares in the company on the 2nd November, 1924, before the winding-up order was made. The whole six petitioners between them held no more than 32 shares out of the total of 200. Only one other shareholder, the respondent, Madam Venkayya, supported them. The company, in its opposition to the petition, represented the views of a preponderant majority. It was amply solvent. Creditors were in no way interested, if they existed at all.

The petition is an attack upon Venkata Rao from every angle. That that attack was inspired throughout by Sabapathi Rao has never been questioned, while Venkata Rao has reiterated in evidence that it is from some unexplained enmity to himself on the part of Sabapathi Rao and from that alone that everything has resulted—the winding-up petition, the appeal from the order dismissing it, and the whole course of the supervening liquidation so marked in its hostility to himself. Their Lordships are not prepared to treat these assertions lightly. They have never been contradicted by Sabapathi Rao, although he has given evidence on two occasions and has made

many affidavits in the course of the liquidation. No petitioner, except himself, has ever taken any part in the proceedings. The petition, for the terms of which Sabapathi Rao is clearly, primarily, and not improbably exclusively responsible, is inexcusable in the recklessness and misleading character of its most serious allegations, and their Lordships have been compelled to note that throughout the recorded proceedings in the subsequent liquidation the activities of Sabapathi Rao have been exclusive, constant, persistent and officious, not to be explained by his insignificant material interest in the liquidation or its results. It is necessary to approach the consideration of the case with these most disturbing facts in mind. The learned trial Judge was able to dismiss the petition on what may be called its own demerits. Their Lordships will anticipate so far as to say that it is almost inconceivable that the High Court could have wound up the company as and when it did or have justified its order by the reasons assigned had these matters been even remotely present to the minds of the learned Judges there.

Being in effect an undiscriminating attack upon Venkata Rao the petition is, characteristically, the victim of undesigned inconsistencies. In one paragraph, for example (para. 5), it contains an allegation that with the exception of the petitioners and their outside supporter, "the share-holders are thwarted by the fear of the influence and capacity of Venkata Rao for doing them harm"; alongside of which is to be found the account, twice given or referred to (paras. 8 and 12), of the manner in which Venkata Rao's proposal that the company should become a Hyderabad Company was, at the very latest meeting of the company, defeated by a majority vote in favour of voluntary liquidation. Again, in contrast with a charge in para. 10 that the treasurer firm improperly retains the company's balances for its own advantage—the main burden of the petition—the complaint of para. 11, inconsistently enough, is that Venkata Rao is proposing to invest Rs. 30,000 of presumably these very balances in the purchase of machinery for the Raichur mill—a purchase from which it is not suggested that, except as share-holders, any advantage could accrue either to himself or his firm.

These contradictions are important in a petition whose remaining charges, when supported by any evidence at all, and when not based upon facts distorted in statement beyond recognition, are either vague or out of date. But as there is one charge—trivial enough, for service on such a petition, but upon the supposed proof of which the learned Judges of the High Court appear mainly to have proceeded in making the winding-up order—it will be convenient to deal with it in detail now. It is typical also of other charges.

It is alleged in para. 8 that six years before, *i. e.*, in 1916, Venkata Rao threatened to call up the unpaid amount of Rs. 250 a share therewith to start the sugar mill at Hospet, which it was known must then be a failure; that the intended and resulting effect was to bring down the market value of the shares: that then he bought up about 60 shares from Chavani Pakirappa and others, and soon after he dropped the subject, as his object had thus been secured. Later in the paragraph it is alleged that at the meeting of the 27th August, 1921—this presumably is the meeting referred to, although with characteristic inaccuracy the date is given as the 12th September, 1921—Venkata Rao again threatened the share-holders in open meeting, "that he would harass them by calling up the unpaid share capital. The share-holders are daily expecting the threat to be put into force."

Now, as to the first of these allegations, the only occasion on which the threat could have been made was not, as alleged, six years, but 14 years before, *viz.*, in 1908, when the firm had not even become treasurers, and at a time when Venkata Rao's position was that of joint agent of the company, with the same Pakirappa, who is named. At that time, as a reference to the minutes shows, the proposal to proceed with the Hospet project and call up capital for the purpose was not that of Venkata Rao at all, but was put forward by, amongst others, S. Gavappa, the father of the sixth petitioner; and as a result of further meetings of the Board, the project was in April, 1909, finally abandoned, and with it any proposal or necessity to make a call. The shares of Pakirappa were purchased by Venkata Rao's firm for Rs. 28,000, but not until January, 1910, and in no connection whatever with the starting of the sugar mill. Venkata Rao gave this circumstantial denial to this charge which, significantly unfounded in point of date, depends only on the evidence of Sabapathi Rao, who was not himself, in 1908, even

a member of the company, being a mere a boy of 16.

As to the second occasion, Venkata Rao, in his evidence, characterises the charge (Record, page 28) as a downright lie, and it is certainly not obvious why, when no attempt to put the threat in force had for nine months been made, the share-holders should still be daily expecting its fulfilment. It seems unlikely, too, that Venkata Rao should have chosen the same threat on both occasions, although its effect upon the Stock Exchange value of the shares does not enter into the later threat at all. But that this second threat was ever made again depends on the statement of Sabapathi Rao alone—a witness, Audimulam Pillai, evidently called to corroborate his story failing to do so (Appendix, Part I, page 43).

The learned Judge found that none of the charges against Venkata Rao had been established. So far as these, in particular were concerned, there was surely no room at all for any other conclusion. Upon the evidence, this is one of the reckless unsubstantiated allegations by which the petition is discredited. It is unfortunate, indeed, that the winding-up order should to any extent have been rested on the assumption that it had been proved.

It would be tedious further to detail the charges in the petition, the alleged delay in payment of dividends and the like. It will suffice to take these from the learned trial Judge's judgment. But there are two matters further affecting the good faith of the petition as a whole which cannot properly be passed over in silence. The first of these are the words in para. 10, in which the position of the firm as treasurers under the special resolution of 1910 is attacked:

"Under the pretext," says para. 10, "that this firm would lend large amounts free of interest to the treasurers for its needs, Mr. Venkata Rao succeeded in getting a resolution passed that the funds of the company shall be entrusted to the treasurers free of interest, and that the treasurers should similarly lend an amount to the company if required."

Such is the petitioners' paraphrase in 1922 of the two sets of special resolutions unanimously adopted in 1910, and acted upon without protest or objection ever since.

The allegation goes on:

"Sums above Rs. 20,000 have been lying with the treasurers for several years for their sole benefit and advantage. . . . The whole thing was a ruse to give the use and the control of the company's funds to Mr. Venkata Rao's family."

It casts in their Lordships' minds the gravest doubt upon the *bona fides* of the petition that the true facts in relation to this matter already set forth should there be so distorted in statement as to be quite unrecognisable.

The other matter, more important still in this connection, relates to the gravest charge of all made by the petition against Venkata Rao, and, in conjunction with him, the company's auditor. In para. 13 the following allegations appear:—

"The petitioners are credibly informed, and believe the same to be true, that all articles supplied to the factory were by Mr. Venkata Rao or his relatives or dependants, and vouchers for higher values were got up in the names of third parties who are either his friends, clients, or dependants over whom he wields an enormous influence."

To this may be added the further allegation from para. 11:

"The petitioners believe that the funds of this company have been utilised for the [said] private concerns of Mr. Venkata Rao's family."

Then, as to the auditor, after a statement that it is upon him that the shareholders had alone to depend for the accuracy of the accounts to which they were not allowed access, the same para. 13 proceeds:

"The auditor is a partisan of Mr. Venkata Rao, and is afraid of losing his auditorship and remuneration if he did not comply with the wishes of Mr. Venkata Rao in granting his certificate blindly. . . . If an independent audit be made, the petitioners believe that several grave and serious irregularities will come to light."

It is a serious thing that no evidence has at any time been adduced in support of these grave allegations, or any of them. With regard to the charge against Venkata Rao, Sabapathi Rao sought in evidence to justify its insertion in the petition on the ground that it was based upon information given to him by an unnamed ex official of the company, who was not, however, going to be called as a witness. And not even by a question put to Venkata Rao, in the course of his prolonged cross-examinations, both on the petition and in the course of the liquidation, has this accusation of fraud against him ever been again referred to or revived. So far as the auditor is concerned, the charge, without the slightest evidence to support it, is even more culpable. Its recklessness may be judged by the fact that not only were the audited accounts invariably accepted in each year with unanimity by the share-holders at meetings, several of them attended by Sabapathi Rao and other petitioners, but the audited accounts after eight years still remain undisturbed. And the auditor is now dead.

These grave allegations of personal dishonesty with no available evidence to support them make it incumbent upon every Court to approach the other allegations of the petition with the greatest reserve.

These were all examined by the learned Judge in the course of an elaborate inquiry. He tried out the case to the end. In a cross-petition the allegations against himself and his firm were denied in detail by Venkata Rao. The petitioners had complained that the company's accounts were not open to the share-holders. To meet this complaint, the books and accounts of the company up to 1922 were produced for the inspection of the petitioners, and were inspected by Sabapathi Rao on different days in August, 1922. Sabapathi Rao, in support of the petition, gave evidence; Venkata Rao was cross-examined at great length.

In the result the learned Judge, as has been already noted, found that the charges made by the petition had not been proved in any particular. It had been conceded, he said, that unless the case could be brought within cl. (6) of s. 162 of the Indian Companies Act no order could be made: no misconduct had been proved against Venkata Rao or the other Directors. The fact that Venkata Rao had a preponderating voice in the company by reason of his owning or controlling a large number of shares was of itself no reason for winding up the company; the allegation that dividends had not been paid regularly was no ground for winding up, but the trouble had only arisen in transmission cases. The petitioners had had inspection of all the accounts, and in no instance had these been shown to be wrong. As regarded the sum proposed to be spent on machinery, it was hardly likely that Venkata Rao, with his preponderating interest, would ruin the company for the pleasure of annoying the other share-holders.

Their Lordships subscribe to that judgment. The order dismissing the petition with costs was in their judgment, on the evidence before the Court, the only possible order. They think it both fair and right to add that on a careful consideration of all the evidence they can find no justification worthy of the name for the suggestion that during Venkata Rao's long tenure of office his management of the company's affairs had in view any other object than the welfare of the company in which as a share-holder he was directly and indirectly, so largely interested. Nor have they in the evidence found any proof that moneys retained by the firm were normally in excess of reasonably possible prospective needs or that there was any impropriety on the part of the treasurers in retaining the moneys they did retain or on the part of the Directors in recommending their retention. The balances were, in fact, the working capital of the company, even although some portion of them might without illegality or even inconvenience have been distributed as dividend had the share-holders so insisted.

The petitioners appealed to the High Court by notice, dated the 17th November, 1922. For some unexplained reason the appeal was not disposed of until the 13th November, 1924—nearly two years later. There were no new materials placed before the Appellate Court to account for this loss of time, which would not have been possible in England, where winding-up appeals are placed in an interlocutory list in order to be beyond any such risk. Their Lordships hope that this case is, in this, as in so many other respects, exceptional. But this delay ought to have weighed with the learned Judges in reaching a decision. The difficulties created by a winding-up order in November, 1924, with effect from the 1st May, 1922, which so soon became manifest in the liquidation, might have given them pause. It does not appear that these difficulties were even present to their minds.

Nor is it easy either to discover or to state the actual reasons of the Appellate Judges for making a winding-up order when they did or at all. They were apparently led to do so partly by the case of *Loch* v. *John Blackwood Ltd.* (1) which, as they noted, had not been available for the Trial Judge's consideration, but which, so far as their Lordships can see, bears no resemblance either in principle or detail to the facts as proved in this case. For the rest, while the learned Judges do not in terms reject the trial Judge's findings of fact, they ignore them altogether. They seem to treat allegations in the petition as true merely because they are placed there. They find neither in its contradictions nor in its charges any room even for criticism. This omission in relation to the alleged threats by Venkata Rao to call up the unpaid share capital of the company is particularly unfortunate. The

(1) (1924) A. C. 783.

learned Judges appear, without examination, to accept these charges as proved, while from their statement of the first of them, it is apparent that the nature of the charge made was quite misunderstood. Perhaps their conclusions on the whole matter may, however, best be taken from their own closing words :—

"It is evident that the affairs of this company are carried on in such a way that the members of one family are able to exercise a predominating influence over the management of the company and to secure certain benefits for themselves. The minority are unable to protest effectively against the actions of the Directors because the majority of shares are in the hands of one family and the Directors themselves are able to hold over the share-holders the fear of having to pay up the unpaid portion of their shares. This causes a lack of confidence in the management of the Directors which there is no hope of improving so long as the present directorate continues and the funds are in the hands of the present treasurers. Under these circumstances, we think the only course we can take to secure the just rights of the share-holders is to direct the winding-up of the company."

Venkata Rao has sworn, and it has not been denied, that before the appeal was heard, two of the petitioners, had notified to him their actual, although apparently not their formal, withdrawal from the proceedings. One had died; a fourth, Sidbasappa, as has been stated, had, before this judgment of the High Court, sold his shares. In active support of the petition, therefore, if Venkata Rao has sworn truly, there remained, at the date of the winding-up order, only Sabapathi Rao and his brother, holding three shares between them, and Madam Venkayya, who had never even verified its allegations. A striking comment on the observations of the High Court when read in the light of the history already set forth.

But, presumably, these petitioning casualties were not—at least, all of them—known to the learned Judges, and Venkata's statement of them may have been exaggerated. Even so, the conclusions of the Appellate Court cannot, in their Lordships' judgment, be supported. Their own examination of the petition leads them, on the evidence, to the inevitable conclusion that its allegations, so far as these were offensive, were entirely unproved. Its proper fate was the dismissal which it met with at the hand of the trial Judge. The winding-up order on the materials before the High Court ought not to have been made. So far the present appeal is entirely justified.

But many further considerations emerging in subsequent events have to be weighed before it can be properly disposed of. To the statement and consideration of these, their Lordships now proceed.

At the instance of the Directors, immediate steps were taken to have the order set aside. An application for leave to use the company's name as appellant was first made. This was strenuously opposed by Sabapathi Rao, who, in an affidavit, challenged Venkata Rao to ascertain the contributories' views on the subject. At a meeting, in answer, held on the 2nd April, 1925, 16 contributories holding 168 shares out of 200 declared themselves for an appeal in the company's name or, if that were not possible, for one in their own. Notwithstanding this declaration of their wishes (*see* s. 174 of the Act); the learned Judge in charge of the liquidation on the 19th November, 1925, refused the leave asked for, on the ground that Venkata Rao was then in default under an order made against him in the liquidation, and, on appeal to the Court, this refusal was, on the 18th December 1925, upheld, on the expressed ground, the basis of which their Lordships are quite unable even to conjecture, that there was no reason to suppose that those who purported to be the company in the application "represented the wishes of the majority of the share-holders." This new misunderstanding of the position at another critical moment in the history is responsible for the further misfortune that an appeal against a winding-up order, so unusual in its occasion and circumstances, only became possible through the special leave granted by His Majesty on the recommendation of this Board two years later, on the 2nd December, 1926. Four further years elapsed before the appeal was brought to a hearing—the greater part of that long interval having been apparently consumed in the preparation and printing of the supplemental appendices included in the record at the instance of the Official Liquidator.

The appeal, quite rightly, is in the companys' name. The objection taken to its competence long persisted in was quite unfounded. In that respect it is in accord with a well-established practice, devised to meet the necessities of just such a situation as here arose.

But this is all mere form or style. The appeal is really that of the contributories who are behind it. They may be truly regarded as the appellants. (See *In re*,

Diamond Fuel Company (2). Of the respondents, the Official Liquidator alone has appeared to oppose. He has taken it upon himself to contest the appellants' case *ab initio*—the remaining respondents, with Madam Venkayya, their unpledged supporter, being all who remain of the original petitioners. They have kept themselves in the background throughout, doubtless by arrangement. The Official Liquidator in his printed case and at the Bar has said for them all that they could have said for themselves. Moreover, he has had printed and included in the record 364 pages of the proceedings in the winding-up, including a verbatim transcript of the depositions that have been taken in the course of it. What has really been attempted by this procedure is that the opposition to the appeal—the petitioners' business—shall be conducted even if it fails at the charge of the assets of the company.

Such unusal partisan activity on the part of an Official Liquidator in relation to such an appeal clearly called for some justification, and this was sought to be supplied by referring to an order of the 14th November, 1928, by the Judge in winding-up, which directed the Liquidator to oppose the appeal and do all the above things. Their Lordships have noted that the order referred to is really an affirmative answer by the learned Judge to questions asked by the Liquidator on an *ex parte* summons, while the order made has been so liberally interpreted by the Liquidator that in the second appendix he has had printed 124 pages of depositions, all taken after the date of the order and, save for a few lines here and there, entirely irrelevant, as their Lordships think, to any issue arising on the appeal.

Their Lordships are gravely concerned that such an order should ever have been asked for. They are even more concerned that it should have been acted upon with so little discrimination. The order, in principle, was sought to be justified by the representation doubtless made by the Official Liquidator to the learned Judge, and as a contention maintained before the Board, that in these appendices facts are disclosed which had they been known to the Court when the petition came before it would have made a winding-up order inevitable. It is merely an aggravation of the position that, in their Lordships' judgment, as will appear presently, no such facts are there disclosed. For, even if they had been, these were facts to be brought forward, if so advised, by the petitioner-respondents at their own risk, and not by the Liquidator at the charge of the assets. Their existence would have been no justification for his becoming partisan in a dispute between two sets of contributories concerning the propriety of an order from which his authority alone proceeded. His only duty on an appeal against such an order was from a position of complete impartiality, and in the interests of the whole body of his constituent contributories to be ready to inform the Board of any facts and circumstances in relation to the company's affairs about which he might be asked or which in his judgment the Board ought to know.

In the present case the Liquidator's attitude is peculiary invidious. It appears from the depositions that he was put forward by the petitioners for his office on the resignation of the official first appointed, and that his appointment was opposed by the Venkata Rao party for that very reason. He, too, was an 'enemy'. From him, therefore, on appointment, an attitude of unqualified detachment was specially to be desiderated. His conception of detachment in relation to this appeal has been to ask for and to obtain *ex parte* and to interpret with an excess of liberality an order which has enabled him free of expense to the petitioners, in relief of their responsibilities, and already at a cost far in excess of any possible interest of theirs in assets, to fight their battle, with, as will be seen, no success and at what except as to a trifling amount, must be the inordinate expense of their opponents. It is to be hoped that orders like that of the 14th November, 1928, will not in future be lightly made in the course of an Indian winding-up. The only results of the order in the present instance have been excessive delay and utterly useless expenditure both o which will, like the delay already referred to, be found to have been operative to the prejudice of the appellants, in absence of whom the order was made.

It was upon these appendices and their contents that the real opposition to the appeal was based by the Official Liquidator. When examined, they strike their Lordships as being for the most part quite irrelevant to the conclusion which he asked the Board to draw from their perusal. It is quite true that there are found in them instances of grave disobedience by Ven-

(2) (1879) 13 Ch. D. 400 at p. 405; 49 L. J. Ch. 301; 41 L. T. 573; 28 W. R. 309.

kata Rao to orders for payment into Court or to the Official Liquidator of moneys shown by their accounts to be in the hands of the treasurers. The record, however, does not establish, as has been contended, either disobedience to orders to hand over the company's remaining books and documents or even reluctance to produce them. Carelessness in relation to their custody or preservation there may have been, but the difficulties with regard to these books seem to the Board to have been largely due to the fact that the mill at Raichur, with, as it would seem, all documents there, had been in the hands since the 1st January, 1924, of the lessee under a transaction later to be referred to. But the orders upon Venkata Rao for payment of money, whether regular or not, ought to have been obeyed, and he must not complain that his disobedience was made, once, the occasion of an order for his committal at the instance of the Official Liquidator. If the pendency of an appeal to this Board was his excuse for disobedience, it was no excuse. Venkata Rao must remain justly responsible and accountable for his recalcitrancy. Their Lordships, however, do not find in what has emerged since the winding-up order anything going to show that before it was made Venkata Rao had been guilty of wrongful acts unknown to the Court and sufficient to justify a winding-up order had they been alleged in the petition. By these supplemental appendices they are not even led to conclude that had the winding-up order not been made Venkata Rao would have been guilty of any disobedience to any order of Court. He nowhere appears to be congenitally recalcitrant. It was his resentment at the existence of a winding-up order in any shape which betrayed him to disobedience, although their Lordships hasten to add that such resentment, however well authenticated, being manifested while the order stood, can never be judicially excused.

But the Official Liquidator points to one other transaction disclosed as justifying his contention under this head. He says that a certain purchase by the Directors of gins in March, 1924, after the dismissal of the petition, together with the lease of these gins to the lessee of the mill, was *ultra vires* the company and a fraud upon it. Venkata Rao's answer on the question of *ultra vires* is that the transaction was conducive to the attainment of the company's purposes an object probably implied in the memorandum of association of every trading company, and very easily implied in the skeleton form in use and adopted for this company in 1882. His answer as to the lease of the gins was that it amounted to the completion of the lease of the mill at Raichur which had been made with the share-holder's assent as from the previous January. It is unnecessary for their Lordships at this stage to go into further detail. The acts were long after the petition and it is, moreover, well settled that an *ultra vires* transaction on the part of Directors, if this was one, is of itself no ground for a winding-up order. A share-holder has his complete remedy in other directions.

Accordingly, their Lordships have reached the conclusion that the proceedings in the liquidation, the details of which —at such great expense—the Official Liquidator has introduced into the appeal, do not, in any way, help the case he has sought to make. On the contrary, they operate further to imperil it. For what, in their Lordships' judgment, these proceedings do show is that, owing to the mistaken principles upon which the liquidation has been conducted, doubtful orders have been made in the past and that, unless the methods hitherto adopted are for the future discarded, nothing can result from the further progress of the liquidation but the dissipation of the company's entire assets in expenses. In other words, the Liquidator's appendices, properly appreciated, point to the discharge of the winding-up order being called for rather than to the continuance of the liquidation being beneficial. And the proper choice between these two alternatives becomes thus ever more difficult.

This statement requires some expansion.

The outstanding fact in relation to this winding-up which seems too far to have been entirely missed is that the contributories are alone interested in its results. The company had no creditors. From this it followed that the liquidation was peculiarly one in which the Court, as to all matters affecting the contributories as a class, would have regard to their wishes as proved by any sufficient evidence (Act of 1913, s. 174) and one, also, in which the Official Liquidator [s. 183 (2)], would lose no opportunity of summoning meetings of contributories for the purpose of ascertaining their wishes in respect of similar matters. Now, it is hardly too much to say that with consequences—serious in many other respects than exces-

sive cost—these vital considerations have been consistently forgotten or ignored throughout the liquidation.

Two typical examples may be given. The first relates to the lease of the Raichur factory, granted pursuant to a resolution of the company in general meeting on the 8th November, 1923, for a term of 10 years from the 1st January, 1924, to Ramachandra, the son of Venkata. Ramachandra's offer was the highest of three then received : the policy of leasing the factory was approved by all : and with regard to the choice of the tenant even Sabapathi Rao, who was present at the meeting, made no protest. Ramachandra had been in possession since the 1st January, 1924, duly paying the rent reserved, when on application by the then Official Liquidator, the Judge, on the 20th August, 1925, declared the lease void under s. 227 (2) of the Act, as being a disposition of the company's property subsequent to the commencement of the winding-up.

Their Lordships do not go into other matters in relation to this order, approved as it was on appeal—into the fact that the value of the lease to the company was not questioned and that, in making the order, no regard was had to the law of the Nizam's Dominions, where the validity or otherwise of the lease would have been determined without any reference whatever to s. 227 (2). They say nothing of all that followed therefrom. They are concerned now only to point out that the later disasters flowed from the initial failure of those responsible to appreciate that no one had been or remained interested in the factory except the share-holders, who had by an unopposed resolution approved the lease, and that so far from declaring it void under the section, it was a transaction to be confirmed almost as a matter of course.

The second typical example of failure in the same respect is disclosed in the proceedings with reference to a dividend of Rs. 40 per share in respect of the profits of the company for the years 1922 and 1924, declared unanimously at a meeting of share-holders, or more accurately of contributories, held on the 27th December, 1925, as one to be paid on the terms that it would be repaid if called for. At that date the winding-up order had been made, but no Liquidator had so far been appointed. In point of law, under s. 178 (2) of the Act the company's assets were then constructively in the custody of the Court, and it is quite clear that no disposition of them by the contributories could be regular. But, on the other hand, except these contributories, no one at the date of the resolution had any interest whatever in the moneys to be distributed, while it is not surprising, as one of the Judges remarks, that the contributories were entirely unanimous in declaring the dividend. Now in the treasurer's accounts for the year 1924, there is a disbursement claimed of Rs. 10,665 in respect of a partial distribution of this dividend, and this disbursement has been attacked by the Official Liquidator from every angle, but always on the basis that any payment whatever of dividend after the winding-up order, albeit, in substance no more than a payment on account of the ultimate interest of each contributory in the surplus assets of the company, was as blameworthy as if, in the liquidation of an insolvent company, it had represented a distribution of creditors' funds amongst contributories.

It was of course the immediate duty of the Official Liquidator in going through the accounts to satisfy himself that the payments set up had in fact been made, and that the money had been received in circumstances which, as between the company and the registered holder of the shares in respect of which it was paid, was a complete discharge to the company. But the Official Liquidator did not think fit to stop there. He obtained orders from the Court directing the repayment of the dividends paid, and orders against the Directors personally for any dividends not so repaid by their recipients, and in other cases—in one particularly, where the registered shareholder himself makes no claim to the dividend (*see* supplemental appendix, page 121), and where the dividend has admittedly been paid to and received by one who claims that in equity he was so entitled to receive it—the liquidator has embarked upon an inquiry in the interest of another claimant in equity to the same dividend, in the course of which he took—and these are now included in the appendies—over 200 pages of depositions, and in connection with which he obtained an order for a commission to Nasik to take evidence, all on a subject and in support of a claim with which the company in liquidation has as such no concern whatever. It is a disturbing circumstance that the claimant for whom all this was done was the original petitioner, Sidbasappa, then not even a contributory, acting through Sabapathi Rao

(*see* second appendix page 119), while the claimant against whom the irrelevant campaign was waged was I. Narayana Reddi, one of the Directors.

But there are other orders made in the liquidation, the terms of which are set forth in the Official Liquidator's appendices, and, on the face of them, at all events, so remarkable that it would not be very disconcerting to note their disappearance with the winding-up order, on which they depend. There are also cases where, on the startling opinion judicially expressed in the order of the 4th March, 1925, "that in effect the treasurers are not very different from the Directors", orders have apparently without discrimination been made against "the Directors" or "the treasurers", without anything whatever to indicate who are the persons so described. Their Lordships have been specially struck by the three orders following:

(*a*) An order of the 19th April, 1928, whereby five named Directors are apparently as for a misfeasance, and on a summons in Chambers ordered to pay Rs. 7,761-13-9—a sum which a debtor to the company had made default in paying, no consideration having apparently been given to the contention that the debt had become statute barred by the neglect of the Official Liquidator, to say nothing of its having been guaranteed by Ramachander, one of the Directors named.

(*b*) An order *in Chambers* of the 26th April, 1928, (*a*) for repayment of the dividends distributed under the resolution of the 22nd December, 1924; (*b*) for payment by Ramachander as guarantor of the Rs. 7,761-13-9 he had already as Director been ordered to pay by the order of the 19th April, 1928

(*c*) An order of the 15th October, 1929, whereby, *inter alia* (*a*) all items of disbursement shown on treasurers' accounts of 1924 were ordered to be refunded by Venkata Rao and the company's treasurers, with apparently no credit given for any benefit derived by the company from the expenditure; (*b*) repayment was to be made by the Directors of the sum paid to the sellers for the gins already referred to, presumably as for a misfeasance, or in respect of an alleged *ultra vires* transaction, without reference to the fact that the gins in question had been delivered to and remained in the hands of the Official Liquidator under a previous order; (*c*) payment by Directors and treasurers was directed of dividends distributed under resolution of the 22nd December, 1924, and not repaid by the recipient, and other smaller payments were ordered without any consideration being given, so far as appears in the records, to the answers made; (*d*) the lease of the gins to Ramachander was set aside.

None of the orders above referred to are under appeal. They have doubtless long since become final in the sense in which administrative orders ever are final. It may be that in working them out defects, apparent on the face of them, ceased to be serious. But their Lordships cannot refrain from expressing the hope that in liquidation proceedings in India matters of such importance will not normarlly be so disposed of.

Their Lordships have now detailed with much particularity the salient incidents in this long history. They have done so, laboriously they fear, but not finding it possible otherwise to make clear within the confines of a self sufficient judgment the difficulty of the problem disclosed. What they find themselves faced with at the end of the day is a winding-up order, made two years after its presentation upon a petition which ought never to have been presented, for, even if not merely vindictive and malicious, the petition was entirely without proved merits. They find also that the winding-up order has in the liquidation been succeeded by a series of orders off-hand in form and on the face of them, at all events, made without full consideration of all relevant circumstances. Lastly, their Lordships find a liquidation in being which, if carried on as it has been begun, can, as they forecast it, end in nothing for the contributories but a call of all the unpaid capital to provide for payment of the costs and expenses. And for these disasters, one and all—with the exception only of the expense and trouble due to the recalcitrancy of Venkata Rao, the costs of which have already and rightly fallen upon him—the petitioners are mainly, if not indeed entirely, responsible. There is, therefore, so far, and even at this distance of time, everything to be said for the discharge of the winding-up order appealed against.

But what would now be the consequences of discharging that order? The business of the company has ceased for years: its undertaking has been broken up: its reconstitution except under new auspices is now probably quite impracticable: and the task of adjusting liability for the mischief

which has resulted from the liquidation presents a prospect of far-reaching and ruinous litigation. Nor could these consequences be mitigated, nor could any bounds be set by their Lordships to the range and extent of future trouble if the winding-up order were now to be set aside. A direction to that effect would, their Lordships cannot doubt, be a calamity to all concerned. They cannot give it.

On the other hand, it seems to the Board by no means hopeless that if the liquidation be left operative, it may by a change of method be possible to avoid at least total disaster.

Their Lordships are, of course, well aware that it is not for them to dictate the future course of the liquidation. That is a matter for the learned Judge in winding-up. The judicial discretion in such matters is, at all events in the first instance, with him alone, and he may not divest himself or be divested of full responsibility for its exercise. The observations accordingly which immediately follow are made merely for his assistance. They are in no way directory. It is enough that they will have his attentive consideration. In their Lordships' view, then, it is essential, if complete disaster is to be avoided, that for the future this liquidation shall be conducted in a spirit of complete impartiality, as between different sets of contributories, and with due regard to the wishes of the contributories (s. 174). It will be for the learned Judge to consider whether this end can be attained under the present liquidator, who has identified himself so completely and, so far, so unfortunately, with the petitioners in their unworthy conflict with the main body of contributories, or whether it will not be necessary to place in the position of liquidator a man of no less high standing than the present Official Liquidator, but who has not hitherto been associated professionally or otherwise with either set of contributories, and who would be advised by a Vakil, equally dissociated from either side, whose appointment would be authorised under s. 181 of the Act. It will further deserve most careful consideration at the hand of the learned Judge, whether in the future course of the liquidation, by whomsoever it is conducted, the audited accounts up to 1923 should not remain undisturbed for reasons similar to those which have led their Lordships to leave the winding-up order in being, and whether the accounts of the company for 1924 should not be taken on the best available materials and audited in order that on these accounts, as so taken, the actual amounts with which the treasurers are to be charged may appear as accurately as is now possible. Particularly, however, will it be for the learned Judge to determine if the liquidator should not be directed to consider, as a protection from all further litigation, whether the liquidation cannot be brought to an end by some scheme under which the whole remaining assets of the company would be taken over by the majority contributories on the terms of their providing for the authorised costs and expenses of the liquidation and a sum equivalent to the then existing value of the shares in the company of the remaining contributories; and whether, failing that, the liquidator should not be directed in relation to the dividend declared on the 22nd December, 1924, and notwithstanding the orders on that subject previously made, either to complete its distribution out of the assets in his hands or enforce repayment from each recipient of the dividend paid to him. In their Lordships' judgment, the preferable course, if funds permit, is, with the sanction of the Court, to complete the distribution. All these observations, however, as their Lordships have explained, express their own views only. They form no part of the order following.

The actual order now to be made should, their Lordships think, be as follows:—That the winding-up order of the 13th November, 1924, although not justified when made, be, by reason of the lapse of time and intervening events, maintained except as to costs. As to these, the order will be discharged.

And their Lordships will humbly advise His Majesty accordingly.

As to costs, as the winding-up is allowed to continue, the petitioners cannot be ordered to pay the company's costs either of the petition or of the appeal to the High Court, proper though such an order would be. But they must not have costs in either Court, and if these costs have been paid by the Official Liquidator they must be repaid. The Official Liquidator must pay out of the assets the costs of the company—that is, the majority contributories—of the petition, of the appeal to the High Court and of this appeal. There will be no costs of this appeal to the petitioner-respondents or Madam Venkayya. The Registrar will tax the costs of this appeal of the Official Liquidator, who will

have liberty to apply in the liquidation for payment out of the assets of these costs or of such part of them as the Judge, in winding-up, may, in view of this judgment, allow, the Official Liquidator having further liberty reserved to apply to the learned Judge for payment otherwise than by the majority contributories of such of his taxed costs as may be disallowed out of assets.

It will be the duty of the Official Liquidator when applying for his costs to bring this judgment of their Lordships to the notice of the learned Judge.

A. *Order confirmed.*

Solicitor for the Appellants:—Mr. *H. S. L. Polak.*

Solicitors for the Respondent, the Official Liquidator:—Messrs. *Watkins and Hunter.*

PRIVY COUNCIL.

Appeal from the Bombay High Court.

July 28, 1931.

LORD TOMLIN, LORD RUSSELL OF KILLOWEN AND SIR GEORGE LOWNDES.

JULIO MASCARENHAS AND OTHERS— APPELLANTS

versus

THE MERCANTILE BANK OF INDIA, LTD. —RESPONDENTS.

Negotiable Instruments Act (XXVI of 1881), ss. 4, 9, 13—Debentures issued by Improvment Trust—Forged endorsements—Surrender of old and issue of new debentures—Novation of contract—Holder in due course—Title to new debentures.

One *F* was entrusted by the plaintiffs-appellants with certain debentures for the purpose of collecting on their behalf the interest as it fell due. *F* by means of forged endorsements in his own favour pledged those securities with the Alliance Bank of Simla endorsing them over to that Bank to secure his own indebtedness. Subsequently the Alliance Bank surrendered these securities to the Improvement Trustees who issued fresh debentures in their place and described the transaction as a renewal of the old debentures. Later on the Alliance Bank under instructions from *F* endorsed over the new debentures in favour of the Mercantile Bank, the respondents to whom *F* had transferred his loan account. The plaintiffs-appellants brought a suit for delivery and transfer to them of those instruments by the Mercantile Bank;

Held, (1) that the debentures were promissory notes and were, therefore, negotiable instruments;

(2) that as there was no irregularity in the transfer the appellants were apparently in the position of holders in due course; [p. 127, col. 2.]

(3) that the new debentures issued by the Improvement Trustees were in form and in substance new and independent obligations in substitution for those under the surrendered instruments; [p. 128, col. 1.]

(4) that the appellants did not acquire any title to these new debentures; [*ibid.*]

(5) that the appellants had no right of action against the Mercantile Bank as the latter were holders in due course of the new debentures. [*ibid.*]

Lee v. *Zagury* (1), distinguished.

Hunsraj v. *Ruttonji* (2), overruled.

Consolidated Appeals Nos. 87 and 88 of 1929 from two decrees of the High Court, Bombay, Civil Appellate Jurisdiction, dated the 26th and 27th March, 1928, reversing two decrees of that Court, in its Ordinary Original Civil Jurisdiction, dated the 12th and 14th April, 1927.

Messrs. *C. J. Conway*, *K. C.* and *J. M. Parikh*, for the Appellants.

Messrs. *Rayner Goddard*, *K. C.* and *C. W. Turner*, for the Respondents.

Sir George Lowndes.—The questions for decision in these appeals arise out of a fraud committed by one Fernandes. In the year 1914 he was entrusted by the appellants, who were residents of Goa, with certain securities for the purpose of collecting on their behalf the interest as it fell due. Among these securities were 41 "debentures" issued by the Trustees for the Improvement of the City of Bombay under powers contained in their Act (Bombay Act IV of 1898) and also one "Municipal debenture," being presumably a debenture issued by the Municipal Corporation of Bombay under Bombay Act III of 1888. All of these securities were transferable by endorsement.

Fernandes seems to have remitted the interest to the appellants regularly till the middle of 1923, when he defaulted, and it was then discovered that he had, in 1918, by means of forged endorsements in his own favour, pledged all the debentures in question (together with others not the subject of these appeals) with the Alliance Bank of Simla, endorsing them over to that Bank to secure his own indebtedness.

Had no further complic tions occurred there would probably have been little difficulty in deciding on the rights of the parties; but in 1921 the Alliance Bank surrendered the 41 Improvement Trust debentures to the Trustees, who exchanged them for 22 new debentures, the face value of which differed in many cases from those

of the originals, though the totals were the same. This transaction is described in the record as a "renewal" of the debentures, and seems to have been in accordance with the usual practice, but it has an important bearing on the rights of the parties. All these new instruments were issued directly to, and in the name of, the Alliance Bank, clear of all previous endorsements. The original securities were cancelled by the Trustees and retained by them. The same process, *mutatis mutandis*, was gone through in the case of the Municipal debenture.

Thereafter, in 1921, Fernandes transferred his loan account to the Mercantile Bank of India, the respondents in these appeals, and on his instructions the Alliance Bank endorsed the new instruments over to the respondents.

The appellants now claim the delivery and transfer to them of these instruments by the respondents. They succeeded in the first Court in India, but failed to hold their decree on appeal and the questions involved came before this Board for final determination. There is no dispute as to the facts set out above.

The securities entrusted to Fernandes were the property of the two sets of appellants, and suits were instituted by them separately on the original side of the Bombay High Court. The defendants in each case were Fernandes, the Alliance Bank, and the respondents, but the suits were defended only by the respondents. They were tried and heard in appeal separately, but are consolidated before the Board, and in their Lordships' opinion the same considerations apply in each.

The original Improvement Trust "debentures," specimens of which are printed in the record, were in the form of a promise to pay a particular sum to the Bank of Bombay or order on the 20th August, 1963, with half-yearly interest in the meantime, at 4 per cent. per annum. On the back was a series of spaces for the entry of interest payments and a column of endorsements commencing with an endorsement by the original payee, the Bank of Bombay, and ending with that of Fernandes to the Alliance Bank. The renewals, with which the appeals are principally concerned, were in the form of a promise to pay the Alliance Bank or order, and contained no reference to the originals except that under the serial numbers of each new instrument was entered another number, which is said to be that of an old debenture, and where two or more of the originals were consolidated in a new instrument the word "consolidation" appeared.

It was agreed on the argument in appeal in India that the so-called "debentures" were promissory notes as defined in s. 4 of Act XXVI of 1881, and, therefore, under s. 13 of that Act negotiable instruments. In their Lordships' opinion this is the correct view of their legal attributes. There was no irregularity in their transfer to the respondents; the references to the old numbers and to consolidation were not, their Lordships think, sufficient to lead the respondents to believe that there was any defect in the title of the Alliance Bank, and it is not suggested that there was anything else in the transaction to put them on enquiry. The respondents were apparently, therefore, in the position of holders in due course under s. 9 of the Act.

The trial Judge, as already stated, decided both the suits in favour of the plaintiffs, the present appellants. The main ground of his judgment was that no title could be acquired by the respondents through the forged endorsements and that the "renewals" must be regarded in law as merely the "fruit" of the original securities. He relied upon the cases of *Lee* v. *Zagury* (1) and *Hunsraj* v. *Ruttonji* (2). He made decrees in the appellants' favour, declaring in each case their title to the instruments claimed, and ordering the respondents to transfer and hand over the same to them together with all interest or dividends realized by the respondents within three years prior to the filing of the suits. He also granted the appellants certain relief against Fernandes, which is not now material.

The appeals were heard by Marten, C.J. and Blackwell, J., who delivered in each suit separate, but concurring, judgments in favour of the present respondents. In the one case they dismissed the suit as against the respondents, declaring that the appellants were not entitled to the "new debentures" held by the respondents; in the other they limited the decree of the lower Court to certain securities not in question in these appeals.

The learned Judges were of opinion that the issue by the Improvement Trustees of the instruments the subject of the suit constituted in effect a new contract in each case between them and the Alliance Bank; that

(1) (1817) 8 Taunt. 114; 1 Moore 556; 19 R. R. 476.
(2) 24 B. 65.

the respondents were holders in due course of these instruments, and that the appellants had no right of action against them. Referring to the authorities on which the trial Judge had relied, they held that the case of *Hunsraj* v. *Ruttonji* (2) was wrongly decided, and that *Lee* v. *Zagury* (1) was a decision on very special facts, and could not govern the cases before them.

In their Lordships' opinion the conclusion come to by the Appellate Court was right. They think that the suits, so far as the respondents were concerned, were misconceived. On the original debentures the Improvement Trustees were, no doubt, bound to the appellants, and the forged endorsements in favour of Fernandes would not, *prima facie*, affect their title. If these debentures had come into the possession of the respondents, the appellants might well have been entitled to recover them. But what the appellants claimed to have transferred and made over to them were instruments to which they never had a title and with which their Lordships think they had no concern. They were not in any sense mere appendages to or continuations of the original securities. They may be called "renewals," but they were in form and in substance new and independent obligations in substitution for those under the surrendered instruments, and entered into by them with the Alliance Bank and their transferees. This is shown by the consolidation of the amounts for which the original promissory notes were issued, and by the elimination of the previous endorsements. In the case of dishonour by the makers it is hardly conceivable that the holders could be entitled to sue the endorsers of the old notes; they would not ordinarily even know who they were, and consolidation would be inexplicable except on the basis of a new contract, as any material alteration of the originals would render them void against intermediate parties; *see* s. 87 of the Act above referred to.

In truth, the only connection between the old and the new instruments was that, as between the Trustees and the Alliance Bank, the consideration for the issue of the new was the surrender of the old instruments. This cannot, their Lordships think, give the appellants any title to the new instruments, though it may not affect their title to the old ones.

It may be that that if the suits had been instituted against the Improvement Trust it would have been difficult for that body to resist them. They were in possession of the securities to which the appellants were entitled, and though they affected to cancel them, this would not necessarily defeat the appellants' title. Their Lordships are not called upon to express, and do not express, any opinion upon this question.

Their Lordships agree with the learned Chief Justice of Bombay in thinking that *Hunsraj* v. *Ruttonji* (2), so far as that decision dealt with "renewals" of Government promissory notes, was wrongly decided. They notice that the Indian Securities Act (XIII of 1886), which provided for such renewals, gave special statutory protection to the Government in respect of the original securities, and this protection is continued, though subject to more stringent conditions, by Act X of 1920.

With regard to *Lee* v. *Zagury* (1) their Lordships agree that it is no authority upon the present case; it was a decision upon a complicated set of facts, and did not affect to lay down any principle of law.

Their Lordships have dealt in this judgment mainly with the Improvement Trust debentures, but they think that the same considerations apply to the Municipal debenture, and that the appeals fail with regard to all of them.

For the reasons given their Lordships will humbly advise His Majesty that the consolidated appeals should be dismissed. The appellants must pay the costs.

R. L. *Appeals dismissed.*

Solicitors for the Appellants.—Messrs. *Birkbeck, Julius, Edwards & Co.*

Solicitors for the Respondents.—Messrs. *E. F. Turner & Sons*

CALCUTTA HIGH COURT.

Civil Appeal No. 199 of 1928.

April 21, 1931.

MUKERJI AND GUHA, JJ.

RADHA GOBINDA DEB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GIRIJA PRASANNA MOOKHERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), ss. 2, 3, 20—Arrears due on 12th January—Sale on 28th March—Validity of sale—Bengal Land Revenue Sales Act (VII of 1868), s. 1—Amalgamation of malguzari *and* thanadari *lands—Single sale for arrears of revenue and* thanadari *dues—Validity—Want of time to complete sale—Adjournment, legality of—Signing order of adjournment in club, legality of—Evidence Act (I of 1872), s. 114, illus.* (e), (f)—*Collector's books—Presumption of correctness.*

Where arrears for which a sale under the Bengal Land Revenue Sales Act took place were payable on the 12th January, 1924, and the estate was sold on the 28th March which was the next date fixed for payment of arrears :

Held, that the sale was not invalid. *Amrita Lal Roy* v. *Secretary of State* (1) and *Saraswati Bahuria* v. *Surja Narain Choudhuri* (2), distinguished. [p. 132, col. 1.]

Where *thanadari* lands have been amalgamated with the *malguzari* lands of the *mehal* so as to form one estate as defined in s 1, Act VII of 1868 and the demands on the two heads have been amalgamated to form a total demand for the estate, one sale can be held for the arrears of revenue for *malguzari* lands and on account of dues for *thanadari* lands. [p 133, col. 2.]

The Collector has jurisdiction under s. 20 of the Bengal Land Revenue Sales Act, 1859, to adjourn a sale to the next day after selling some of the items if he cannot complete the sale of all the items before 5 P. M. [p. 134, col. 1.]

The fact that the order for adjournment was signed by the Collector at a club and not at his office cannot affect his jurisdiction or the validity of the sale. [p. 134, col. 2.]

Non-service of a notice under s. 7 the Act, which is meant to forbid *raiyats* and under-tenants to pay rent to the defaulting proprietor, has no bearing on the question of, and cannot affect, the price fetched at the sale. *Gobind Chunder* v. *Shirajunnessa* (8), *Mahammad Azahar* v. *Raj Chunder* (9), *Azimuddin Patwari* v. *Secretary of State* (10) and *Sheikh Mahommad Aga* v. *Jadunandan Jha* (11), referred to. [*ibid.*]

Entries in the books of the Collectorate may be presumed to be correct and such books must be examined to arrive at a finding as to whether there were arrears or not. *Saraswati Bahuria* v. *Surja Narain Choudhuri* (2) and *Mahommad Solaiman* v. *Birendra Chandra Singh* (3), referred to. [p. 133, col. 1.]

Appeal against Original Decree of the Officiating Sub-Judge, Birbhum, dated the 12th September, 1927.

Mr. *Karunamoy Ghose*, for the Appellant.

Messrs. *Braja Lal Chakravarti* and *Hari Prasanna Mukherji*, for the Respondents.

Judgment.—This is an appeal by the plaintiffs from a decree dismissing their suit.

The plaintiffs are two brothers who, as well as their uncle defendant No. 2 are *shebaits* of their family idol Sree Sree Radha Govinda Deb Thakur. One of the *debutter* properties of the idol is a 14 annas 2 *ganda* 2 *karas* share of an entire estate, No. 1246 of the Birbhum Collectorate, which goes by the name of Lot Kutubpur and includes *thanadari* lands. This share constitutes a separate account property being revenue-paying estate No. 1246-1. It was sold at a revenue sale held by the Collector of Birbhum on 28th March 1924, and purchased thereat by defendant No. 1. The *shebaiti* right of the two plaintiffs extends to a half of the said share and that of defendant No. 2 to the other half.

On 8th July, 1925, the plaintiffs commenced this action on a plaint in which it was averred that there was bitter enmity and long standing litigation between them and defendant No. 2; that estate No. 1246 1 having fallen into arrears for non-payment of the revenue of the January *kist* of 1924 the estate was advertised for sale to be held on 27th March, 1924; that on that date defendant No. 2 sent his officer Nimai Chandra Ghose to Suri, and the plaintiffs also sent their officer there with money for their share of the revenue; that Nimai Chandra Ghose gave out that he would pay the amount of revenue together with such penalty as the Collector might impose and also filed a petition for that purpose before the Collector; that the plaintiffs' officer, believing that the revenue would be so paid in and finding that a *chalan* for such deposit had been passed made over the plaintiffs' share and the revenue to Nimai Chandra Ghose and came back; and that thereafter Nimai Chandra Ghose having thus succeeded in misleading the plaintiffs' Officer and sent him away, did not deposit the revenue and fraudulently caused the estate to be put up for sale on the next day and got it purchased for defendant No. 2 in the *benami* of the defendant No. 1. Certain irregularities and illegalities in the procedure adopted for the sale were also averred. It was also alleged that substantial loss was thus caused as property worth Rs. 50,000 had been sold up for Rs. 18,100 only. The prayers were for setting the sale aside on a declaration that it was illegal, *ultra vires* and without jurisdiction, and for recovery of possession of the estate together with mesne profits.

Defendant No. 1 in his written statement filed on 29th October, 1925, denied that there were any irregularities or illegalities as

alleged in the plaint, or that he was a *benamidar* for defendant No. 2, or that ther was any substantial loss.

On 18th January, 1927, that is to say, about a year and a half after the action was commenced, the plaintiffs made a petition for amendment of their plaint. This amendment was allowed in spite of the objection of defendant No. 1. The amendment in substance was that the plea of *benami* purchase was given up, and it introduced a statement to the effect that the plaintiffs had been subsequently informed that Nimai Chandra Ghose did not get the money which he was expecting in order to make the deposit and upon that he entered into an arrangement with defendant No. 1 under which the latter agreed to purchase the property at the sale and then to reconvey the same to defendant No. 2 on receipt of Rs. 2,000 as his profits in the transaction. A prayer was added that the property should be reconveyed to the idol on receipt of the said amount or such other amount as was considered proper.

In the additional written statement which defendant No. 1 filed on 31st March, 1927, after the aforesaid amendment of the plaint, the said defendant denied the arrangement alleged.

Defendant No. 2 took no part in the suit.

Before dealing with the other questions that have arisen in this appeal it would be convenient, by way of clearing the ground, to dispose of a few questions of fact on which the findings of the Court below were against the appellants and the correctness of which findings has been assailed before us on their behalf.

The first question is whether the alteration in the averments made by the amendment of the plaint was made *bona fide*, the allegation as to a *benami* purchase by defendant No. 2 in the name of defendant No. 1 being abandoned and the story of a secret arrangement under which defendant No. 1 was to reconvey the property to defendant No. 2 for a profit of Rs. 2,000 being set up. The plaintiff Kshirode Mohan Ghose Moulik stated in his evidence :

"The statements I have made in para. 16 of the plaint (meaning the allegations as to the *benami* purchase) I got from Rakhal Banerji, *Am-mukhtear* of Asit (meaning defendant No. 2). That Rakhal Banerji cannot be found now in Suri. I do not know his whereabouts . . . . I got the information about the statements made in para. 4 of the amendment petition from Rakhal Babu (meaning the story of the secret arrangement, towards the beginning of January, 1927 . . . . I have no good feelings with any men of Asit. I have no faith in Asit. I have no faith in his *karmacharis* . . . . I cited Ashu as witness as Rakhal told me he was present at the tim of sale. I did not consult Ashu about what he knows. I cited Nimai and Santiram as witnesses as Rakhal told me that they were present at the time of sale. I did not consult them before, but I expected that they would speak the truth as their masters had been disappointed. I sent for Rakhal also at the beginning of January, 1927, to know what the witnesses would say. I called him at Kshitish's house. Then he told me the real state of matters as stated in my amendment petition. I did not take Rakhal to anybody for repeating his second statements (meaning the story of the secret arrangement. I had no reason to disbelieve Rakhal Babu and so I got the plaint amended."

In our opinion, it is perfectly incredible that the witness could have, without taking any precautions to fix Rakhal to his second statements when he had once gone back upon his first statements, and without assuring himself that the officers of his bitter enemy who were all concerned in the fraud would support his case as witnesses on his behalf, could have thought of getting such an important alteration made in his case. Such a position, in our judgment, is unthinkable. We entirely agree with the conclusion of the Subordinate Judge on the point and hold that, finding in the course of the year and a half that had elapsed that defendant No. 1 had secured unimpeachable documentary evidence (which has subsequently been produced by him in the case), showing that the purchase had been made by that defendant on his own behalf and with his own money procured by loan and not on behalf of defendant No. 2, the plaintiff joined hands with defendant No. 2 to make a common cause and set up the story of a secret arrangement in order to recover the property.

Next, as regards the truth of the story itself. The story rests upon the evidence of P. W. No. 1 Nimai Chandra Ghose, the Sardar Dewan of defendant No. 2, P. W. No. 2 Santiram Mukherji another officer of defendant No. 2, and P. W. No. 3 Ashutosh Chatterji, a man of inconsiderable position and a relation of P. W. No. 2. A close scrutiny of the evidence of these three witnesses discloses wide divergence as to the details, and there are clear and irreconcilable contradictions as regards the time, the place and other essential particulars of the transaction which they profess to speak to. Besides, it is improbable to the last degree that such a secret arrangement with such far-reaching consequences could be entered into by these officers of defendant No. 2 on their own responsibility and without any reference to their master or that no greater precaution would be taken by

them to guard against defendant No. 1 resiling from it. Defendant No. 2, on whose behalf and for whose benefit this agreement is said to have been entered into, has not ventured to come forward; his officers have made barefaced admissions as having been party to a serious fraud intended to secure for defendant No. 2 an advantage over the plaintiffs by depriving them of their property. It is not suggested that during the long period that elapsed since the sale and till the amendment was applied for, there was any demand for specific performance of the agreement, or any tender of the amount of Rs. 2,000; and indeed it is admitted that there have been no such steps taken. In support of the story of this secret arrangement, it has been attempted to be shown that the officers of defendant No 2 were scaring away intending bidders in order to help defendant No. 1 to make the purchase, but we are not satisfied that any such thing was really done by them. It is utterly incredible that there was such an arrangement and, indeed, everything points to the falsity of the story so put forward. On the other hand the evidence of defendant No. 1 himself and of such witnesses of his as D. W. No. 4 Baidya Nath Roy, D. W. No. 5 Ananta Lal Ghosal and D. W. No. 6 Debendra Chandra Ghosal—witnesses who appear to us to be perfectly reliable—have given a clear and convincing account as to how the purchase was made. On that evidence we are satisfied that it was a *bona fide* purchase made by defendant No. 1 for his own benefit. The evidence, oral and documentary, as regards the source of the purchase money need not be discussed as the plea of *benami* has been abandoned, but we may say, once for all, that we can see nothing suspicious anywhere in that evidence.

Then arises the question whether the plaintiffs' story of their having sent their share of the Revenue through an officer of theirs and that officer having been bluffed by defendant No. 2's officer Niami Chandra Ghose, with the assurance that the Revenue would be duly put in by him, is true. In view of the fact that the allegation of a *benami* purchase was withdrawn, and in view of our finding that defendant No. 1 was a *bona fide* purchaser, the question has lost all its importance. But it is as well that we should record our opinion as to the truth or otherwise of the story as it has been discussed before us at considerable length. The story is given by P. W. No. 1 Nimai Chandra Ghose in these words:

"Plaintiffs' man, Ramendra Prosad Ghose Hazra came that day to the Suri Collectorate. He paid me Rs. 500 (the amount of the revenue payable by them, for deposit and then went away between 12 noon and 1 P. M."

Plaintiff's Witness No. 4 Ramendra Prosad Ghose Hazra, also deposed to the same effect and also deposed that subsequently Nimai paid him back the said sum of Rs. 500. The plaintiff Kshirode Mohan Ghose Moulik, P. W. No. 11, has also given the same story. But no documentary evidence, showing that Rs. 1,000 had in fact been sent through Ramendra for deposit of the revenue of this estate and also of another estate Madanpur or that Rs. 500 was received back subsequently, has been produced. The said plaintiff when pressed in cross-examination about his account books, said that they were missing, that the man who used to write them had absconded with them and gave other answers which are highly unconvincing and unsatisfactory. It would be surprisingly strange if in the face of so much ill-feeling and enmity between the parties Ramendra, if he had been really sent with the money, would not have taken some precautions for ensuring that the money would be put in, but would be satisfied with an assurance that Santiram would be coming with the amount due on account of defendant No. 2's share. It is important to point out that in the appeal before the Commissioner for setting aside the sale (Ex. 17) the payment of Rs. 500 by Ramendra to Nimai was not alleged. It is interesting to note that long before the institution of the present suit the plaintiffs and defendant No. 2 filed a petition (Ex. N) on 15th November, 1924, objecting, to the mutation of defendant No. 1's name as purchaser of the estate and there they stated;

"That disputes having arisen amongst the co-sharers of the *mehal*, the revenue of the Collectorate was not deposited in time ... that the disputes amongst the objectors have now been settled. They will, therefore, institute a case in the highest Court for setting aside the sale of the *mehal* sold."

It also appears that in a plaint which defendant No. 2 and another person filed in 1927 (Ex. U) for setting aside the revenue sale held on the 25th June, 1925, in respect of another *mehal* Paharpur, in which the present plaintiffs are their co-sharers, it was alleged that an officer of the present plaintiffs, in collusion with the purchaser, scared away intending bidders by assuring them that the revenue would be deposited, and ultimately did not put it in with the

object of depriving defendant No. 2 of his property. In these circumstances and for the reasons given above, we think we ought to hold that the story is not true.

What has been said above will give an idea as to our view of the facts of the case: shortly put, it is this that for some reason or other the proprietors were not diligent or it may be that each was expecting that the other would pay, or it may again be that they were honestly expecting to be able to pay, but at the last moment the requisite amount was not available. We proceed next to consider the other points that have been urged in the appeal.

The main contention of the appellants is that the sale was without jurisdiction inasmuch as there were no arrears. In the Court below two documents were produced on behalf of the plaintiffs (Exs. 14 and 15) as affording foundation for the argument that there were no arrears. The Subordinate Judge was of opinion that these documents did not relate to the estate in question and that, even if they did, Ex. 14 would show that on the 12th January, 1924, on which date the arrears for which the sale took place were payable, the revenue for the months of *Aswin*, *Kartik* and *Aghrayan* was in the arrears. The Subordinate Judge was unable to connect the documents with the estate in question because of the difference in the amount of revenue and also because he thought that *Taluk* Fateh Chand in Parganna Kutubpur and not Lot Kutubpur was mentioned in them. The difference in the amount of the revenue may not unreasonably be explained by the fact that the estate subsequently lost some of its lands, of which fact however there is no evidence. And there is evidence that the word "Fatehchand" may be read also as 'Fatehpur': *vide* P. W. No. 13. The conclusion of the Subordinate Judge on the question of identity, therefore, does not rest on any very sure foundation. But it is needless to pursue the matter further because the appellants themselves have resiled from the position they took in the Court below and no longer contend that the documents relate to the estate in question. They have, on the other hand, relied on the Subordinate Judge's conclusion that the documents relate to some other *mehal*; presumably because they see that if the documents be held to relate to the estate in question, they would, as pointed out by the Subordinate Judge, show that there were arrears due. The appellants have pressed before us the other contention that they urged in the Court below on the authority of the observations of Chatterjea, J., in *Amrita Lal Roy* v. *Secretary of State* (1) (46 Ind. Cas 447) and have supplemented it by reference to the recent decision of the Judicial Committee in the case of *Saraswati Bahuria* v. *Surja Narain Choudhuri* (2). That contention is that as the sale was for recovery of revenue due up to *Pous* (*i. e.*, December-January) *talab* (demand), the amount, though unpaid, was not an arrear of revenue within the meaning of s 2, Act XI of 1859, until 1st February, and for payment of such arrears the last date fixed by the Board of Revenue under s. 3 of the Act was 28th March, and consequently there were no arrears on the date fixed for the sale. The decisions upon which the appellants have relied are entirely distinguishable on the facts. In *Amrita Lal Roy's case* (1) the observations of Chatterjea, J., were based upon the view that he took of the facts, *viz.*, that upon the documents produced in the case and in the absence of the *kistbundi* governing the estate, the expression "January *kist*" or "January *talab*" was to be taken as meaning the date contemplated in s. 2 of the Act. Their Lordships of the Judicial Committee in *Saraswati Bahuria's case* (2) also did not intend to lay down any new law: their Lordships, on examining the materials on the record, came to the conclusion that "the revenue was payable in four instalments *viz*, the 7th June, the 28th September, the 12th January and the 28th March" that the revenue payable on the 28th March became an arrear on the 1st April, of which the last date fixed for payment under s. 3 of the Act by the Board of Revenue was the 7th June and so the sale on the 6th June was without jurisdiction. In the present case, a careful perusal of the papers of the Collectorate, and especially the notices Exs. 13 (*a*) to 13 (*f*) and the Arrear List Ex. 18 distinctly mention 12th January, 1924, as the last day for the payment of the revenue which in our opinion can be nothing else than the last date contemplated by s 3 of the Act and is not the date of the instalments according to the settlements and *kistbundi* of the *mehal* as contemplated in s. 2 of the Act. The entries in the *touzi* Ledgers (Ex. 16 series)

(1) 46 Ind. Cas. 447; 22 C. W. N. 769; 28 C. L. J. 51.

(2) 130 Ind. Cas. 676; A. I. R. 1931 P. C. 57; 10 Pat 496; 35 C. W. N. 444; 60 M. L. J. 350; (1931) M. W. N. 369; Ind. Rul. (1931) P. C. 84; 53 C. L. J. 307; 12 P. L. T. 357 (P. C.).

upon which the appellants strongly rely, do not in our opinion, militate against this view. It is quite true that the expression "*Pous talab*" is used in the documents. It should however be borne in mind that since the proprietor is quite safe so long as he pays the revenue by the last date for payment fixed under s. 3 of the Act, the earlier date on which it was payable under the settlement and *kistbundi* of the *mehal* lost in course of time all its importance, and was lost sight of in practice and the last date fixed for payment under s. 3 became all important. In our judgment, the expression "*Pous talab*" used in the documents is not the instalment for *Pous* according to the settlement and *kistbundi* of the *mehal*, but the instalment for which the last date of payment as fixed under s. 3 of the Act falls in *Pous*, and is loosely used to mean the instalments payable by the 12th January as so fixed. The books of the Collectorate showed the estate in arrears and the relevant entries therein may be presumed to be correct under s. 114, Evidence Act having regard to Illustrations (e) and (f) [*Mahommad Solaiman* v. *Birendra Chandra Singh* (3)] and such books must be examined in order to arrive at a finding as to whether there were arrears or not: *Jagadiswar Narain* v. *Muhammad Hazig Hussain* (4).

In the judgment of their Lordships in *Saraswati Bahuria's case* (2) the notice issued in that case under s. 7 of the Act is set out and in that notice it was not the last day fixed for payment of the arrears under s. 3 that was mentioned but on the other hand it was stated that

"Rs. 45-7-3 is due on account of arrears of revenue for the period ending the 21st *Chait* 1326 corresponding to 28th March, 1919."

These words, their Lordships held, would indicate that the date mentioned was the date of the settlement and *kistbundi* contemplated by s. 2 of the Act. Their Lordships also considered the other materials on the record and they also supported that conclusion. Of course the learned Judges of the Patna High Court from whose decisions the appeal was taken had held that as there was no necessity to state in a notice under s 7 the date contemplated by s. 2, the date given in the notice should be taken as the date fixed for payment under s. 3; [see *Suraj Narain* v. *Saraswati Bahuria* (5),] but their Lordships of the Judicial Committee did not take that view. The notices in the present case are entirely different. This contention of the appellants, therefore, must be overruled.

The Collector's jurisdiction to hold the sale has also been impugned upon several other grounds to which reference will now be made. Firstly, it has been argued that the estate consisted of *malguzari* lands and of *thanadari* lands and that for arrears due on account of revenue for *malguzari* lands and on account of demands for *thanadari* lands, one sale could not be held. So far as this contention is concerned, it has no substance because although in the Collectorate ledgers (Exs. 16 to 16-c) separate accounts in respect of the said two items are kept, the A register (Ex. 12) and the D Register (Ex. 8) show that the *thanadari* lands have been amalgamated with the *malguzari* lands of the *mehal* and they together form one estate as defined in s. 1, Act VII of 1868 and that the demands on the two heads have been amalgamated to form a total demand for the estate. Secondly, it has been contended that there was no *mehal* named Huda Kutubur Fatehpur which was the name given in the notices, but that the real name of the *mehal* was Lot Kutubpur in Pargana Fatehpur. There is evidence that the *mehal* is known by the former name, that it is the name which it bears in most of the Collectorate papers. That again is the name which defendant No. 2 gave as of this *mehal* in Ex. 2. Moreover the number of the estate was also given in each of the notices, and there was not the least chance of anybody being misled as to its identity, nor indeed is there any evidence that anybody was in fact misled. Thirdly, it has been argued that whereas the estate belongs to the idol of whom the plaintiffs and defendant No 2 are only *shebaits*, they have been described in the papers as proprietors. This, if at all, is an irregularity of no substance. Fourthly, it has been contended the sale was without jurisdiction because the Collector's order on the petition for exemption made by Nimai Chandra Ghose was illegal, being a conditional and not an absolute order of exemption; and the decision of the Judicial Committee in the case of *Lala Gouri Shankar Lal* v. *Janki Pershad* (6) has been cited in support of the conten-

(3) 74 Ind. Cas. 906; A. I. R. 1922 P. C. 405; 50 I. A. 247; 50 C 243; 44 M. L. J. 388; 32 M. L. T 115; 27 C W. N. 719; 37 C. L. J. 561 (P. C.).

(4) 98 Ind. Cas. 930; A. I R. 1926 P. C. 126; 53 I. A. 246; 6 Pat 200; 31 C. W. N. 107; 5 M. L. J. 815; 44 C. L. J. 515; 8 P. L. T. 1; 38 M. L. T. 5 (P. C.).

(5) 88 Ind. Cas. 485; A. I. R. 1925 Pat. 750; 3 Pat. L R. 237; 6 P. L. T. 738.

(6) 17 C. 809; 17 I. A. 57; 5 Sar. 518 (P. C.).

tion. It is difficult to understand of what use this contention is to the appellants because it is not their case that the order had the effect of exempting the estate from sale. Their Lordships in that case held that an order under s. 18, Act XI of 1859, for exempting an estate from sale for arears of revenue must be an absolute exemption, and not an order having effect as an exemption or not according to what may happen or be done afterwards, and that it must not depend on an act which may or may not be performed. The Collector's order in the present case was:

"Exempted on payment of all arrears and penalty Rs. 150 as a special case."

It was not an absolute order, but it only comes to this: that there was no order under s. 18 of the Act exempting the estate from sale. How that would vitiate a sale when it was held, the arrears not having been paid in the meantime, it is not possible to imagine. Fifthly, it has been contended that the adjournment of the sale to the next day was in contravention of s. 20 of the Act and so the sale held was illegal. The order of the Collector as regards this adjournment was in these words:

"To-day was fixed for revenue sale. Four sales were held out of 21 in the sale list. The proceedings could not be finished till 5 P. M. It was brought to my notice that in the case of T. No. 1246-1 Huda Kutubpur Fatehpur with Police (? lands) the defaulting proprietor who was allowed exemption under s. 18, Act XI of 1859, on payment of all arrears and penalty, could not deposit the amount up to 5 P. M All the bidders have now left the Court. The sale is, therefore, adjourned till to-morrow (noon) 28th March, 1924."

It has been said that s. 20 authorizes the Collector to adjourn a sale when he is unable from sickness, from the occurrence of a holiday or from any other cause, to commence the sale on the day fixed or, if having commenced it he is unable from any cause to complete it; and that the sale in the present case was adjourned to the next day on the ground that the Collector was unable to commence it on the date fixed because he had to wait till 5 P. M. for the deposit to be made which was not a cause *ejusdem generis* with sickness or holiday and so the adjournment was illegal. In our opinion this argument is based upon an erroneous interpretation of the section. The sale spoken of in the section is the sale proceedings of all the estates that are to be sold on the particular day. That sale had commenced, and 4 out of the 21 estates were sold. The other estates could not be sold because it was already 5 P. M. and all the bidders had left, and the result was that the sale which had been commenced could not be completed. To this case the latter part of the provisions quoted applies, and an adjournment in such circumstances may be granted by the Collector when "from any cause" he is unable to complete the proceedings. The expression "any other cause" in the former part of the provision means a cause *ejusdem generis*, but the expression "any cause" which occurs in the latter part need not be so. Sixthly, some arguments have been advanced to show that the notices under ss. 6 and 7 of the Act were not duly served. To this argument s. 8, Act VII of 1868, affords a complete answer. It is true that there is a note in the sale list showing that the notice under s. 7 was not duly published as regards the *mehal* in question and there is a decision of this Court in the case of *Rajrani Dasi* v. *Ganesh Prasad Mahapatra* (7), which says that s. 8, Act VII (B. C.) of 1868, would not debar one from proving that the notice had been served in a wrong *mehal* in contravention of the Act. But non-service of a notice under s. 7 of the Act, which is meant to forbid *raiyats* and under-tenants to pay rent to the defaulting proprietor, has no bearing on the question of, and cannot affect, the price fetched at the sale and is consequently immaterial in the present case. *Gobind Chunder* v. *Shirajunnessa* (8), *Mahommad Azahar* v. *Raj Chunder* (9), *Azimuddin Patwari* v. *Sceretary of State*, (10) and *Sheikh Mahommad Aga* v. *Jadunandan Jha* (11).

Two other objections of comparatively minor importance were also urged. The objection that 30 days did not elapse from the date of publication in the Calcutta Gazette does not even bear examination in view of the provisions contained in s. 6 of the Revenue Sale Law. There is also no substance in the contention based upon the fact that the order for adjournment of the sale, to which reference has been made above, was signed by the Collector at the Lees Club and not at the Collector's office. The signature at the place mentioned did not affect the jurisdiction of the Collector nor did it in any way affect the sale that ultimately took place.

In conclusion it is necessary to state, as regards the value of the property sold,

(7) 5 Ind. Cas. 650; 37 C. 407; 14 C.W. N. 626.
(8) 13 C. L. R. 1.
(9) 21 C. 354.
(10) 21 C. 360.
(11) 10 C. W. N. 137; 2 C. L. J. 325.

that though the Subordinate Judge has held that its fair price is Rs. 31,000, his calculations are based upon figures that are not correct, and that on a proper calculation on the basis of the figures to be found in the Valuation Statement under the Cess Act (Ex. 11) the value would work out at somewhere about Rs. 22,000. We have not been able to find any materials on which we may hold that the price fetched at the sale was utterly inadequate or that the deficiency that there was due to any irregularity or illegality.

The result, in our opinion, is that this appeal fails. It is accordingly dismissed with costs.

A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Criminal Revision No. 1261 of 1930.
February 9, 1931.
CUMING, J.
MON MOHAN PANDE—PETITIONER
versus
CORPORATION OF CALCUTTA
—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 69, 70, 370—Summons—Mode of service—Conviction without proper service of summons—Legality—Judgments of Presidency Magistrates—Contents—Calcutta Municipal Act (III of 1923), s. 391.

The records of Presidency Magistrates should be properly kept and the provisions of s. 370, Criminal Procedure Code, should be properly and strictly complied with.

A conviction under s. 391, Calcutta Municipal Act, cannot be upheld where the summons has not been properly served on the accused.

A summons is not properly served where it is left with the *durwan* without any attempt being made to find out the accused.

Messrs. *Bepin Chandra Mallick* and *Rabindra Nath Banerji*, for the Petitioner.

Messrs. *Probodh Chandra Chatterji* and *Pashupati Ghose*, for the Opposite Party.

Judgment—The petitioner in this case has been found guilty under s. 391, Calcutta Municipal Act, and sentenced to pay a fine of Rs. 120. The ground on which the rule has been granted is first of all that no summons having been served on the petitioner his conviction in his absence was illegal. The contention appears to be well founded. The summons itself bears the endorsement "served on the *durwan*." Section 69, Criminal Procedure Code, provides that a summons shall, if practicable be served personally on the person summoned and s. 70 provides that if by the exercise of due diligence he cannot be found in a Presidency Town a duplicate may be left with his servant.

The peon's return does not show that any attempt was made to find out the petitioner. Obviously no attempt has been made to comply with the provision of the Code for service of summons and for that reason the Magistrate's order is illegal. The rule must be, therefore, made absolute and the conviction set aside. I cannot part with the case without dealing with what I can only describe as the extraordinary way in which from start to finish the case has been dealt with in the Magistrate's Court. The record to be appreciated requires to be seen. It consists in a printed form for application of summons which apparently was supplied by the Corporation of Calcutta. It bears at the bottom the signature of the Chief Executive Officer and it was filed in Court on 6th March, 1929. The Magistrate proceeds to use the application as an order-sheet. These orders are not recorded in any particular order. They seem to be recorded anywhere where there is a blank space and finally all round the edge of the piece of paper. It is perhaps for this reason somewhat difficult to follow the order in which the orders are made, and as some of the orders are written over them it is difficult to discover how many orders are passed.

As I have stated it requires to be seen to be appreciated. There seem to be some 30 or 40 orders beginning on 6th March, 1929, and ending on 13th October, 1930, when the case was finally disposed of. As far as can be gathered from them the parties one or both were usually absent. This does not seem to have caused the Magistrate the slightest concern. He merely fixed another date and when on this date parties were again absent fixed another. He fixed some 30 or 40 of these dates.

Finally on 13th October, 1930, the Magistrate noted that accused was absent, offence proved and he fined Rs. 120.

Not the slightest attempt is made by the Magistrate to comply with the provision of s. 370. All he has recorded is that accused M. M. Pandey is fined Rs. 120 under s. 391. Who is the complainant, what was the offence what was the date of commission, etc., he makes no attempt to record. I may here say that this is not a solitary case. I have a batch of some eight cases tried by the same Magistrate in the same slovenly and unsatisfactory way. The attention of the Chief Presidency Magistrate is drawn to this matter and he is requested to take

steps at once so that the record of the Municipal Magistrate may be properly kept and also that the provision of s. 370, Criminal Procedure Code are properly and strictly complied with. There is a proper form for trial of cases and it is to be used. Let a copy of this order be sent to the Local Government.

A. *Order accordingly.*

CALCUTTA HIGH COURT.

Criminal Revision No. 1218 of 1930.
February 9, 1931.
CUMING, J.

PROBODH CHANDRA GUHA—
PETITIONER
versus
CORPORATION OF CALCUTTA—
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 370—Presidency Magistrates—Duty to keep records properly.

Presidency Magistrates should see that the records are properly prepared and kept in compliance with the provisions of s. 370, Criminal Procedure Code.

Criminal Revision against an order of the Municipal Magistrate, Calcutta, dated the 13th October, 1930.

Mr. *Santimoy Majumdar*, for the Petitioner.

Messrs. *Probodh Chandra Chatterji* and *Pashupati Ghose*, for the Opposite Party.

Judgment.—The facts of the case are these:

On 4th February, 1928, a gentleman described as a Theatre Inspector brought a charge against the present petitioner Probodh Chandra Guha for not taking out a license under s. 391. Of what Act s. 391 is a section does not appear, but I am told it is a section of the Calcutta Municipal Act. The parties themselves then do not seem to have taken any further interest in the case. The Magistrate records a number of orders of absentee and fixes a number of dates of which not the slightest notice seems to have been taken. I have referred to the manner in which this Magistrate keeps his record in another case (1261*). I would only remark this record is kept in the same dirty and slovenly way.

At last on 13th October, 1930, nearly three years after the case was instituted, the parties condescended to be present and the Magistrate passed the following extraordinary order the meaning of which I have been unable to discove :

"Agent says P. C. Guha is no longer Secretary. The Art Theatre Limited are fined Rs. 100 only under s 391 under which accused is liable for a few months performance also."

*[See 136 I. C. 135—*Ed.*]

If I understand the order rightly the Art Theatre Limited have been fined Rs. 100 though, as far as I can see, they were not the accused persons but it was P. C. Guha who was the accused. What the remark of the Magistrate—'under which accused is liable for a few months performance also"—I do not pretend to understand

As in other cases no attempt whatsoever has been made in this case to comply with the provision of s. 370, Criminal Procedure Code.

Hardly any of the particulars required to be recorded by the Magistrate have been so recorded.

I might point out that the headings of the application for summons made by the Corporation are not recorded by the Magistrate. I would draw the attention of the Chief Presidency Magistrate to the record and request him to see that records are properly prepared and the provision of s. 370, Criminal Procedure Code observed.

In the present case I have no alternative but to set aside the order of the Magistrate being apparently a meaningless order.

He could not convict the Art Theatre Ltd, as they were not the accused, and so far as I can understand no order has been passed really with respect to the accused P. C. Guha.

Let a copy of this order also be sent to the Local Government.

A. *Order set aside.*

CALCUTTA HIGH COURT.

Criminal Revisions Nos. 915 and 916 of 1931.
January 11, 1932.
PEARSON AND M. C. GHOSE, JJ.

NAGENDRA NATH SEN GUPTA—
PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 231, 233, 234—Penal Code (Act XLV of 1860), ss. 409, 477-A—Misjoinder—Joinder of two or more charges for breach of trust with two or more for falsification of accounts—Legality—Alteration of charge—Accused's right to re-examine witness—Refusal to allow re-examination—Validity of trial.

Three offences of criminal breach of trust may be tried together and three offences for falsification of accounts may be tried together, but as an offence of criminal breach of trust is not of the same kind as an offence of falsification of accounts the trial of two or more charges of criminal breach of trust cannot legally be joined with two or more charges of falsification of accounts. *Raman Behari Das* v. *Emperor* (1), followed. [p. 137, col. 1.]

Where after the conclusion of the case and before

delivery of judgment, the trying Magistrate made an alteration in the charge and though the accused asked for certain witnesses to be called for cross-examination, his prayer was rejected on the ground that the alteration was immaterial :

Held, that s. 231, Criminal Procedure Code, was mandatory and as the Magistrate had acted in violation of the terms of s. 231 the trial was illegal irrespective of the question whether the accused was prejudiced or not. [p. 137, col. 2.]

Messrs. *S. C. Taluqdar*, and *Monmatha Nath Roy*, for the Petitioner.

Messrs. *Khundkar* and *Anil Chandra Roy Chowdhury*, for the Crown.

M. C. Ghose, J.—The petitioner has been convicted in two separate cases under ss. 409 and 477-A of the Indian Penal Code and under s. 55 of the Postal Act. The prosecution case is that the petitioner was a Post Master in charge of the Hatigarh Postoffice and in that capacity on different dates in the month of December, 1930 he received five value-payable articles for delivery to the consignees on payment of the price. He delivered the articles and received payments therefor but dishonestly misappropriated the sums realised and dishonestly omitted to make proper entries in the Register and in each transaction he is said to have committed an offence under ss. 409 and 477 A, Indian Penal Code, and undr s. 55 of the Postal Act. Three of these transactions were tried in one trial and two of them in a separate trial.

It is urged before us that the charges of three distinct criminal breaches of trust could not be properly tried together with the charges of three distinct falsification of accounts, that the two classes of cases could not be joined together and that such misjoinder of charges has vitiated the trial. Section 233 of the Code of Criminal Procedure says ' For every distinct offence of which any person is accused there shall be a separate charge" and every such "charge shall ordinarily be tried separately." Under s. 234 a person may be charged and tried at one trial for three offences of the same kind committed within a space of 12 months. Therefore, three offences of criminal breach of trust may be tried together and three offences for falsification of accounts may be tried together. But an offence of criminal breach of trust is not of the same kind as an offence of falsification of accounts. Therefore, the trial of two or more charges of criminal breach of trust cannot legally be joined with two or more charges of falsification of accounts. See the case of *Raman Behari Das* v. *Emperor* (1), in which it was held that a joinder of three charges under s. 409 with three under s. 477-A relating to different transactions is not warranted by any of the exceptions provided in the Code and is illegal and that a misjoinder is absolutely fatal to the trial.

It has also been urged that the learned Magistrate after the conclusion of the case and before delivery of judgment made an alteration in the charge. The accused person thereupon made a petition asking for certain witnesses to be called for cross-examination. The learned Magistrate rejected the petition. In his explanation the learned Magistrate states that in this case the alteration was in no way material and that the objection raised by the accused was absolutely frivolous. It may be that the alteration did not in fact prejudice the accused in any way but it is to be observed that s. 231 Criminal Procedure Code does not leave any discretion to the trying Magistrate The section is mandatory. It states that in a case of an alteration of a charge after the commencement of the trial the accused shall be allowed to recall or resummon and examine any witness who may have been examined. In my opinion, the rejection of the petitioner's petition was in violation of the terms of s. 231 and as such has vitiated the trial.

In the circumstances, the convictions in both the cases are set aside and the cases are sent back for a fresh trial according to law.

The petitioners will remain on the same bail pending further orders by the Magistrate.

Pearson, J.—I agree.

A. *Revision allowed.*

(1) 22 Ind. Cas. 729; 41 C. 722; 15 Cr. L. J. 153; 18 C. W. N. 1152.

CALCUTTA HIGH COURT.

Criminal Appeal No. 6 of 1931.

December 22, 1931.

RANKIN, C J, AND C. C GHOSE, J.

THE SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL—APPELLANT

versus

LUDUR CHANDRA DAS—RESPONDENT.

Opium Act (I of 1878), s. 9 (e)—'Importing' and 'exporting', meanings of — Sending opium from Native State addressed to accused's nominee in British India—Refusal of addressee to accept — Offence, nature of—Place of commission of offence—Opium smuggling—Heavy fines, necessity of—Criminal Procedure Code (Act V of 1898), ss 179, 188—S. 188, whether overrides s. 179.

The offence of importing opium is an offence con-

stituted by bringing it into the territory in question' It does not matter where it was before, provided it was outside the province. If the goods once come across the border of the territory in question, if they come for and on account of the accused with his consent, the offence of importing is complete. It is not necessary to show that the accused did anything outside the territory. [p. 139, col. 1.]

A, who was a resident of Assam, sent from Cooch Behar a parcel (which was subsequently found to contain opium) addressed to *B* in Assam which *B* was to receive on his behalf. The Post Master getting suspicious requested *B* to take open delivery and on his refusal duly opened the parcel and it was found to contain opium:

Held, (*i*) that *A* was guilty of importing opium in Assam under s. 9, Opium Act, and the offence was entirely committed in Assam. [p. 139, col. 2.]

(*ii*) that the offence of possession was not made out as *B* had refused to take possession of the parcel [*ibid*,]

(*iii*) that the offence was not committed in Cooch Behar at all and s. 188 of the Criminal Procedure Code had, therefore, no application to the case. *Munshi Lal* v. *Emperor* (1) and *Emperor* v. *Govind Ram* (2), followed. [p. 140, col. 1.]

Since the amendment of the Criminal Procedure Code, s. 188 overrides s. 179 in any case in which s. 188 is applicable. [p. 139, col. 2.]

The trial Magistrate dealing with cases of opium smuggling should impose heavy penalties in cases where traffic is clearly brought home to the accused. [p. 140, col. 1.]

Mr. *Kundkar*, Deputy Legal Remembrancer, for the Crown.

Mr. *Manindra Lal Banerji*, for the Accused.

Rankin, C.J.—In this case, the accused Ludur Chandra Das was convicted by the trial Magistrate of an offence under cl. (*c*) and also cl. (*e*) of s. 9 of the Opium Act (I of 1878). On appeal, the learned Additional Sessions Judge of the Assam Valley Districts has set aside both those convictions. The Government has brought this appeal against that order of acquittal made by the learned Judge.

The facts of the present case as proved by evidence are particularly short and conclusive. The accused is an Assamese living in Assam. The part of Assam to which he belongs is a place called Bokakhat. In May 1930, he sent some telegrams to a relation of his named Khagendra Nath Saikia who also lives in Bokakhat. These were sent from Cooch Behar; but the original writing of the telegrams has been produced and proved. The telegrams asked Khagendra not only to send him money but intimated that certain things were being sent by the accused from Cooch Behar to Khagendra in Bokakhat. One telegram ran "silver parcel is sent am penniless wire 150". On the 29th of May or soon after, there arrived by post in the Bokakhat Post Office a parcel addressed to Khagendra. The Sub-Post Master was suspicious and he made arrangements to request Khagendra to take open delivery in the presence of two witnesses of this parcel. Khagendra refused whereupon the parcel was duly opened and it was found to contain opium.

There can be no doubt that the defence which was to the effect that the accused had sent the parcel from Cooch Behar but that the parcel contained silver bangles and that opium had been substituted at a later stage broke down entirely. It was disbelieved and it need not trouble us. Khagendra who gave evidence for the prosecution said that the accused told him that he was going to Tezpur and that he would send letters and parcels meant for his (accused's) own home to the address of Khagendra who was to hand them over to his accused's) family. A letter (Ex. 5) was seized, as a matter of fact, from Khagendra's house and whether or not Khagendra is just as bad as this accused person, it is at any rate certain that the accused went to Cooch Behar having arranged with Khagendra to receive opium on his behalf and despatched the opium to Khagendra in order that it might get into the accused's own control. In these circumstances and on these facts, the question is whether the accused has committed an offence under the Opium Act (I of 1878) and, if he has committed offence, has he committed the offence in Cooch Behar or in Assam?

For the present purpose, it will be as well to assume that we know nothing about the law prevailing in Cooch Behar and we may even assume—though I daresay it is not in the least true—that peoples who send opium from Cooch Behar to other States commit no offence against that State whatever. Clarifying our ideas in this way we come to ask whether the accused has committed any offence under the Opium Act and we find this: By s. 9 of the Act, any person who in contravention of the Act possesses opium or imports or exports opium is liable to be convicted of an offence. If we ask what is meant by "any person who imports opium", there is a definition. Import means "to bring into the territories administered by any Local Government from sea or from foreign territory or from a territory administered by any other Local Government" and, in like manner, Export means "to take out of the territories administered by any Local Government to sea or to any foreign territory or to any territory administered by another Local Government". It is clear enough, therefore, that the offence of

importing opium is an offence constituted by bringing it into the territory in question. It does not matter where it was before provided it was outside the province. The offence is in bringing it in and the word "bring" may be specially noticed as part of the definition. If the goods once come across the border of Assam into Assam, if they come for and on account of the accused with his consent-let alone by his procurement—the offence of importing into Assam is complete; it is not necessary to show that the accused did anything outside Assam. In this particular case, the accused went outside of Assam into Cooch Behar and posted the parcel in effect to Bokakhat for himself which was exactly the same as if he had posted it to his own address and in his own name: but the offence of importing into Assam would be equally complete had the goods been despatched pursuant to the accused's order by some body in New York and it would be equally complete if when the goods crossed the border the accused had been taking a voyage on the high seas for the benefit of his health. The coming of the goods for the accused, on his account and with his consent is bringing them into Assam and is an offence of importing the goods. That this is the right view to take appears from cases which have been decided in other Courts The first decision is that of *Munshi Lal* v. *Emperor* (1). Mr. Justice Walsh said this: "I say nothing to discourage the view that a person who exports from outside the United Provinces to a ware house inside the United Provinces of which he is really the proprietor or temporary possessor, even under a false name, is, in fact, committing an offence under the Act of importing into the United Provinces, although he is also the person who exported from outside. It is perfectly possible for me to send an article for myself from the High Court at Allahabad to my Chambers in London, and, if I did so with a dutiable article without declaration, I should be guilty of importing into England"; and a Bench of the same High Court confirmed this view in the subsequent case of *Emperor* v. *Govind Ram* (2) the learned Judges pointing out that the person who imported must be a person who was intending or had the right to take delivery or desired to take delivery inside the area. I am quite satisfied on the evidence in the present case that the substance of the matter is that those goods were sent by the accused from Cooch Behar to himself in Assam on his own account and the fact that they were to be taken delivery of by Khagendra under an arrangement with him has no importance at all. The position under the Opium Act is exactly the same as if he had kept a ware-house in Assam and he had sent the goods to that spot.

In these circumstances, I come to consider the view taken by the Courts below. The trial Magistrate found that the accused was guilty both of possession of this opium and also of importing it and he imposed a fine of Rs. 250 on each of the charges. As regards possession, I cannot say that it appears to me that that offence is at all made out having regard to the fact that the article was not, in fact, taken possession of —Khagendra having refused altogether to take possession of it after he became suspicious. The Magistrate, however, found that the accused caused it to be imported from a foreign territory and he convicted him of that offence. When the case came before the learned Additional Sessions Judge, the learned Judge was not satisfied that there was any proof of possession and, so far as that ruling is concerned, I am disposed to agree with him on the facts of this particular case. But his view on the other question was this that what was shown was an offence of exporting opium from Cooch Behar and he thought that while Khagendra might be placed on his trial for importing opium into Assam the accused had not imported opium into Assam but had only exported it from Cooch Behar. Accordingly the learned Judge took the view that as the offence alleged against the accused was an offence committed in Cooch Behar and as there was no certificate from the Political Agent of Cooch Behar prosecution on that account did not lie. The Magistrate had thought and said that the case was one under s. 179 and not under s. 188 Criminal Procedure Code. Of course, if it was under s. 188, it would be no answer to say that the case was under s. 179, because Mr. Banerji has shown that since the Code was amended s. 188 over-rides s. 179 in any case in which s. 188 is applicable; that is to say, where the question is as to a Native Indian subject committing an offence without and beyond the limits of British India or a British subject committing an offence in the territories of a Native Prince and so forth. It appears to me however

(1) 66 Ind. Cas. 184; 20 A. L. J. 198; 23 Cr. L. J. 248; A. I. R. 1922 All. 21.

(2) 81 Ind. Cas. 100; 46 A. 146; 25 Cr. L. J. 612; A. I. R. 1924 All. 558; L. R. 5 A. 46 Cr.

that the learned Judge was wrong. The offence of which the Magistrate rightly convicted the accused was of importing the goods into Assam and that offence it appears to me is amply proved. That is not an offence committed in Cooch Behar at all from the nature of the offence. The offence is entirely committed within Assam, and s. 188 Criminal Procedure Code has no application to the case. In my judgment, therefore, the Government appeal must be allowed, the acquittal must be set aside and the accused must be convicted of the offence of importing this opium into Assam. It is very unfortunate that, although this accused has been found to be trafficking in opium notwithstanding the great trouble the Legislature in Assam has taken to stop the evils of opium smuggling, this accused person who had engaged himself in committing such an offence in order to get rich is punished only by a fine of Rs. 250. Trial Magistrates dealing with these cases should have sufficient business sagacity to impose heavy penalties in cases where traffic is clearly brought home to the accused, because obviously a man trafficking in opium can well afford to pay a fine of Rs. 250 and still make a handsome profit. However, in the present case, the question of sentence is not one which at the moment we have any jurisdiction over. It will be sufficient to restore the judgment of the Magistrate and to direct that on this count the penalty imposed by him shall stand, namely, a penalty of Rs. 250 fine, in default, to undergo six months' rigorous imprisonment.

C. C. Ghose, J.—I agree.

A. *Appeal allowed.*

CALCUTTA HIGH COURT.

Criminal Revision No. 112 of 1931.

March 3, 1931.

CUMING, J.

SURENDRA NATH BHATTACHARJEE —COMPLAINANT—PETITIONER

versus

BASANTA CHANDRA BHATTACHARJEE—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250 (3) —Order directing compensation—Appeal—Power of Appellate Court to go into facts.

There is nothing that debars the Court in an appeal from an order under s. 250, Criminal Procedure Code, directing a complainant to pay compensation, from going into all the facts of the case in order to determine whether the case is false and vexatious, even though in doing so it may have to come to a finding showing that the acquittal of the accused was wrong. [p. 140, col. 2.]

Criminal Revision against an order of the Deputy Magistrate, Brahmanberia, dated the 31st July 1930.

Mr. *Hemendra Kumar Das*, for the Petitioner.

Mr. *Birendra Kumar Dey*, for the Opposite Party.

Judgment.—The petitioner who obtained this rule brought a certain case against the opposite party and the Magistrate who heard the case acquitted the opposite party and ordered the petitioner to pay Rs. 100 to the opposite party under s. 250, Criminal Procedure Code, on the ground that the case was false and vexatious. The learned District Judge in disposing of this appeal held that it was not open to him to go into the facts of the case and it was not open to the petitioner to go into the facts of the case to show that the case was not false and vexatious. He first of all apparently heard both the parties with a view to decide what he described as the scope of the appeal and his conclusion was as follows:

"It, therefore, appears to me that I am not competent to consider whether the accusation was false or whether it was vexatious But I am competent to consider only whether the order for compensation is proper in the circumstances of the case, that is to say, taking the Magistrate's view of the evidence as it stands and whether the amount of compensation is suitable."

He therefore seems to think that he cannot upset the Magistrate's findings of fact. What, I think, seems to have weighed with the learned Judge is that he cannot set aside the order of acquittal and he seems to think that, as he might have to upset the same finding of fact on which the acquittal was based, he was not allowed to question these findings of fact. The view which the learned Judge has taken is not correct. Section 250 (3) provides that:

"a complainant or informant who has been ordered under sub-s. (2) by a Magistrate of the Second or Third Class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty Rupees may appeal from the order in so far as the order relates to the payment of the compensation, as if such complainant or informant had been convicted on a trial by such Magistrate"

and clearly the section under which the appeal is heard is s. 423 (1) (c) which deals with an appeal from "any other order." There is nothing, as far as I can see, that debars the Judge in appeal from going into all the facts of the case in order that he may determine whether the case is false and vexatious It may be that in doing so he may come to certain findings of fact which show that the acquittal was wrong. That however is quite immaterial.

Right or wrong, he cannot set aside the acquittal, but he can set aside the order for compensation if it is based on wrong findings of fact.

The rule is therefore made absolute. The order of the learned Judge is set aside and the appeal must be sent down to him for re-hearing in the light of the observations I have just made. It would be open to him in rehearing this appeal to go into all the facts of the case and after going into those facts determine whether the case was false and vexatious and whether the order for compensation was right and whether the amount of compensation was suitable.

A. *Order accordingly.*

CALCUTTA HIGH COURT.

Insolvency Case No. 131 of 1930.

January 27, 1931.

PANCKRIDGE, J.

SUMERMULL SURANA, *In re.*

Presidency Towns Insolvency Act (III of 1909), ss. 17, 30, 90—Property in Foreign State—Whether vests in Official Assignee—Adjudication in British India—Injunction against proceedings in Native State—Power to grant—Annulment of adjudication—Power of Insolvency Court, whether terminates.

An adjudication order does not operate to vest the insolvent's immoveable property situated in a Foreign State in the Official Assignee or when there has been a composition scheme approved of by the Court, in the trustees of the composition under the order approving the scheme. *Mogi & Co. In re* (10), relied on. [p 142, col. 2.]

But, the language of s. 90 (1), Presidency Towns Insolvency Act, is wide enough to confer on the Court the power of granting an injunction restraining proceedings in a Foreign Court by creditors of an insolvent who is so adjudicated in a British Court and the more so when the parties sought to be restrained carry on business within the Court's jurisdiction even if they do not reside there and have assets within its jurisdiction which can be attached in the case of any breach of the injunction. There is also nothing in principle which prevents the Court from restraining such proceedings. *Lachmriam Kevalram* v. *Poonam Chand Pitamber* (11), distinguished [p. 142, cols. 1 & 2.]

The jurisdiction of the Insolvency Court is not exhausted owing to the annulment of the adjudication. The Court has jurisdiction to give effect to the scheme it has approved. [p. 142, col. 2.]

Mr. *S C. Bose*, for the Insolvent.

Mr. *Pugh*, for the Respondent

Judgment.—This is an application by the firm of Sumermull Surana lately carrying on business at No. 113, Monohardas Katra, Calcutta, that the firm of Bansilal Abir Chand and Mannalal Dhanraj be restrained by injunction from proceeding with suits instituted by them in Bikanir. Messrs. Mannalal Dhanraj have not appeared and as against them the applicants are entitled to the injunction claimed with costs.

The relevant facts concerning the suit instituted by Bansilal Abirchand are as follows:

According to the applicants the propreitors of the petitioning firm are two in number: Sumermull Surana and Uday Chand Rampuria. The firm were adjudicated insolvent on 18th July, 1930. On 15th August, 1930, the insolvents submitted a scheme of composition to their creditors which provided for payment of six annas in the rupee to the unsecured creditors and also that on the composition being approved by the Court all the estate of the insolvents should vest in the trustee named in the scheme.

The insolvents had shown Bansilal Abir Chand as unsecured creditors in their schedule, their debts being admittedly in respect of commercial transactions in Calcutta. The insolvents say that Bansilal Abirchand had full notice of the meeting held by the Official Assignee on 1st September, 1930, at which the scheme was approved by the requisite majority of the creditors. Bansilal Abir Chand deny that they received notice. They were it is true not represented at the meeting but they have taken no steps to set aside the composition. On 10th September, 1930, the Official Assignee applied under s. 29, Presidency Towns Insolvency Act 1909, and the scheme of composition was approved by the Court; and the adjudication was annulled. Bansilal Abirchand's suit in Bikanir was instituted on 17th July, 1930, *i e*, on the day immediately preceding the date of the adjudication order. It is for Rs. 10,497-15 0, which sum admittledly represents business debts contracted by the defendants in Calcutta. The suit is not against the firm of Sumermull Surana as such but against Sumermull Udoychand, Sewchand, Meghraj and Mohunlal The plaintiffs who are domiciled in Bikanir State and subjects of H. H. the Maharaja of Bikanir say that all the defendants have proprietary interests in the firm which is a joint family business. Written statements have been filed in that suit. It is admitted that the defendants have immovable property in Bikanir against which the plaintiffs propose to execute their decree, if they obtain one.

Mr. Pugh in opposing the application, argues that the Court has no jurisdiction to make the order. He refers to the *Carrbn*

Iron Co., v. *Maclaren* (1), where when an administration decree had been made in England the House of Lords set aside an injunction restraining a creditor's action for debt brought against the executors of the estate in the Scotch Courts. He also relies on *Pennell* v. *Roy* (2) and *Chapman, In re* (3). In the former case the Court refused to restrain a creditor from proceeding against the real estate in Scotland of an English bankrupt for a sum of money equal to the dividend payable on the debt. In the latter case the Chief Judge in Bankruptcy, after a Receiver had been appointed, refused to restrain creditors in New York who had instituted suits there against the debtor. It appears that in refusing the injunction the Court attached considerable weight to the fact that it would be ineffectual.

Mr. Pugh also maintains that what is sought here is a perpetual injunction and by reason of s. 53, Specific Relief Act, such injunctions can only be granted in suits and not in insolvency proceedings, and he says that the concluding observations of Sir Arthur Wilson delivering the judgment of the Judicial Committee in *Tituram Mukerji* v. *Cohen* (4) at page 192* support this argument. On the question of jurisdiction Mr. Bose has referred to a large number of cases. He argues that since the creditors could certainly be made defendants here even though their business may be carried on through a *gomastha*, and could be adjudicated here. In *Hurruck Chand Golicha, In re* (5) and *Kostur Chand* v. *Dhanpat Singh* (6) there is nothing to prevent them from being restrained by injunction in the manner his clients ask. I confess I do not think that cases like *La Compagnie Generale Trans-Atlantique* v. *Thomas-Law & Co.* (7) and *New York Life Insurance Company* v. *Public Trustee* (8) which deal with the residence of a foreign corporation are of much assistance. Having looked into the authorities I have come to the conclusion that there is nothing in principle which prevents the Court from restraining proceedings in a foreign Court where, as here, the parties sought to be restrained to carry on business within the jurisdiction even if they do not reside here, and have assets within the jurisdiction which can be attached in the case of any breach of the injunction Moreover I am disposed to think that the language of s. 90 (1), Insolvency Act, is wide enough to confer on the Court the power of granting an injunction of the character here asked for.

In a Bombay decision to which I shall shortly refer, although the injunction was refused, it was not suggested that there was any technical difficulty in granting it.

Chiday, In re (9), appears to me a sufficient answer to the suggestion that owing to the annulment of the adjudication the jurisdiction of the insolvency Court is exhausted that that Court retains jurisdiction to give effect to the scheme it has approved, is, I consider, too plain to require argument.

The difficulties of the applicant are in my judgment with regard to the merits. It was pointed out by Rankin, J., in *Mogi & Co., In re* (10) at page 447 * that adjudication order does not operate to vest the insolvent's immovable property situated in a Foreign State in the Official Assignee.

The petitioners admittedly own immovable property in Bikanir which will be answerable for any decree which is obtained against them there. This property never vested in the Official Assignee and it equally in my opinion has not vested in the trustees of the composition under the order approving the scheme. Mr. Bose says that if a conveyance is necessary to complete the title of the trustees he undertakes to execute one. I do not think that would mend matters, and even if it would I should not be justified in adjourning the application to give an opportunity for taking this step.

The creditors have taken no part in the Calcutta insolvency, much less have they approved the composition scheme, why should they be prevented from seeking the aid of the Courts of their own State for recovering their dues from property that has never been the subject-matter of the insolvency proceeding? It has not been shown that these creditors occupy a privileged position, or that other creditors

(1) (1855) 5 H. L. C. 416; 24 L. J. Ch. 620; 3 W. R. 597.
(2) (1853) 3 De. G. M. & G. 126; 22 L. J. Ch. 409; 17 Jur. 247; 1 W. R. 237; 98 R. R. 78.
(3) (1872) 15 Eq. 75; 42 L. J. Bk. 38; 27 L. T. 628; 21 W. R. 104.
(4) 33 C. 203; 32 I. A. 185; 8 Sar. 908 (P. C.).
(5) 5 C. 605; 6 C. L. R. 382.
(6) 23 C. 26; 22 I. A. 162; 6 Sar. 617 (P. C.).
(7) (1899) A. C. 431.
(8) (1924) 2 Ch. 101; 93 L. J. Ch. 449; 131 L. T. 438; 68 S. J. 477; 40 T. L. R. 430.

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(9) (1875) 1 Ch. D. 177; 45 L. J. Bk. 49; 33 L. T. 55 3 24 W. R. 182.
(10) 96 Ind. Cas. 459; A. I. R. 1926 Cal. 898; 43 C. L J. 36.

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whether subjects of Bikanir State or not did not have the opportunity of seeking the aid of the Bikanir Courts prior to the insolvency had they wished to do so.

The Bombay case to which I have referred, *Lachmiram Kevalram* v. *Poonam Chand Pitamber* (11) where an injunction was refused is distinguished by the fact that the creditor suing in the Foreign Court undertook to give notice to the other creditors of any property he succeeded in recovering so as to enable them to claim rateable distribution. The creditors in this case are not disposed to be so accommodating, but on the other hand, the point as to the vesting of the foreign immovables was not taken. If the creditors obtain a decree they may have difficulty in executing it at all in British India and possibly also against moveables elsewhere. But that stage has not arrived and I have come to the conclusion that the applicants have not been successful in establishing such circumstances as would now justify me in restraining the creditors from proceeding with the Bikanir suit.

The application, therefore, is dismissed with costs as against Bansilal Abirchand. The costs will be as of one day's hearing.

A. *Application dismissed.*

(11) 59 Ind. Cas. 444; A. I. R. 1921 Bom. 128; 45 B. 550; 22 Bom. L. R. 1173.

CALCUTTA HIGH COURT.

Civil Appeal No. 414 of 1929.

February 19, 1931.

C. C. GHOSE AND MALLIK, JJ.

HRIDAYKRISHNA ADYA—APPELLANT

versus

OSMANALI MANDAL—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 55—Fraudulent transfer—Avoidance — Exclusive jurisdiction of Insolvency Court—Referring parties to Civil Court, illegality of.

Under the Provincial Insolvency Act, the insolvency Court is the only Court which has jurisdiction to go into the questions raised under s. 53 of the Act and decide the same and the parties should not be referred to the civil Court for determination of such questions. [p. 144, col. 1.]

Where a Receiver reports to the effect that a transfer is fraudulent and prays that the transfer might be annulled under s. 53, the Court should treat the report as an application under s. 53 and go into the matter for itself after taking evidence. [p. 144, col. 2.]

Appeal against an order of the Additional District Judge, Hooghly, dated the 14th June, 1922.

Messrs. *Sharatchandra Ray Chaudhuri*, *Bijankumar Mukerji*, *Apoorabadhan Mukherji* and *Bhutnath Chatterjee*, for the Appellant.

Messrs. *Panchanan Ghose* and *Hiralal Ganguli*, for the Respondent.

Judgment.—This appeal raises a question under s. 53, Provincial Insolvency Act. The matter has arisen under the following circumstances. One Lehajuddin Jamadar was adjudicated an insolvent under the Provincial Insolvency Act on 5th July, 1927. Subsequently by an order made by the insolvency Court a Receiver was appointed to take charge of the properties belonging to the insolvent. The Receiver was asked to investigate whether the insolvent had got any immovable properties The attention of the Receiver was drawn to the fact that the insolvent had conveyed certain immovable properties to one Osmanali Mandal on 26th May 1926, that is, on a date which was within two years of the date of adjudication of the insolvent as such. The Receiver made an investigation and submitted a report to the insolvency Court. His report was to the effect that the transfer in favour of Osmanali Mandal was not in good faith nor for valuable consideration. He accordingly prayed to the insolvency Court that the said transfer might be annulled under the provisions of s. 53, Provincial Insolvency Act. It appears that the Receiver had taken the statements of various people who appeared before him. The matter having come before the Insolvency Court under these circumstances, the question arose whether that Court could take action under s. 53, go into the matter for itself and come to a determination on the point as to whether or not the transfer in favour of Osmanali Mandal was in good faith and for valuable consideration. On that point it was obvious that the insolvency Court had to take evidence; but it did not take evidence, but was content with the report of the Receiver and the statements of the parties who had appeared before the Receiver. No evidence in the legal sense of the terms was taken by the insolvency Court. The Court came to the conclusion that an order under s 53 of the Act being of a summary character it was not desirable in the circumstances to make such an order. But he referred the Receiver to the Civil Court for determination by means of a suit of the question or questions raised in his report. It is against this order of the insolvency

Court which is dated 14, June 1929, that the present appeal has been directed.

Our attention has been drawn to the circumstances under which the order in question came to be made and s. 53 Provincial Insolvency Act, has been contrasted with s. 55, Presidency Towns Insolvency Act. It is clear from the records before us that if the question had to be determined by the insolvency Court under the Provincial Insolvency Act, such investigation has not been done. On the other hand, it is equally clear that if according to the language of s. 53 Provincial Insolvency Act, it is open to the insolvency Court to decline jurisdiction and to refer the parties to a Civil Court for determination of the matter in issue, then what has been done by the insolvency Court is one which it was competent to do and to which no exception can be taken. The question therefore, is whether the Insolvency Court under the Provincial Insolvency Act, is the only Court which can determine the question raised in the section or whether any other Court has jurisdiction to go into the matter.

Mr. Panchanan Ghose, who has appeared for the transferee, contends that according to the decisions in England based on a section which is more or less identical with s. 56, Presidency Towns Insolvency Act, the insolvency Court is not the only forum which has seisin of matters such as are referred to in s. 55, Presidency Towns Insolvency Act. That is no doubt true as far as the decisions go at the present moment; but there is a significant change in the terms of s. 53, Provincial Insolvency Act and it has been held in several cases decided in India that under the Provincial Insolvency Act the insolvency Court is the only Court which has jurisdiction in the matter to go into the questions raised under s 53 Provincial Insolvency Act, and decide the same and that the parties should not be referred to the civil Court for determination of such questions: see in this connexion the cases collected in Sir Dinshah Mulla's book on Insolvency at pages 48, 49, 429, and 430. Therefore, the view which has found favour in India, is that the insolvency Court under the terms of the Provincial Insolvency Act is the only appropriate tribunal which can determine the question raised under s. 53 of the Act and we are in agreement with this view.

In that view of the matter, the question arises whether such determination has taken place in this case. The learned Additional District Judge has not come to any decision. He has referred no doubt to various circumstances giving perhaps an idea of the inclination of his mind but he has not as stated above come to any decision he having been content with expressing an opinion that it was a summary order which was prayed for and that he was not willing to make such a summary order. That obviously having regard to what has been stated above is wrong and, therefore, the conclusion we have come to is that the report of the Receiver in insolvency shoud be treated as an application for action under s. 53, Provincial Insolvency Act and that the matter has got to be investigated in evidence to be produced in Court. If the evidence does not satisfy the Court that the transaction in question can be successfully impeached, having regard to the language of s. 53, then obviously the transferee must be held to have acquired a valid title to the properties conveyed by the deed of transfer. If on the other hand, the evidence does not satisfy the Court that the transfer cannot be questioned, then it will be for the Court to determine whether such transfer, in the circumstances of this case should be annulled by the Court. We desire to express no opinion. We have only indicated what should be done.

Therefore, the conclusion is that the matter should be remitted to the Court of the Additional District Judge at Howrah sitting in insolvency and the matter must be investigated afresh on evidence to be produced in Court.

Mr. Ghose points out that certain transactions took place, which were beyond the limit of two years from the date of adjudication These and various other circumstances will no doubt be brought to the notice of the learned Judge But having regard to the terms of the order, we prefer not to go into the merits ourselves, but will leave the matter to be tried out afresh on lines indicated above by the learned Additional District Judge of Howrah sitting in insolvency.

The costs of this appeal will abide the result. We assess the hearing fee at three gold *mohurs*.

A. *Case remanded.*

ALLAHABAD HIGH COURT.
FULL BENCH.

Second Civil Appeal No. 314 of 1929.
August 4, 1931.

SULAIMAN, ACTG., C. J., BOYS, MUKERJI, KING AND BAJPAI, JJ.

RAM KARAN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM DAS SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (III of 1926), ss. 99, 121—Cause of action before Act III of 1926—Suit after Act—S. 99, whether applies—Jurisdiction of Civil Court—Interpretation of Statutes—Retrospective effect—General principles—Law affecting right to sue, limitation etc., whether adjective law.

Held, by the Full Bench *Sulaiman, Actg. C. J. and Bajpai, J. dubitante*).—Section 99 of the Agra Tenancy Act of 1926 does not apply to a suit in respect of which the cause of action, *i. e.*, the wrongful ejectment or the wrongful resistance to possession arose before the said Act came into force, and the jurisdiction of the Civil Court to entertain such a suit is not barred under s. 230 of the said Act. [p. 155, col. 2.]

Per *Sulaiman, Actg, C. J.*—If a new enactment lays down that a person may under certain conditions sue for certain specified reliefs, and he sues after the Act has come into force it would not, strictly speaking, be giving to the Act a retrospective effect if he avails himself of its provisions. The Act is in force when he is suing, even though his cause of action might have accrued before the Act was passed. It would be giving a retrospective effect if the Court applied that Act to a suit previously instituted. [p. 147, col. 2.]

A substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantive right as they are ordinarily matters of procedure only. [p. 148, col. 1.]

There is nothing in s. 99 which either curtails the period of limitation or fixes the *forum*. [*ibid.*]

Where a suit is "of the nature of a suit under s. 99, even though it may not strictly come under that section, the jurisdiction of the Civil Court is barred. [p. 148, col. 2.]

When a question of limitation is raised it ought to be decided in accordance with the Law of Limitation in force at the time of the institution of the suit and not that in force at the time of the cause of action, unless there be any express provision to the contrary in the Act itself. [p. 149, col. 1.]

The fear of a curtailment of the period of limitation or of the taking away of any vested right does not apply to a declaratory suit under s. 121, as no period of limitation is fixed for such a suit. Such a suit is clearly cognizable by the Revenue Court only, even though the denial of title takes place before the Act came into force. [p. 149, col. 2.]

Per *Mukerji, J.*—Where a suit is against a landholder or a person who pretends to be a landholder having a right to eject the plaintiff, or where the suit is against a person holding a derivative title from such land-holder or person claiming as above, the suit should be governed by s. 99. "Claiming through" cannot mean raising a plea by way of defence or making a false claim without the shadow of title. [p. 151, col. 1.]

Second Appeal from a decision of the Subordinate Judge, Jaunpar, dated the 15th November, 1928.

On 23rd June, 1931, Mr. Justice Boys and Mr. Justice Smith made the following

Order of Reference To a Full Bench.

This is a defendants' appeal arising out of a suit for a declaration, as it is worded, "that the plaintiffs are the owners in possession of 4 *bighas* and 12 *biswas* in the holding in dispute specified below, and according to this proportion they (the plaintiffs) are entitled to realise the rent from the sub-tenants, and the defendants Nos. 1 and 2 have nothing to do therewith." The defendants Nos. 3 to 8 are the alleged sub-tenants. The holding in dispute was a fixed-rate tenancy comprising 6 *bighas* 17 *biswas* and 15 *dhurs* of which the plaintiffs claimed 4 *bighas* and 12 *biswas*

At a later date a further relief was added that 'an injunction may be issued to the defendants Nos. 1 and 2, restraining them from offering obstruction in the plaintiffs' realising the rent from the sub tenants." The plaint is, as usual, not very happily drafted to express what the plaintiffs obviously meant. In para. 4 of the plaint they stated that "Suit No. 194 of 1912 of the Court of the Munsif of Jaunpur has been fought between the parties in which it has been decided that the plaintiffs are the owners in possession of 4 *bighas* and 12 *biswas*, this decision is final between the parties and it is binding upon them." Paragraph 5 stated, "A case has also been fought between the parties in the Revenue Court which ordered that these plaintiffs were the owners of the property in dispute"

Now the history of the case, which we shall have to set out in some detail, suggests that what the plaintiffs really meant by these pleadings was that they were the owners of three-fourths (thus roughly described in the judgments) of a fixed-rate tenancy, while the defendants were the owners of the remaining one-fourth, that the plaintiffs and the defendants were not joint tenants of the whole fixed rate tenancy, but owned entirely separately from each other their own shares, and that, therefore, the defendants in interfering with the plaintiffs' collection of their own shares of the rents due by the sub tenants were acting as trespassers

The defendants pleaded that the rights

of the plaintiffs or their predecessors-in-title to a fixed-rate tenancy in three-quarters had ceased as long ago as June 25th, 1912, as a result of the ejectment suit brought by the father of the present defendants Nos. 1 and 2 in his capacity as *zemindar* against the predecessor-in-title of the plaintiffs.

It will be best now to state the history of the litigation about this property. One Badal Lonia owned a fixed-rate tenancy. He mortgaged three-fourtths of this to Bishunath, predecessor-in-title of the present plaintiffs. He subsequently sold the remaining one-fourth to the father of the present defendants Nos. 1 and 2. The description of the shares in the judgments as three-fourths and one-fourth appears to be a convenient method of briefly describing the shares.

On the 22nd of February, 1912, Bishunath brought a suit on his mortgage, making Badal Lonia and the father of the present defendants Nos. 1 and 2 parties, and on the 9th May, 1912, he obtained an *ex parte* decree.

On the 25th of June, 1912, the father of the present defendants Nos. 1 and 2 in his capacity as *zemindar* ejected Badal Lonia from the three-fourths of the fixed-rate tenancy, which had been mortgaged to Bishunath, for failure to pay rent. To this suit Bishunath was not made a party, nor is there anything to show that he knew anything about it.

About three years later, on the 14th of October 1915, Bishunath got the three-fourths of the fixed-rate tenancy sold and himself purchased it. Subsequently he applied to the Revenue Court and got mutation on March 8th, 1917, the Assistant Collector's order being upheld by the Collector. The Assistant Collector relied on the Civil Court proceedings in the mortgage suit and told the father of the present defendants that he should go to the proper Court and get a declaration if he felt that he was entitled to it. The Collector in his judgment upholding the order of the Assistant Collector said that he refused to be influenced by any games that the defendants' father might have been up to with the mortgagor in the matter of the ejectment. In the years 1920, 1921 and 1922 some suits were brought by the plaintiffs or Bishunath, their predecessor-in-title, for rent against the sub-tenants. The latter pleaded that they had paid the rent in good faith to the present defendants Nos. 1 and 2, and it being found that the plaintiffs and their predecessor-in-title had not ever collected any rents, there was no ground for holding that the payments of the sub-tenants which were actually made were made otherwise than "*bona fide*" by them and the suits were dismissed. That completes the history of the proceedings prior to the present suit which was instituted on September 2nd, 1927. The plaintiffs say that the defendants Nos. 1 and 2 denied the rights of the plaintiffs in June, 1925, and date their cause of action from that denial, and also from the 4th of April, 1923, when the last of the rent suits was decided against them in appeal. The trial Court dismissed the suit with costs. The lower Appellate Court gave the plaintiffs the declaration asked for and is silent as to the injunction. The defendants now appeal.

Two main questions arise. First, whether Act III of 1926, s. 99, applies to ejectments or obstruction to possession occurring before September, 7, 1926. Secondly, what is the exact form of the issue which a Court has to determine when considering the question of its jurisdiction in the light of s. 99 of Act III of 1926. In reference to the first question, whether Act III of 1926, s 99, is applicable at all to an ejectment or obstruction to possession occurring before September 7, 1926, it has been held by two Judges of this Court in *Abdul Hakim* v. *Mukarram Ali* (1)

"that s. 99 can apply only to a dispossession which took place after September 7, 1926."

It is true that the learned Judges were in that case dealing with dispossession from a grove, but the language used is general. In view of the fact that s. 99 only deals with procedure, and does not affect any vested rights it is at least open to question whether s 99 is not applicable to some cases, at any rate, of ejectment or obstruction to possession of date prior to the commencement of the Act.

The second question is concerned with the interpretation of s. 99 of Act III of 1926 and, more particularly, with the interpretation of the decision of the majority of the Judges in *Ananti* v. *Chhanno* (2), *i. e* after the judgment of the lower Appellate Court now under appeal. We think that the effect of the judgment of the majority in this Full Bench may be stated as follows:—

(1) 124 Ind. Cas. 478; (1929) A. L. J. 1157; A. I. R. 1930 All, 158; 14 R. D. 106: Ind. Rul. (1930) All. 526.

(2) 124 Ind. Cas. 540; 52 A. 501; (1930) A. L. J. 256; A. I. R. 1930 All. 193; 14 R.D. 201; Ind. Rul. (1930) All 540 (F. B.)

1. Whether the suit is cognizable by the Court must be determined, in the first place, by the allegations made in the plaint. 2. If upon the allegations in the plaint the suit does not appear to be cognizable by the Court, the plaint will be returned for presentation to the proper Court. 3. If, on the allegations in the plaint, the Court is of opinion that the suit is cognizable by the Court, mere allegations, whatever they may be, in the written statement will not oust the jurisdiction of the Court to try the suit 4. It will proceed to try the issue as to its jurisdiction, and if it finds the facts alleged by the plaintiff to be true, it will proceed to trial of the other issues. 5. If it proceeds to try the suit and finds that the facts alleged by the defendants are true, with the result that it has no jurisdiction, it will dismiss the suit; unless even at that late stage the plaintiff is allowed to amend his plaint so as to make it entertainable in a Revenue Court, in which case the plaint can be returned for presentation to the Revenue Court."

The only difficulty that arises is in reference to the use of the learned Judges of the phrase at page 508*.

"If it found . . . . that the facts alleged by the defendant are true."

and the repetition of practically the same phrase at page 513*

"The allegations made in the written statement . . . . found to be true.

Taken literally, it would be found that the allegations in the written statement are *e. g.*, the defendant is a land-holder, the defendant has collected rents, and such like statements of fact. We do not think, however, that, the words we have quoted must be taken to mean that the Court in trying the issue of jurisdiction must literally determine the truth or otherwise of such allegations. The issue that it has to frame in order to determine questions of jurisdiction is not whether the defendant is a land-holder, tenant etc., but whether the defendant is "claiming as a land-holder, tenant etc.," in the words of s. 99. But we have it on the authority of the same Full Bench decision that the word "claiming" cannot be held to mean merely pleading a claim. The issue, therefore, which the Court has to determine is in effect whether the defendant is claiming as a land holder, tenant etc , and whether there is a reasonable substance in that claim. We think corroboration of our view that this was what was intended by the learned Judges is to be found in the passage at the bottom of page 512* where they say,

"It has been said that the object of the Legislature was to attract to the Revenue Courts all suits in which any question of tenancy rights is involved. We may accept this but we may also insist that the question must be a real one and not merely a litigious allegation. If there is a real question, the plaintiff will be aware of it; and he will either set it out in his plaint and have it tried by the Revenue Court, or he will conceal it and find that his suit is dismissed by the Civil Court."

Had it been clear that s. 99 of Act III of 1926 was applicable to the dispossession in question in the present suit, which was long prior to the 7th September, 1926, we should have proceeded to apply the judgment of the Full Bench and the view that we take of it to the present case. There is, however, the initial question as to whether s 99 is applicable at all, and in view of the decision of the two Judges to which we have already referred, we think it desirable that the matter should be considered by a Full Bench. It has already arisen more than once to the knowledge of one of us, and calls for authoritative decision. Another point that might have arisen in this case is the applicability of s. 121 of Act III of 1926, but it does not appear to have been raised in either of the Courts below by either side or by either Court.

In view of what we have said, let the case be laid before the Hon'ble the Acting Chief Justice with a view to the constitution of a Full Bench.

Mr. *K. Verma*, for the Appellants.

Mr. *L. M. Roy*, for the Respondents.

OPINION.

Sulaiman, Actg. C. J.—The plaint, as it was filed and as it stands un-amended, was merely for a declaration of title on the allegation that the plaintiffs were in possession. After the arguments were over, the plaintiffs applied that if they were found to be out of possession, a decree for possession might be passed. The plaint may accordingly be treated as a plaint in a suit for declaration of title and, in the alternative, for possession. If the new Tenancy Act of 1926 were to apply, the suit would be under s. 121, and, in the alternative, under s. 99 of the Act.

If a new enactment lays down that a person may under certain conditions sue for certain specified reliefs, and he sues after the Act has come into force, it would not, strictly speaking, be giving to the Act a retrospective effect if he avails himself of its provisions. The Act is in force when he is suing, even though his cause of action might have accrued before the Act was passed It would be a retrospective effect, if we applied the Act to a suit previously instituted. The present plaintiffs-tenants are being 'prevented from obtaining possession' of a part of their holding, and they have also possibly been 'ejected'. The Act does not say that the ejectment should have

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been before the Act came into force. It of course implies that they should have been ejected or prevented from obtaining possession, before the suit is filed. The expression 'otherwise than in accordance with the provisions of this Act', to my mind, does not mean that even if they had been ejected in accordance with the provisions of the previous Tenancy Act, they have been conferred a right under s. 99. A statutory right conferred by a new Act may even be made a foundation of a defence to the plea of *res judicata*. If the plaintiffs were ejected unlawfully before the new Act, they are persons who have been ejected 'otherwise than in accordance with the provisions of this Act'. Surely it cannot be said that in such a case they have been ejected in accordance with the provisions of this Act. If the plaintiffs fulfil the requirements of the section and bring themselves within its scope, there appears to be no reason why they cannot avail themselves of a new enabling section which has come into force before the suit is actually filed.

No doubt a substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantive right. The selection of *forum* and the period of limitation are ordinarily matters of procedure only. The selection of a Court in no way affects the right of suit itself. The Limitation Act does not necessarily extinguish the right, though it certainly places a bar against remedy by suit.

It seems to me that so far as the old s. 77 and the new s. 99 are concerned, they do not deal at all with the choice of Court or the period of limitation. Under the former section a right to sue was conferred and that right has been re-affirmed under the latter. Indeed, it has been to a certain extent enlarged, if not explained.

The period of limitation has been curtailed, if at all, as a result of s. 232 read with the Fourth Schedule. The *forum* is fixed by virtue of s. 230 read with that Schedule. There is nothing in s. 99 which either curtails the period of limitation or fixes the *forum*. This is patent from the fact that if s. 99 were omitted from the Fourth Schedule, the result as to *forum* and limitation would be different, even though the phraseology of s. 99 were to be left absolutely untouched.

The Legislature apparently intends that disputes relating to agricultural lands should be settled in the Revenue Court and settled promptly. It considers that six months provide an ample time for a tenant to sue. I would much rather consider it a deliberate provision than attribute to the Legislature a blunder due to ignorance that there may be hard cases unprovided for.

Section 230 confers exclusive jurisdiction on Revenue Courts and ousts the jurisdiction of the Civil Courts of suits 'of the nature' specified in the Fourth Schedule. The Legislature instead of saying 'all suits specified in the Fourth Schedule has stated' all suits of the nature specified etc. It would, therefore, seem to me that if the present suit is 'of the nature' of a suit under s. 99, even though it may not strictly come under that section, the jurisdiction of the Civil Court is barred.

No doubt under the old Tenancy Act it was held that a suit between rival tenants was cognisable by the Civil Court. But one possible view would have been that even a rival tenant could obtain adequate relief from the Revenue Court by implead ing the land-holder also, and, therefore, the old s. 167 applied to his case. There was certainly no bar to his impleading the rival tenant in a suit under the old s. 95 He might also have impleaded the land-holder in a suit under s 79 by treating the possession of a person claiming through the land-holder as the constructive possession of the landholder. Similarly, it was held in a number of rulings that if a tenant was prevented from obtaining possession, he was not 'dispossessed.' Here again a different view was possible. Might it not be that the Legislature has merely disapproved of these rulings? On this view, the new Act in no way curtails the period of limitation or alters the *forum*.

Again, the only question before a Civil Court is one of jurisdiction. The further question, what period of limitation would apply if the suit were filed in a Revenue Court is not at all before us. Whatever, we may say would be a mere *obiter dictum* and would not be binding on the Revenue Courts. Revision and appeals arising out of suits under s. 99 would lie exclusively to Revenue Courts. In Sch. IV there is no starting point of limitation mentioned where a tenant is prevented from obtaining possession as distinct from dispossession. It may be that the Revenue Court may hold that the six months rule does not apply to such prevention. Or it may be

that they may hold that the right to sue on such prevention has been conferred for the first time by the new Act which would give a fresh start for limitation. Or they may hold that such a suit is not barred by limitation at all, as there is no period of limitation fixed for it in the Schedule. Or they may say that in such a case the cause of action accrues year after year, and the rights of the, parties must be determined irrespective of any question of limitation. It is unnecessary to speculate what the Revenue Courts may actually hold as it is quite outside our function to do so. All that I can say is that when a question of limitation is raised it ought to be decided in accordance with the Law of Limitation in force at the time of the institution of the suit and not that in force at the time of the cause of action, unless there be any express provision to the contrary in the Act itself.

I would not wish to express any opinion on the case of a rent-free grantee, who was not a tenant, and it is doubtful whether his interest was a 'holding' under the old Act.

I have accordingly grave doubts as to the inapplicability of s. 99. But I must admit that as a result mainly of some of the previous rulings of this Court, there might be great hardship in some cases and plaintiffs may be left without any remedy. As my learned brethern think that the section should not be made to apply where a cause of action on an ejectment had arisen before the Act was passed, I am not prepared to dissent, but solely because of the hardship mentioned above.

The defendants Nos. 1 and 2 are admittedly two of the *zemindars* of the *mauza*. After they obtained the ejectment of Badal from the Revenue Court they consistently took up the position that the fixed-rate tenancy was extinguished, and never said that they continued to be co-tenants. I might have been inclined to the view held by the Board of Revenue that ejectment by a few out of several land-holders would bring the case under the old s 79 also. The entire co-parcenary body cannot be treated as a corporation or as a single juristic unit. All the co-sharers are landholders. For a person to be landholder it was not necessary under s. 3 (5) of the old Tenancy Act that the whole rent should be payable to him. But the majority of my learned brethern think that the question does not arise because it is now found that the defendants are co-tenants and they, therefore must have ejected the plaintiffs in the capacity of co-tenants and not *zemindars*. As it is not disputed that s. 99 of the new Act would now cover the case of dispossession by some of the land-holders only, the question has lost its importance. I need not, therefore, consider the position under the old s. 79 at any length.

The fear of a curtailment of the period of limitation or of the taking away of any vested right does not apply to a declaratory suit under s. 121, as no period of limitation is fixed for such a suit. Such a suit is clearly cognisable by the Revenue Court only, even though the denial of title took place before the Act came into force.

It follows that if the plaintiff alleges that he is in possession and claims the declaration against the land-holder or persons claiming through him, but, in the alternative asks for possession in case it be found that he was out of possession, his plaint is liable to be returned for presentation to the Revenue Court. The Court, however, may require him to make up his mind whether he would admit his dispossession and ask for recovery of possession. If he does not admit dispossession, the Court cannot allow him to lead evidence to show that he is in possession but must return the plaint. If the plaintiff gives up his allegation of being in possession and amends his plaint so as to turn the suit into one for recovery of possession on a dispossession which took place before the Act, the Court should proceed to try the question of title.

With regard to the interpretation of the rule laid down by the majority of the Judges in the Full Bench case of *Ananti* v. *Channo* (2) the referring order accurately represents it. The word 'claiming' does not mean pleading in the written statement. If the suit cannot be thrown out on the allegations contained in the plaint, the Court must proceed to determine the question of fact whether the person sued against was a land-holder, or any person claiming as land-holder, or any person claiming through such land-holder or person. A mere false allegation that he was so claiming would not do. The expression 'claiming through such land-holder or person' is an adjectival clause qualifying the word 'person'. It must be found that the defendant was such a person. One cannot be a person claiming through such land-holder or person, unless he either derives title from him (*e. g.* a transferee), or holds under him (*e. g.* as a *thekadar*, lessee or

tenant etc.) or is authorised by him and is acting on his behalf as agent or servant. If such a fact were established on investigation by the Court, then, unless the Court permits the plaintiff to amend his plaint, the suit would have to be dismissed because the allegation, on which the plaintiff came to Court, that the defendant was a mere trespasser would be found to be untrue.

Mukerji, J.—This is a reference to the Full Bench to determine whether the suit brought under the following circumstances is cognisable by the Civil Court in which it was instituted, or whether it should have been filed in the Revenue Court.

The plaintiffs, who are the respondents here, are the sons and legal representatives of one Bishunath Singh. One Badal Lonia was a tenant at fixed rate of a holding comprising 6 *bighas* and odd of land. The tenancy at fixed rate being transferable under the law, Badal Lonia made a simple mortgage of about three-fourths of this holding in favour of Bishunath on 28th October, 1903. Several years later, on 20th July, 1911, he sold the remaining area of his holding to Sumran Singh, the father of the defendants Nos. 1 and 2, who are the appellants before us. Bishunath Singh brought a suit on his mortgage, and made Sumran a party to the suit, along with the mortgagor, Badal. Bishunath obtained an *ex parte* decree for sale on 9th May, 1912. In due course the decree was executed, the property mortgaged was sold and was purchased by Bishunath Singh himself, who got delivery of possession on 14th October, 1915. In the meanwhile, Sumran, who was a co-sharer in the village took steps to have Badal ejected, and took delivery of possession as against Badal on 25th June, 1912. To these ejectment proceedings Bishunath was no party, and the lower Appellate Court has found that the ejectment proceedings were fraudulent and held behind the back of Bishunath Singh in order to injure him. Bishunath Singh's name was recorded in the revenue papers by an order dated 8th March, 1917, in spite of Sumran's objection to the contrary.

It appears that the fixed-rate tenancy is in the possession of certain sub-tenants, and they pay rent. Bishunath Singh sued the sub-tenants for recovery of rent, but the sub-tenants pleaded that they had paid their rent, in good faith, to Sumran Singh. The suits succeeded in the first Court, but were lost in the Court of Appeal, which gave its judgment on 4th April, 1923. Thereupon, the respondents brought the suit out of which this appeal has arisen to obtain a declaration that they were the owners of three-fourths of the holding, and to that extent were entitled to recover the rents from the sub-tenants. While the suit was still pending in the Court of first instance, the plaintiffs asked for possession. The plaintiffs' case was that the principal parties, that is to say, the plaintiffs and defendants Nos. 1 and 2, were co-tenants and the defendants, as holders of a fractional share in the tenancy, had no right to usurp the entire rent payable by the sub-tenants.

The defence was that the defendants Nos. 1 and 2 were in possession as *zemindars*, having ejected Badal before Bishunath could put the tenancy to auction sale in pursuance of his mortgage-decree. They also pleaded that the suit was not cognisable by the Civil Court, and was barred by six months' rule of limitation, inasmuch as s. 79 of the Tenancy Act of 1901 applied to the case.

The first Court dismissed the suit on the ground that the plaintiff-tenants' rights had come to an end. In appeal by the plaintiffs, the sub tenants were exempted, on the ground that the main contest lay between the plaintiffs and defendants Nos. 1 and 2. The Appellate Court found that the ejectment proceedings were bad and collusive, that the defendants' father could not have ejected the mortgagor-tenant, because the former himself was liable to pay the rent, being a fractional owner of the tenancy, that the land being actually in the possession of sub-tenants, there could have been no dispossession of the plaintiffs and that, in any case, the dispossession of the plaintiffs was not by a *zemindar*, but by a co-tenant. The learned Subordinate Judge also found that the defendants Nos. 1 and 2 were not the sole *zemindars* of the holding in question, but were one of 35 or 36 co sharers owning the holding. On the question of jurisdiction both the Courts below held that the suit was cognisable by the Civil Court.

In appeal the question is whether the suit was cognisable by the Civil Court. The argument of the appellants is that the suit is between co-tenants, and, therefore, falls within the purview of s. 99 of the Tenancy Act of 1926, and that being the case, s. 230 of the Tenancy Act of 1926 barred the jurisdiction of the Civil Court.

There can be no doubt that a suit between rival tenants falls within the purview of

s. 99, inasmuch as it is a suit by a tenant against a person claiming through the land-holder. It was held by a Full Bench of three Judges in the case of *Sahdeo* v. *Budhai* (3) that a suit between co-tenants falls within the purview of s. 99 of the Tenancy Act of 1926. The words "claiming through" in cl. (*b*) of s. 99 mean holding a derivated title from the land-holder. The idea is that where a suit is against a land-holder or a person who pretends to be a land-holder, having a right to eject the plaintiff, or where the suit is against a person holding a derivative title from such land-holder or person claiming as above, the suit should to be governed by s. 99 of the Tenancy Act of 1926. "Claiming through" cannot mean raising a plea by way of defence of making a false claim without the shadow of title. Here in this case, the defendants are purchasers of a quarter share of the fixed rate tenancy, and, therefore, they are persons who "claim through" the land-holder. The suit is, on the face of it, governed by s. 99.

The question, however, is whether s. 99 has a retrospective effect, and applies to a case where the cause of action arose before the Act came into force. In the case before us the Court below has granted a decree for possession, and, therefore, we must take it that the prayer for amendment of the plaint for granting possession was allowed by the lower Appellate Court. The dispossession in this case must be taken to have taken place in 1923, when the Appellate Court decided against the plaintiffs. The plaintiffs' cause of action, for the suit for claiming possession arose in 1923, namely, more than three years prior to the coming into force of the Act of 1926. As stated above, the question is, does this Act apply? If it does, the suit was wrongly brought in the Civil Court, and it will be our duty to return the plaint to the plaintiffs for presentation to the proper Court.

There are solid reasons against holding that s. 99 has a retrospective effect.

Section 99 is not a rule of procedure or adjective law. It professes to lay down remedies for a wrong. The law of remedies is substantive law, and, therefore, ordinarily the law will have no retrospective effect. This is a well-known proposition of law for which no authority need be quoted. It is, no doubt, open to the Legislature to enact a substantive rule of law and yet to give it a retrospective effect. But the presumption as regards interpretation is that, unless and until the Legislature gives the clearest indication that a rule of substantive law will have a retrospective effect, the Court will not give the rule that effect.

In Craies' Statute Law (3rd Edition by Pease and Gorman) there appears the following opinion at page 326:

"If the enactment is expressed in language which is clearly capable of either interpretation, it ought to be construed as prospective only"

Again the book quotes Lord O'Hagan as having pronounced the following:

"Unless there is some declared intention of the Legislature clear and unequivocal or unless there are some circumstances rendering it inevitable that we should take the other view, we are to presume that an Act is prospective and not retrospective."

At page 330 appear the following observations:

"It is a well recognised rule that Statutes should be interpreted, if possible, so as to respect vested rights".

Again:

"In the absence of anything in an Act to show that it is to have a retrospective effect, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time that the Act is passed".

I may lay emphasis on the last quotation. Again at page 331 we have the following:

"It seems a strong thing to hold that the Legislature could have meant that a party who, under a contract made prior to the Act, had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation".

I have quoted enough from the book to show that where an existing right is likely to be taken away by the operation of an Act, unless there is something which compels a Court to give the Act a retrospective effect, it will not give the Act that effect.

In the light thus thrown by decided cases, on the authority of which the observations quoted in Craies are based, I shall consider the provisions of s. 99.

So far as the Allahabad High Court is concerned, it was settled law that a suit between rival tenants was cognisable by the Civil Court, and the rule of limitation applicable was 12 years. No doubt some Judges have expressed a doubt as to the correctness of this proposition, but the proposition has been so long held in this Court that the rule laid down amounted to a rule of law. It is not necessary to quote authorities on the point. In view of this rule of law, the plaintiffs could very well wait for four years before they instituted the suit in 1927 to recover possession from their co-

(3) 117 Ind. Cas. 337; 51 A. 853; A.I. R. 1929 All. 751; (1929) A. L. J. 849; 13 R. D. 556.

tenants. If the plaintiffs are now told that s. 99 applied to their case because the suit fell within the language of s. 99, the result would be that the plaintiffs would find that six months' rule of limitation, under Art. 12 of the Fourth Schedule of the Tenancy Act of 1926, applied to their case, and their suit was already time-barred in October, 1923, well nigh three years before the Act of 1926 came into force. This is position which is hardly desirable. It was argued that the Legislature really disapproved of the decisions of the High Court in which it was held that suits between tenants were covered by the Civil Procedure Code and not by the Tenancy Act of 1901, and really gave effect to a decision of the Board of Revenue to the contrary. This may be so; but did the Legislature say in so many words, or by necessary implication, that they were not only overruling the opinion of the Allahabad High Court, but were also giving the law framed by them a retrospective effect, with the result described above? I fear there is no such indication of the mind of the Legislature to be found within the four corners of s. 99.

Again, there is a number of cases in which similar hardships would accrue.

A rent-free-grantee was not a tenant under the Tenancy Act of 1901, nor is he a tenant under the Tenancy Act of 1926. Yet the Legislature has deemed it fit to put him down with a tenant under the rule enacted in s. 99 of the Act of 1926. A rent-free grantee, not being a tenant, did not come within the purview of s. 79 of the Tenancy Act of 1901, which provided remedies for ejectment by a land-holder. A rent-free grantee's suit, in case of ejectment by a land-holder, was, therefore, before the passing of the Act of 1926, cognisable by the Civil Court, and the rule of limitation applicable to such a suit was 12 years, and not 6 months. Supposing that a rent-free grantee was ejected a year before the Act of 1926 came into force. When he brings his suit for recovery of his land against the land-holder, he finds, if s. 99 applies, that he has to go to the Revenue Court. So far there is no harm. But he finds also that his suit, by the application of Art. 12 of the Fourth Schedule of the Act of 1926, was already barred by time, six months prior to the promulgation of the Act of 1926. Is it a position desirable? Are we bound to hold that s. 99 has a retrospective effect, although the result of such retrospective effect would be so disastrous?

Again, let us take the case of a suit by a tenant against a person who claims to be a land-holder, although he may not be one. Such a suit, before s. 99 came into force, was undoubtedly a suit cognisable by the Civil Court, and governed by 12 years' rule of limitation. If the tenant was dispossessed by a person claiming to hold the position of a land holder, and claiming a right to eject the tenant, more than six months before the passing of the Act of 1926, he will find, when he brings his suit under s. 99, that it was already time-barred at the date of the institution of the suit, although he never had any reason to suppose that he should bring his suit so quickly.

Then again, let us take the case of a tenant who got a seven years' lease from the land-holder. Let us suppose that having paid the premium and obtained a written and registered lease, the tenant is unable to get possession, and he must bring a suit. To such a suit s. 79 of the Act of 1901 did not apply, for it was no case of ejectment. It was accordingly held by this Court that the tenant's suit, in the circumstances would lie in the Civil Court, and the rule of limitation would be 12 years. If the tenant, after the passing of this Act, brings his suit within a year of his cause of action, namely, the date of the execution of the lease in his favour, he would be told that his suit was already time-barred within six months of the arising of his cause of action. This is a contingency which must be avoided, and we must hold that s. 99 has not a retrospective effect.

Examples may be multiplied to show that similar hardships would arise in other cases also.

But it has been argued that hardship is no good reason for interpreting a law otherwise than it should be interpreted, that if any hardship arises, it is not on account of an application of s. 99, but by the application of the rule of limitation, which is only a procedural law, and that when s. 99 gives only a right of suit and says that a tenant and others mentioned there "may sue", s. 99 must be applied. I shall consider this argument seriatim.

Before I take up any of these arguments, I will point out that the language of s. 99 of the Act of 1926 also points to the conclusion that it is applicable only when a cause of action arises after the Act has come into force. It contains the words "otherwise

than in accordance with the "provisions of this Act". A plaintiff is allowed to sue under s. 99, and to ask for the remedies prescribed by it where he finds himself ejected from, or prevented from obtaining possession of his holding. How can it be said, if the ejectment of the plaintiff took place, or if the prevention from obtaining possession took place, before the Act came into force? Supposing the plaintiff described above wants to bring his suit at once, and there is no Act of 1926 in force, how will he know that he has been ejected from, or prevented from obtaining possession of his holding "otherwise than in accordance with the provisions of the Act of 1926?" It has been argued that the words "otherwise than in accordance with the provisions of this Act" mean nothing but this, "otherwise than in accordance with law". If that was so, it would have been much easier and more expressive to use the latter expression than the former. By using the words "this Act", I should think, the Legislature intended that this s. 99 should apply only where the cause of action arises after the Act has come into force.

Now I take up the three arguments which I have noticed above.

First I take up the question whether the hardship alluded to above is caused by s. 99, or by the application of the Law of Limitation, and whether, therefore, we should apply s. 99, irrespective of the consequences due to the application of the Law of Limitation. In my opinion, this argument is only partial, and does not take notice of the full consequence of the application of s. 99. Section 99 cannot be read apart from the Law of Limitation that is applicable to a suit under s. 99. The argument of hardship is advanced only to show that it was not the intention of the Legislature to apply s. 99 to cases in which the cause of action arose before the enforcement of the Act. If we were otherwise certain that s. 99 must be applied to a suit of the nature described in s. 99, then it would be immaterial for the purposes of the Court administering justice, whether the Law of Limitation adversely affected or not the litigants; for then we can take it that the Legislature did not care if some cases of hardship did occur. But it is precisely because we do not know in clear terms that the Legislature meant to apply s. 99 to cases where the cause of action arose before the law came into force, and because we know that as a matter of principle, substantive law, or indeed any law, is not to be given a retrospective effect, unless the intention is clear on the point that we have to look to the consequence of the application of the law. So much for the first and second arguments.

The third argument is that the words "may sue" only make the section an enabling one, and not a compulsory one, and wherever the facts of the case bring it within the language of s. 99, it must be applied. This again, in my opinion, is a fallacious argument. Where s. 99 does not apply, because the cause of action arose before s. 99 became the law, the suit is based, not on s. 99 but on older law, *i. e.* either Civil Procedure Code or Tenancy Act of 1901. The present suit is not under s. 99 of Act of 1926, and there is no compulsion on the plaintiffs to sue according to s. 99.

I come to the conclusion, then, that to the case before us, namely, to a suit by a tenant against a co-tenant for recovery of possession, on the ground that he was dispossessed in 1923, s. 99 has no application.

If follows that the plaintiffs' remedy is in the Civil Court. On the allegations made in the plaint, the suit was cognisable by the Civil Court. The suit was taken cognisance of by the Civil Court. Although the plaintiffs alleged in the plaint that they had been dispossessed by a co-tenant, it was open to the defendants to show that they (the defendants) had dispossessed the plaintiffs, not in their capacity of tenants, but in their capacity of *zemindars*. In other words if the defendants succeeded in showing that they were the *zemindars* of the fields in question, and that they had dispossessed the plaintiffs in their (defendants') capacity as *zemindars*, the Court would be bound to find that it was a case to which s. 79 of the Act of 1901 applied, and the suit would be thrown out on the ground that the plaintiffs came to Court on a false cause of action, which did not give the Civil Court jurisdiction to try the suit. But such is not the case here. It has been found that the plaintiffs' allegation is true, namely, that they were dispossessed by their co-tenants.

The rule of limitation for a suit like this, in which the cause of action arose in 1923, was 12 years, and the present suit is within that time. The result is that the suit was rightly decreed by the lower Appellate Court.

I would, for the foregoing reasons, dismiss the appeal with costs, including Counsel's fees in this Court on the higher scale.

Boys, J.—This case was referred to a Bench by Mr. Justice Bajpai sitting singly.

It came up for hearing before myself and Mr. Justice Smith.

Before us, the Division Bench, the case was argued as if the plaint was framed as asking for relief against a trespasser. It is immaterial now to consider why this view of the case was accepted in argument, but it may be that it was to some extent due to the pleadings in para. 3 of the plaint, and paras. 13 and 16 of the written statement. The case was, therefore, argued before the Division Bench with reference to the effect on it of the decision in *Ananti* v. *Channo* (2), where it was held that where the plaintiff sues as a tenant alleging the defendant to be a trespasser, the case is cognisable by the Civil Court. As the Division Bench was in some doubt as to the meaning of the Full Bench when speaking of the issues to be tried by the Civil Court, the case was referred to a stronger Bench with a view to interpret that part of the Full Bench decision in reference to which the Division Bench was in doubt. We were further of opinion that an important point was involved in the case, namely, as to the applicability of s. 99 of the Tenancy Act, III of 1926, to cases where the ejectment, or the date on which the plaintiff first began to be resisted in obtaining possession, was prior to the commencement of the Act.

On the case coming before a Full Bench of three Judges, attention was drawn specifically to the first paragraph of the plaint which suggests that the position taken by the plaintiff was that he as co-tenant of three-quarters of an undivided fixed-rate tenancy was being resisted by the defendants as co-tenants of the remaining quarter. In this aspect of the case, it is manifest that the decision of this Court applicable is not *Ananti* v. *Channo* (2), but *Sahdeo* v. *Budhai* (3), in which it was held that where a plaintiff sues for possession as co-tenant, alleging the defendant to be a co-tenant, he must go to the Revenue Court.

If this is all that there was in the case the appeal would have had to be allowed.

There remained, however, the question of the applicability of s. 99, and with this may be considered also the applicability of s. 121, also of Act III of 1926. Section 121, again was not relied on in argument before the Division Bench, but in our referring order we made reference to this section as requiring consideration.

I have no hesitation in holding that s. 99 and s. 121 both deal with substantive rights and are not matters of adjective law. They both declare the right of the plaintiff in certain circumstances to sue. They have nothing to do with the question of venue, or any other matter of procedure; these matters are provided for by s. 230 read with Sch. IV. Nor have they even anything to do with the question of limitation.

To consider s. 99 first: I am of opinion that it is not applicable to any ejectment or resistance to possession, which ejectment occurred or resistance commenced before the passing of Act III of 1926.

In the first place it does not apply to any ejectment, etc., which has been effected "otherwise than in accordance with the provisions of this Act." These words are ambiguous. Literally read, they clearly suggest that the Act is only intended to be applicable to circumstances occurring after the commencement of the Act, for a person could not be ejected or prevented from obtaining possession in accordance with the provisions of this Act came into force. On the other hand, to read the Act thus literally would mean to hold, in the first place, that a person, who had been lawfully ejected prior to the Act under the previously existing law, could be said not to have been ejected "in accordance with the provisions of this Act", and, therefore, under s. 99 a right of suit would be conferred by s. 99. This is manifestly absurd, but in effect any such absurdity would be prevented by the principle of *res judicata*.

I am disposed to think that the existence of these saving words and the form in which they occur, may be very simply accounted for. A draftsman would naturally set out to say the circumstances under which a person ejected, etc, could sue. It would then occur to the draftsman or to somebody else. "But you have given him a right to sue 'if ejected', and that would cover even lawful ejectment under this very Act". This would suggest naturally incoroporation of the words "otherwise than in accordance with the provisions of this Act." It might have occurred, but evidently did not occur, to the draftsman that there was also the case of ejectment according to law under the previous Act.

Enough has been said to indicate that the words are ambiguous and no amount of speculation can remove that ambiguity; and that being so, the most

beneficial interpretation must be given to the words, and that is that the Act does not apply to events occurring before the Act came into force. That is the most beneficial interpretation manifestly, for otherwise a suit might by the harsher construction be barred by limitation and might, owing to the change in the law, be barred by limitation months or years before the Act came into force.

It is true that in certain cases a new period of limitation may bar the remedy which a plaintiff would have had before the Statute came into force giving the new period of limitation but I cannot find anywhere that this is a hard and fast rule applicable without exception to all cases, and it appears to me that the present is a case to which certain remarks of Lord Campbell, C. J., are particularly applicable. I quote from Craies' Statute Law, 4th edition of Hardcastle on Statutory Law, 1907, page 331:—

"The question arose whether this Act had a retrospective operation and was to apply to cases of damage done before its passing. The Court decided that it was retrospective, and Lord Campbell C. J., in giving judgment, said: 'if the Act had come into operation immediately after the time of its being passed, the hardship would have been so great that we might have inferred an intention on the part of the Legislature not to give it a retrospective operation, but when we see that it contains a provision suspending its operation for six weeks, that must be taken as an intimation that the Legislature has provided that as the period of time within which proceedings respecting antecedent damages or injuries might be taken before the proper Tribunal. ....A certain time was allowed before the Act was to come into operation, and that removes all difficulty."

Now in the present case the hardship caused by holding the Act to be in the sense we are now considering retrosactive is manifest, and in the Act itself there is no period of grace allowed to suggest that it was intended to be so retroactive. The Act came into force within seven days (*i. e.*, the necessary period for printing and notifying in the Gazette) from the date of the Governor-General's assent.

As to s. 121, it has been established before us that on the pleadings as eventually settled this must be regarded as not merely a suit for a declaration but a suit also for possession.

I would, therefore, hold that the Civil Court had jurisdiction and dismiss the appeal.

King, J.—I agree with Mukerji, J., that the jurisdiction of the Civil Court to try the suit is not ousted by s. 99 read with s. 230 of the Agra Tenancy Act, 1926.

As the lower Appellate Court has granted a decree for a declaration and for possession, we must take it that the plaintiff was allowed to amend his plaint by adding a prayer for possession. Before this amendment of the plaint the plaintiff sought merely a declaration of his right as tenant. The jurisdiction of the Civil Court to try such a suit was clearly barred by s. 121, read with s. 230, of the Tenancy Act, 1926. The material allegations and reliefs set forth in the *amended* plaint may be taken to be briefly as follows. The parties are co-tenants of a fixed-rate holding, the plaintiff having a three-fourths share and the defeadants a one fourth share. The holding is cultivated by sub-tenants. The defendants collect the whole rent from the subtenants and deny the plaintiff's right to any share of rent and thus have wrongfully dispossessed the plaintiff. The cause of action arose on 4th April 1923 when the plaintiff's rent-suit was dismissed by the Appellate Court, and also in June 1925 when the defendants denied the plaintiff's title. The plaintiff prays for a declaration of title to three-fourths of the holding and for recovery of possession.

If we ignore the date of the cause of action, then the suit clearly falls within the scope of s. 99 of the Agra Tenancy Act, 1926, and the jurisdiction of the Civil Court is barred by s 230.

The main question for our determination therefore, is whether s. 99, applies to a suit when the cause of action (*i. e*, the wrongful ejectment, or the wrongful prevention from obtaining possession) arose before September 7, 1926 when the Agra Tenancy Act of 1926 came into force.

I think this question should be answered in the negative, partly on general principles of interpretation but mainly on the interpretation of s. 99 itself.

Before the Tenancy Act of 1926 came into force the plaintiff had a vested right of suing the defendants, his co-tenants, who had wrongfully dispossessed him, for recovery of possession. The suit lay in the Civil Court, as s. 79 of the Tenancy Act, 1901, only applied to a suit by a tenant against his *landholder*. The plaintiff's case was that the defendants ejected him as co-tenants and not as land-holders, and the Court below has found this to be correct. The period of limitation was 12 years. We may take the cause of action to have accrued on the 4th of April 1923 when the plaintiff's rent-suit was dismissed by the Appellate Court. It is clear, therefore, that

the plaintiff had a vested right of suit n the 9th of September 1926. Did he lose that right on the 7th of September 1926 when the new Act came into force?

Now it is a well recognised rule that Statutes should be interpreted, if possible so as to respect vested rights. (Craies on Statute Law, 3rd edition, page 330). Many cases might be cited to show that Courts have refused to allow Statutes to have retrospective effect, although their language seemed to imply that such was the intention of the Legislature, because, if the Statutes had been so construed, vested rights would have been defeated.

The Gaming Act, 1922, repealed s. 2 of the Gaming Act, 1835, (which made money paid to the holder of securities given for consideration arising out of certain gaming transactions recoverable from the person to whom the securities were originally given) and enacted that "no action for the recovery of money under the said section shall be entertained in any Court." In *Henshall* v. *Parter* (4), McCardie, J., held that in accordance with well-established rules of construction, as well as by virtue of s. 38 (2) of the Interpretation Act, 1889, the Act of 1922 does not prevent the bringing of an action under the repealed section of the Act of 1835, after the date when the repealing Act came into force, in respect of a cause of action which had arisen before that date.

It must be observed that s. 38 (2) of the Interpretation Act, 1889, is almost verbally identical with s. 6 of the U. P. General Clauses Act, 1904.

In accordance with well-established rules of interpretation, therefore s. 99 must not be construed as defeating the plaintiff's vested right of suing for recovery of possession unless the Legislature makes it perfectly clear that this was their intention.

Now, if we construe s. 90 as applying to suits where the cause of action arose before the 7th of September, 1926, it is clear that the plaintiff is absolutely deprived of his remedy. The period of limitation for a suit under s. 99 is six months from the date of wrongful dispossession. This means that the suit became time-barred on the 5th of October 1923, about three years before the Act of 1926 came into force.

It is argued that the time within which a suit must be instituted is a question of procedure, and there is no vested right in Procedure. This is true, but in the present case if s. 99 were held applicable it would not merely mean that the plaintiff must sue in the Revenue Court instead of in the Civil Court, and that he must file his suit within a shorter period. It means that the plaintiff cannot sue at all, as his suit had become time-barred long before the new Act came into force. Hence the alteration in the rule of procedure would operate as an alteration of substantive law in absolutely depriving the plaintiff of his remedy. This is an undoubted hardship, and this case is by no means likely to be an isolated or exceptional case.

These considerations emphasize the duty of the Court to interpret the Statute, if possible, so as to respect vested rights.

Turning now to the consideration of the language of s. 99 think it may be fairly held to indicate that it is not intended to apply to cases where the cause of action arose before the 7th of September, 1926.

Section 99 provides for a suit by a tenant . . . . . ejected from, or prevented from obtaining possession of, his holding . . . . . "otherwise than in accordance with the provisions of this Act." I lay stress on the last words "This Act" means of course the Act of 1926. Now take the case of a tenant ejected in 1923. It was obviously impossible at the time of the ejectment to determine whether he was, or was not, ejected in accordance with the Act of 1926, Section 99 clearly could not apply to such a case unless we amplify the phrase so as to mean,

"otherwise than in accordance with the provisions of this Act, if this Act had been in force at the time of the ejectment."

But this is very far-fetched. I think the language of the section shows that it was only intended to apply to cases where the cause of action arose after the Act of 1926 came into force. It is only in such cases that it is possible to decide whether the dispossession was, or was not, in accordance with the provisions of the Act of 1926.

I hold, therefore, both upon the general rules of intepretation, and upon the interpretation of the section itself, that s. 99 does not apply to this suit, as the cause of action arose before the 7th of September, 1926. The Civil Court therefore had jurisdiction to try the suit.

I agree that the appeal should be dismissed with costs.

Bajpai, J.—I agree generally with the opinion of the Acting Chief Justice, but like him I am not prepared to dissent from

(4) (1923) 2 K. B. 193; 92 L. J. K. B. 866; 39 T. L. R. 409; 67 S. J. 537; 129 L. T. 443.

the order proposed by the majority of the Bench.

I only wish to point out that I am of the opinion that the law of limitation is a law of procedure and the general rule is that a Statute of limitation is retrospective in its operation and governs all proceedings from the moment of its enactment, even though the cause of action might accrue before the Act came into force. In *Soni Ram* v. *Kanhaiya Lal* (5) their Lordships of the Privy Council held that in a suit brought on the 4th of March, 1907 for the redemption of a mortgage, dated the 2nd of January, 1842, the law of limitation applicable to the case was not Act XIV of 1859, the law in force on the date of the acknowledgments, but Act XV of 1877 which was in force at the time of the institution of the suit. It is said that the application of this principle might work great hardship in cases where the Legislature in its wisdom curtails by a new enactment the period of limitation prescribed for a particular kind of suit, for it might well happen that a litigant in the belief that he had for instance, twelve years for instituting the suit after the accrual of the cause of action might wait for seven years and then, if a new Act is passed and the period is cut down to six years, he will not be entitled to maintain a suit, because he would be beyond time by a year on the date the new Act came into force and his right would be lost for no fault of his whatsoever. This argument assumes that a Legislature would adopt such a drastic measure without making provisions for cases of this kind by inserting a period of grace. I am, therefore, of the opinion that no argument can be advanced based only on the hardship of the situation, because I am sure that where the Legislature cuts down the period of limitation, it will always provide for hard cases by putting in a period of grace, when a period of limitation is prescribed for the institution of a particular suit, it does not create any right in favour of anybody; but simply prescribes that a suit of that nature has to be filed within that particular period and, if it is not so filed, the remedy is lost, although the right remains. That the right remains and is not extinguished is clear by the fact that, if a new enactment is passed and prescribes a longer period of limitation, the suer would be entitled to avail himself of that extended period of limitation and obtain redress. I wish however to make it clear that the law of limitation is not always a purely adjective law, inasmuch as in certain cases it provides for the creation of rights by prescription and the corresponding extinction of rights (s. 28 of the Indian Limitation Act of 1908) and if those rights have vested in individuals under one law of limitation, they cannot be divested by the introduction of a new law of limitation or by an amendment in the law. It is only when the retrospective application of a Statute of limitation would destroy vested rights that it is not to be construed retrospectively, otherwise the ordinary rule is that rules of limitation are rules of procedure and no one has a vested right in any period of limitation.

By the Court.—The suit, as amended by the addition of the prayer for possession, was cognisable by the Civil Court, and we accordingly dismiss the appeal with costs, including Counsel's fee in this Court on the higher scale.

A. *Appeal dismissed.*

(5) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

ALLAHABAD HIGH COURT.

Second Civil Appeal No 1843 of 1928.
May 13, 1931.
PULLAN, J.

RAM LOCHAN NAIK AND OTHERS—DEFENDANTS—APPELLANTS
versus.
SRI THAKURJI ASTHAPAT—PLAINTIFF—RESPONDENTS.

Agra Tenancy Act (III of 1926) s. 4 (d)—Sir-*holder*—*Co-sharer recorded in possession of land as* khud kasht *in year previous to passing of Act—Co-sharer to be recorded as* sir-*holder—Manner of obtaining possession, whether material.*

The parties were co-sharers in a certain *zemindari*. Certain plots of land were entered in the name of a certain person who was the *pujari* of the plaintiff-respondent. This *Pujari* was dismissed from service and he surrendered these holdings to the defendants-appellants who had their own names entered in the revenue papers as *khud kasht* holders in 1924:

Held, that when the new Agra Tenancy Act came into force on September 1926, they became *sir* holders being co-sharers who were recorded as being in possession of these plots as *khud kasht* in the year previous to the passing of the Act. [p. 158, col. 1.]

Held, further, that there is nothing in the new Act which enables a Court to go back to the manner in which possession was obtained and the plaintiff was not entitled to recover joint possession. [p. 158, col. 2.]

Second Civil Appeal from the decision of the Subordinate Judge, Basti, dated the 3rd July 1928.

Dr. *K. N. Katju*, for the Appellant

Mr. *P. L. Banerji* (with him Mr. *Ambika Prasad Dube*), for the Respondent.

Judgment.—The plaintiff-respondent and the defendants-appellants are co-sharers in a certain *zemidari*. There are six plots of land which were up to the year 1924, but for how long it has not been ascertained, entered in the name of a certain Jhakri who was the *pujari* of the plaintiff-respondent. This Jhakri was dismissed from service and surrendered these holdings to the defendants appellants. These had their own names entered in the revenue papers as *khud kasht* holders in the year 1924 (1332 *Fasli*). When the new Agra Tenancy Act came into force on 7th September 1926 these persons became under the definition of "*sir*" in s. 4 of that Act "*Sir*-holders" being co-sharers, who were recorded as being in possession of these plots as *khud kasht* in the year previous to the passing of the Act. The plaintiff *Sri Thakurji Asthapat* brought this suit for possession of the plots and for mesne profits claiming that he and not the defendants was the "*sir*-holder". The suit was partially decreed by the first Court. The plaintiff was given a decree for joint possession over the plots, but not for exclusive possession, and his suit for mesne profits was dismissed. He appealed against this decision and a cross-objection was preferred by the defendents. In the cross-objection the defendants claimed that the land was their "*sir*" and the plaintiff was not entitled to joint possession. The lower Appellate Court however, took the view that although the defendants' names were entered as *khud kasht* holders the entry was not *bona fide* and that the land, although it became "*sir*" became the "*sir*" not of the defendants but of the plaintiff who was in the opinion of the Court, the real *khudkasht* holder, at least up to the year 1924. The finding of the Court below that Jhakri represented *Sri Thakurji* and held the *khud kasht* land on his behalf can perhaps not be challenged in second appeal, but the effect of this finding is only this that in the year 1924 one of the co-sharers was occupying some of the joint land as *khud kasht*, under the law which was then in force. No *sir* rights were acquired by a co-sharer in respect of land which he was occupying as *khud kasht* after the passing of the Act No. III of 1901, and there is no question of good faith in this matter. All that can be held is that after the year 1924 the other co-sharers were in possession. How they obtained possession is immaterial, but they certainly occupied the land and cultivated it as their *khud kasht* for the two years which elapsed before the passing of the new Tenancy Act. There is nothing in that Act which enables a Court to go back to the manner in which possession was obtained by a co sharer. The Court has merely to decide that the co-sharer was in possession of certain land as *khud kasht* previous to the passing of the Act and is bound on that finding to hold the land to be the "*sir* of that co-sharer. It would be unreasonable for the Court to say that such and such land is certainly cultivated as *khud kasht* by *A*, but he took it from *B* and so *B* ought to be recorded as "*sir*-holder" and not *A*. This in effect is what the lower Court has done, and I cannot uphold this finding. In my opinion the defendants-appellants were properly recorded as "*sir*-holders" in these plots. The plaintiff respondent is their co-sharer, but he is not entitled to have any decree given him for joint possession in the plots which his co-sharers hold as "*sir*". The suit therefore should be dismissed entirely. I allow this appeal with costs throughout, set aside the decree of the the Courts below and order the suit to be dismissed with costs.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Case No. 2256 of 1927.
Connected with
Second Appeal Nos. 2242 and 2257 of 1927.
June 25, 1930.

SEN AND NIAMAT ULLAH, JJ.

SITAL PRASAD—DEFENDANT—APPELLANT

versus

RANJIT SINGH AND OTHERS—PLAINTIFFS—AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 107—Re-sale—Necessity of notice—Trade usage—Sale without notice—Burden of proof—Pleadings—Illegal re-sale—Measure of damages—Civil Procedure Code (Act V of 1908), s. 100—Finding of fact—Usage.

It is open to a party to plead a trade usage in conflict with the provisions of the Indian Contract Act, but if a party relies on a trade usage its incidents and details ought to be indicated with clearness and precision and where there is an issue between the parties as to the existence of such an usage the onus of proof lies upon the party propounding the same. [p. 159, col 2.]

Even if a re-sale is illegal for want of notice, if a breach of contract on the part of the buyer is established, the seller can claim damages on the basis of the difference between contract price and the market price on the date of the breach.[p 160, cols 1 & 2.]

Where there is evidence legally sufficient to support a finding as to the existence of an usage, the High Court cannot set aside that finding on the ground that the quantum of evidence is meagre and scanty. But where the usage has not been pleaded with precision and the evidence adduced is vague and inconsistent a finding may be over-set by the High Court on the ground that it was not justified by the pleadings and was not supported by evidence of a relevant character. [p. 160, col. 2.]

Second Appeal from the decision of the Subordinate Judge, Muzaffarngar, dated the 30th June 1927.

Messrs. *P. L. Banerji*, and *K. N. Laghate*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

Judgment.—This and the connected appeal arise out of a suit for damages, consequent upon a breach of contract relating to the purchase of two grain pits, situate in *Mauzas* Sambhalka and Bhuniyori respectively. The plaintiffs claimed Rs. 948-12-3 for principal and interest up to the date of suit as also *pendente lite* and future interest.

Plaintiffs alleged and the defendants did not dispute that the latter had agreed to purchase the two grain pits at certain rates detailed in the plaint, and that earnest money had been duly paid but that the defendants had failed to pay the balance of the price and take delivery. The balance was payable up to *Chait Sudi* 15th and delivery ought to have been taken upto *Chait Sudi* 2nd corresponding to the 17th of March 1923.

Plaintiffs averred that there was a trade usage in the grain market of Shamli that where the buyer failed in his obligation as to the payment and delivery on due dates, the seller was entitled to re-sell the grain pits according to the market-rate and that in pursuance of this usage the plaintiffs resold the grain pit in Sambhalka. This resulted in a loss to the plaintiffs of Rs. 587-1-3. They claimed this sum together with Rs. 138-5 interest upto the date of the suit. This grain pit belonged to the plaintiffs.

No re-sale was held of the second grain pit which was alleged to have been purchased from Kallu Mal Kedar Nath. Plaintiffs alleged that they had to pay to Kallu Mal Kedar Nath Rs. 141-3 for this grain pit. They claim for recovery of this sum and Rs. 41-12 as interest.

The suit was contested on the ground that the contract between the parties was really of the nature of a wager, that a claim for damages for its breach was not legally maintainable, and that the plaintiffs were not competent to sell the grain pit at Sambhalka without complying with the provision of s. 107 of the Indian Contract Act.

The Court of first instance found that the plaintiffs had not, as a matter of fac , purchased the second grain pit from Kallu Mal Kedar Nath and were not in a position to sell the grain pit to the defendants on the 25th of June 1922 when the bargain was struck relating to this grain pit and held that the claim regarding this was untenable. It decreed the plaintiffs' claim for Rs. 587-1-3 principal and Rs. 138-5 interest as to the other grain pit.

Both the parties appealed. The lower Appellate Court allowed the plaintiffs' appeal and dismissed the cross-appeal. The result was that the plaintiffs' claim stood decreed in its entirety.

The defendants in their appeal to this Court contend that the plaintiffs were not entitled to re-sell the grain pit situate in *Mauza* Sambhalka without complying with the conditions laid down in s. 107 of the Indian Contract Act. In answer, the plaintiffs set up a trade usage under which it was not necessary for them to serve a notice upon the defendants as a condition precedent to their selling the grain pit.

It is open to a party to plead a trade usage in conflict with the provisions of the Indian Contract Act. If a party relies upon a trade usage, its incidents and details ought to be indicated with clearness and precision; and where there is an issue between the parties as to the existance of such an usage, the onus of proof lies upon the party propounding the same.

The defendants denied that the plaintiffs had re-sold the grain pit in Sambhalka. On this point there is no clear finding by either of the Courts below, In the view we are about to take, it is not necessary to call for a finding as to whether there was a re-sale or not. Their main contention was that in no case could damages be assessed on the basis of the difference between the contract price and the price fetched on a re-sale, since no notice of the projected sale was given to the defendants under the imperative provision of s. 107 of the Indian Contract Act.

Plaintiffs do not aver that they ever gave any notice to the defendants of the contemplated sale.

Where the property in the goods had

passed to the defendants, but the latter were in default and refused either to pay the balance of the price or to take delivery of the goods on the due dates, two remedies were available to the plaintiffs; (1) to claim compensation on the basis of the difference between the contract price and the market price on the date of the breach or (2) to re-sell the property under s. 107 and recover the difference, if any, between the contract price and the price realised by the re-sale. The present suit is not to enforce the first remedy, nor is it a suit to recover losses sustained by a resale held under s. 107 of the Indian Contract Act. A trade usage has been set up by the plaintiffs the details of which have been given in para 3 of the plaint. It has not been pleaded that by force of this usage the plaintiffs were competent to sell the grain pits belonging to the defendants without any notice to them of the projected sale. The Court of first instance neither framed nor tried an issue as to the existence or the incidents of the usage as alleged by the plaintiffs.

The lower Appellate Court deals with the question subsidiarily in its treatment of s. 107 of the Indian Contract Act. It held that the provision of s. 107 was not mandatory but was optional, a view with which we entirely disagree. The claim for recovery of loss caused by a re sale may be an optional remedy. But the plaintiffs cannot be permitted to re sell the goods in defiance of the conditions imposed by s. 107 of the Indian Contract Act unless they establish a trade usage at variance with its provisions. We have already observed that the plaintiffs have not pleaded that under the usage prevailing in the grain market of Shamli it was not necessary to give the defendants a notice of the contemplated sale where the latter are guilty of a breach of the obligations under the contract. The lower Appellate Court holds that the usage is proved, but its finding rests upon the statements of two witnesses Gokul Chand and Kishori Lal which have not only no bearing upon the question of notice but are vague and nebulous to a degree. The following is the summary of their statements as given in the judgment of the lower Appellate Court

"Gokul Chand has given he custom when he comes to say that the vendor has to wait till *Chait Sudi* Ist., when he will inform "*Itala dekar*", the vendee, if his shop subsists (*i. e* if the vendee is to be found), and then the grain pit can be re-sold by the vendor. Kishori Lal, plaintiff, has said that a vendor could re-sell it without any enquiry from the vendee."

The statement of Gokul Chand does not support the usage and is open to the construction that it is necessary to give a notice to the purchaser. Kishori Lal does not say a word about notice but speaks of the necessity of an enquiry from the vendee. Upon the *data* accepted by the lower Appellate Court, the inference, in affirmance of the usage as now set up before us, was wholly unwarranted. Where there is evidence legally sufficient to support a finding as to the existence of an usage, this Court cannot set aside that finding on the ground that the quantum of evidence is meagre and scanty. But where the usage has not been pleaded with precision and the evidence adduced is vague and inconsistent, a finding may be over-set by this Court on the grounds that it was not justified by the pleadings and was not supported by evidence of a relevant character. We therefore hold that the plaintiffs have failed to prove a trade usage entitling them to sell the grain pit without notice to the defendants.

The plaintiffs' claim however cannot be permitted to rest here. We are clearly of opinion that a breach of contract on the part of the defendants having been established, the plaintiffs are entitled to claim damages on the basis of the difference between the contract price and market price on the date of the breach.

Before we can finally dispose of this appeal we think it desirable to have a finding from the Court below on the following issue.—

What was the difference between the contract price and the market price of wheat in Shamli on the 17th of March 1923?

Parties shall be at liberty to produce further evidence The lower Appellate Court is directed to submit its finding within two months of the receipt of the record. Upon return of the finding ten days' time will be allowed for objections.

We are of opinion that the plaintiffs were entitled to interest for the period *pendente lite* and future rights up to the date of realisation. The contention about interest is therefore overruled. No reason has been assigned why interest for the period between the institution of the suit up to the date of realisation should be refused.

A. *Case sent back.*

BOMBAY HIGH COURT.

First Civil Appeal No 183 of 1926,
June 29, 1931.

BAKER AND NANAVATI, JJ.

DATTATRAYA PANDURANG JOSAVI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LAKSHMAN MAHADEV POHEKAR AND OTHERS—DEFENDANTS—RESPONDENTS

Grant—Construction of sanad—*Grant in consideration of piety and learning—Personal grant—Act XI of 1852, Schedule A,r. 2*—Inam *Commissioner—Finality of decision—Summary Settlement Act (II of 1863)—"Lands held under a treaty",meaning of—Civil Procedure Code (Act V of 1908), s. 11, O. XLI, r. 10* - Res judicata—*Litigating under same title—Mortgagee suing in two different capacities—Security for costs, object of —Bombay Pleaders Act (XVII of 1920), s. 20 (1)* (a)—*Fees of two Pleaders, taxation of—Limitation Act (IX of 1908), Sch. I, Art 120—Suit to set aside alienation—Cause of action when arises.*

Where there is no reference in the *sanad* that a grant is for religious and charitable purposes but is made in consideration of the piety and learning of the grantees who are *Brahmans*, the grant though it may be described by the word '*Dharmarth*', is not to the *devasthan* but is a personal one. *Chintaman Balaji Dev* v. *Dhondo Ganesh Dev* (7), *Irapa* bin *Malapa Naik* v. *Apasaheb Irbasapa Desai* (8), *Collector of Thana* v. *Hari Sitaram* (9) and *Rupa Jagshet* v. *Krishnaji Govind* (10), distinguished. [p. 165, col. 1.]

The decision of the *Inam* Commissioner by virtue of the provisions of r. 2, Schedule A of Act XI of 1852 is final as regards the land and interest concerned in the decision. *Vasudev Pandit* v. *Collector of Poona* (3) and *Ramrav Govindrao* v. *Secretary of State* (4), referred to. [p. 164, col. 2.]

The expression "land held under a treaty" used in the Summary Settlement Act refers to cases in which the root of the title is a treaty. In order to hold that land is held under a treaty it must be shown either that the original title was under a term of a treaty which remained in force or that the treaty of cession guaranteed title. *Kalabhai* v. *Secretary of State for India* (5), distinguished. *In re Vasudeo Harihar* (6), followed. [p. 165, col. 1.]

A mortgagee suing in two cases under different capacities cannot be said to be litigating under the same title and, therefore, does not attract the application of s. 11, Civil Procedure Code. *Madhavrao Hariharrao* v. *Anusuyabai* (1) and *Drummond* v. *Attorney-General* (2), referred to. [p. 163, col. 2.]

The point of *res judicata* being a question of law may be taken for the first time in appeal where it does not necessitate the taking of further evidence. [*ibid.*]

Where the appeal has been heard and decided on the merits the object of asking for security disappears. [p. 166, col. 2]

Under s. 20 (*a*), Bombay Pleaders Act, where a party has engaged two Pleaders, he is entitled to have the fees of both the Pleaders taxed in the bill of costs even though one of the two Pleaders is a junior hand. *Tulsi* v. *Omkar* (12), followed. [p. 167, col. 1.]

The cause of action in a suit to set aside an alienation arises when the alienation is made and not when the alienation becomes known to the plaintiffs. *Venkatachella Reddiar* v. *Collector of Trichinopoly* (11), followed. [p. 166, col. 1.]

First Appeal from a decision of the District Judge, Ahmednagar, in Civil Suit No. 1 of 1925.

Mr. *Navalkar* (with him Mr. *Virkar*), for the Appellants.

Mr. *H. C. Coyajee*, (with him Messrs. *D.R. Patwardhan* and *K. V. Joshi*), for Respondents Nos. 2, 3.

Mr. *P. B. Shingne*, Government Pleader, for Respondent No. 4.

Baker, J.—In the year 1790 A D. the village of Takli in the Ahmednagar District was granted by the Holkar Darbar by a *Sanad* to Bhanudas, the great-grandfather of the plaintiffs and his brother Eknath. The property descended to the male issue of the grantees and ultimately to Manohar and Eknath uncles of the plaintiffs who are the sons of Eknath's sister. From the year 1875 the *inamdars* had been mortgaging the *inam* to various persons and ultimately by a decree of the High Court the right of Eknath to redeem the property, Manohar being dead, was declared to be foreclosed.

The present suit was brought by the plaintiffs, the nephews of Eknath, for a declaration that the *inam* being for religious and charitable purposes is inalienable and consequently the mortgagees were not entitled to deprive the *inamdars* of it. Eknath was defendant No 5 in the suit as he did not join as plaintiff. He has since died.

The prayers of the plaintiffs were for a declaration to the effect that the income of the village of Takli is not liable to be mortgaged by Manohar and Eknath for their personal debts and that no property in the said income of the village has passed by the foreclosure decree of the High Court passed on April 13, 1917; that the mortgage transactions in favour of defendants Nos. 1 to 3 may be declared to be void and no longer binding on the religious endowment created by the *inam patra* in connection with the village of Takli and for an injunction against defendants Nos. 1 to 3 for preventing them from claiming any income of the said village from defendant No. 4, the Collector, in virtue of the said foreclosure decree and that defendant No 4 should be directed to pay the income of the Dumala village of Khare Takli to the plaintiffs and their heirs and successors. The defendants in the suit were the mort-

gagees, the Collector of Ahmednagar and Eknath, who did not join as a plaintiff.

Various objections were taken by those of the defendants who defended the suit, *viz*, defendants Nos. 2 and 3 who were the sub-mortgagees of defendant No. 1 and also by the Collector.

The District Judge of Ahmednagar held that the suit would not lie as regards the injunction prayed for though it would lie as regards the declaration. He held that the suit was barred under Art. 120 of the Indian Limitation Act; that the adjudication of the *Inam* Commission in 1852 and the summary settlement in 1863 were binding on the plaintiffs; and that the grant of the suit *inam* was not a grant for religious and charitable purposes, but was a personal grant of a heritable and transferable nature, and so the alienations by Manohar and Eknath were not void; the income of the said village was not liable to alienation for the debts of the mortgagors and that the mortgage transactions of 1875 A. D. resulting in the foreclosure decree of the Bombay High Court were binding on the *inam* income, and consequently dismissed the suit.

The plaintiffs make this appeal. The arguments in this appeal have gone on for three or four days but the questions in issue lie in a narrow compass. The main objections which have been brought against the suit by the defendants are that by virtue of the foreclosure decree in 1917 by which the right of Eknath to redeem the mortgage was declared to be for ever lost and his interest in the property is gone, the plaintiffs who are his heirs are equally bound and the principle of *res judicata* will apply to the present suit. The second point is whether the nature of the grant is, as contended by the plaintiffs of a religious and charitable nature and, therefore, inalienable or whether it is a personal grant to the holders, *viz*, the family of Eknath, and, thirdly, whether the suit is barred by limitation.

There are also certain cross-objections which have been filed and certain applications : one for amendment, one for security for costs, and one for an injunction which will be dealt with at the end of the judgment.

The first point is as regards the effect of the order of the High Court in 1917. In order to understand the case it will be necessary to give a brief history of the transactions between the *inamdars* and the mortgagees. The grant, as I have said, was in 1790. The *Inam* Commission in 1852 held the property to be personal *inam*, a decision which was confirmed at the summary settlement under Bombay Act II of 1863. In 1875 the then holders of the *inam* mortgaged the property to defendant No. 1 Pohekar. In 1876 the *inamdars* sold a part of the equity of redemption to one Khemchand. There was a subsequent mortgage to Pohekar and a decree was obtained on the second mortgage in 1892 by Pohekar and in 1896 the mortgaged property, *i. e*, the *inam*, was put up for sale and was purchased by Pohekar but that proceeding was subsequently set aside by the District Judge of Ahmednagar. In 1898 there was a sub-mortgage by defendant No 1 Pohekar to Bagde, the father of defendants Nos. 2 and 3, who are the contesting defendants in this case. In 1903 Bagde sued for possession and in 1904 he got a decree. In 1907 there was a redemption suit by the two *jahagirdars* and Khemchand, who, as I have already said, was a purchaser of one-third of the equity of redemption. In the course of that suit an injunction was granted by the Court against the Bagdes preventing them from recovering any portion of the income of the village. The proceedings in this suit ended in a decree for Rs. 10,000 and odd. An appeal was made to the High Court by Khemchand as he objected to the amount which was found due under the mortgage. The *jahagirdars* did not appeal but were made respondents. In 1911 the High Court found in Appeal No. 37 of 1910 that Rs. 10,000 and odd were due on the mortgage and passed a redemption decree, the usual provision being made for the right to redeem being for ever foreclosed if the money was not paid within the period directed by the Court. The money was not paid and in 1917 on the application of the mortgagee the High Court declared that the right of the mortgagor was foreclosed. The date of that order is July 9, 1917. Although the appeal had been lodged by Khemchand one of the mortgagees alone the *jahagirdars* were also parties to the suit. The decree referred to the whole mortgage and that was the understanding of the parties. The effect of this foreclosure decree was to extinguish the right of Eknath and his brother Manohar to redeem the mortgage. After it had been passed there was an application made by Eknath to the High Court, which is Ex. 31, page 32, in which for the first time the theory is put forward that the property was property

set apart for religious and charitable purposes and, therefore, inalienable, and the High Court in disposing of this application states that "the decree is binding on the parties to the litigation and it is not possible to entertain the application for amendment at this distance of time. If the property really belongs to the *Devasthan* and if it has been improperly diverted from its use for the purposes of the *Devasthan* it may be open to those who are interested in the *Devasthan* to file a proper suit with a view to question the validity of this alienation." The application was rejected. This was in September, 1924, and in 1925 the plaintiffs, who are the nephews of Eknath and Manohar, bring the present suit.

It has been argued on behalf of the defendants that the present suit is really a last attempt on the part of Eknath to get back his property when all other means have failed, and it has been contended that inasmuch as the validity of the mortgages has been finally decided by the High Court in this litigation in the case of Eknath it would not be competent to him to re-open the question. So also his nephews who claim as his heirs are equally barred.

On behalf of the appellants it has been strenuously contended that the capacity of the plaintiffs to bring the present suit is not as the heirs of Eknath, but as persons interested in the *Devasthan* or rather the religious foundation, as there is no temple but only a tomb of the ancestors of the parties at which an annual festival is held, or as successors in the *vahivat* of the foundation. It was somewhat difficult from the present case to ascertain the exact position which the plaintiffs seek to occupy. My own impression is that they vary their position from time to time as it suits their purpose. The matter, however, is made clear by a reference to the judgment of the lower Court in which it is stated at page 5, line 15:—

"As the suit went on, it was pointed out to the plaintiffs' Counsel that the suit could not be maintained by the plaintiffs in two different and inconsistent characters, and finally the Counsel for the plaintiffs informed the Court that the suit was brought by the plaintiffs as presumptive heirs of Eknath and not as devotees or worshippers or strangers to the grant interested in the performance of these festivals."

It so happened that during the pendency of this suit Eknath died on December, 16, 1926, and an application had been made by the plaintiffs for leave to amend the plaint in order to join a prayer for possession to the other prayers for a declaration and injunction which they have made. That has been opposed by the defendants and it is a matter to be dealt with later. But it is pointed out that the plaintiffs in the present case claim what interest they have in the *inam* by virtue of their relationship to Eknath. If, contrary to what has been stated in the lower Court, which I have just repeated, *viz*, that they are the heirs or presumptive heirs of Eknath, we assume that they are persons who are suing as interested in the *vahivat* of this foundation, the fact still remains that their interest arises from their relationship to Eknath. They do not sue as strangers or as members of the Hindu community who are interested in the performance of the ceremonies at the tomb of their ancestors, but by virtue of their relationship to the family of the *jahagirdars*, of whom they are now the sole male representatives. If this is so, it appears to me that the suit would be barred inasmuch as the validity of the mortgages has been finally declared by the High Court in the case of Eknath and that the plaintiffs who now stand in the shoes of Eknath would be barred exactly in the same way as Eknath himself would be barred.

Numerous cases have been quoted by the learned Counsel on either side, but the matter seems not to require very much authority. The learned Counsel for the respondents has relied on the case of *Madhavrao Hariharrao* v. *Anusuyabai* (1). The point really is, as has been pointed out by the learned Counsel for the appellants, whether under s. 11 of the Civil Procedure Code the parties are litigating under the same title. It is quite true that a mortgagor suing in one capacity will not be barred when he sues in a distinct capacity. In fact he is a different person: *Drummond* v. *Attorney-General* (2). But, as I have already pointed out, the capacity in which the plaintiffs now sue is, by virtue of their heirship to Eknath, the same capacity in which Eknath himself stood. But this point is not really of very great importance in view of the findings at which I am going to arrive. I will state it again later on, because even supposing that the view which I have taken here is not correct, yet when we go into the facts it will be seen that the bar of *res judicata* does apply to the present case. It has been contended

(1) 36 Ind. Cas. 505; 40 B. 606; 18 Bom. L. R. 768.
(2) (1849) 2 H. L. C. 837.

by the the learned Counsel for the appellants that this case was not set up in the lower Court and, therefore, it is not open to the respondents to take advantage of it now. It is, however, a point of law, and since no further evidence is required in the present case than the record of proceedings in the High Court, I do not think that there is any reason why it should not be taken in first appeal.

Passing on to the next point as to the nature of the grant in the present case the following circumstances will appear. First of all, both by the *Inam* Commission in 1852, and, secondly, by the summary settlement in 1863 this property has been regarded not as *Devasthan* property but as private *inam* of the holders. Secondly, throughout the history of this property it appears to have been dealt with by the holders as if it were their private property. Thirdly, during the whole of this complicated litigation which went on for many years in connection with the mortgages executed by Eknath and his brother Manohar to the various mortgagees, *viz*, the Pohekars and the Bagdes, which ultimately went up to the High Court, we do not find any plea set forth by the mortgagors that the land was inalienable and, therefore, the mortgages were not binding upon them. And, lastly, we have the terms of the *sanad* itself which have been interpreted by the learned District Judge and which I shall have to refer to in some detail. Now, so far as regards the determination by the *Inam* Commission it has been contended by the learned Counsel for the appellants that the object of the *Inam* Commission was to determine the liability of the land to pay dues to Government and that the Courts are not precluded from going into the real nature of the grant. As regards the adjudication in the summary settlement under Act II of 1863 it is contended that that does not apply to lands held under a treaty, and this land is not held under a treaty. The decision of the *Inam* Commission is Ex. 66. The entire village was claimed as hereditary *inam* and the decision was that the village of Takli minus the ancient *haks* and *inams* to be continued in *inam* so long as there shall be in existence any male lineal descendant of Ramchandra Gosavee *bin* Bhanoodas Gosavee Wusmutkar. The decision under the Summary Settlement Act which is contained in the *sanad* (Ex. 92) describes the property in column 11 as permanent (enfranchised private property). In neither of these documents is there any reference whatever to the property being granted for religious purposes. Under Sch. II, r. 2 of Act XI of 1852, *i. e.*, the Act setting up the *Inam* Commission, the decisions of the proceedings of the *Inam* Commissioner were appealable to the Government whose orders were final, and that that was so, was held in *Vasudev Pandit* v. *Collector of Puna* (3). Similarly, in *Ramrav Govindrao* v. *Secretary of State* (4) it was held that the decision of the *Inam* Commissioner was, by virtue of the provisions of r. 2, Schedule A, of Act XI of 1852, final as regards the land and interest concerned in the decision. Then as regards the decision under the Summary Settlement Act it is contended that that Act does not apply to the land in dispute because land under a treaty is specially exempted under the Act. The learned District Judge has pointed out that no treaty was produced before him and he was not prepared to hold that the land was held under a treaty. The basis of the argument is that the village originally belonged to Holkar's Government and it is contended that it came in possession of the British Government by a treaty with Holkar. A reference has been made to Bombay Regulation XXIX of 1827 which deals with the bringing under operation of the Bombay Regulations the territories in the Deccan and Khandesh. That Regulation deals both with the territories which were acquired by conquest from the Peshwa and from other States by treaties and agreements and so far as I can see it is not at all clear from this Regulation that this particular village Takli was acquired directly by treaty by the British Government from Holkar's Government. A reference will be found at the top of page 3 of Volume I of the Bombay Code in which the villages constituting the *Zila* of Ahmednagar are mentioned and the reference is "The Peshwa's share of the two *Parganas* Bijapur and Gandapur, together with the village of Takli." That would quite easily mean that the village of Takli was held under the same conditions as the other two villages. Supposing that at this time in 1827 Takli belonged to the Peshwas it must have passed to the British Government by conquest and not by treaty. However, assuming that there was a treaty with Holkar by which certain villages in the Deccan were handed over to the British Government, that does not make the land

(3) 10 B. H. C. 471.
(4) 4 Ind. Cas. 832; 34 B. 232; 11 Bom. L. R. 1333.

in question "lands held under a treaty" under the definition in the Act of 1863. The learned Counsel for the appellants has relied on the case of *Kalabhai* v. *Secretary of State for India* (5). That, however, does not bear on the point in dispute. The expression "lands held under a treaty" used in the Summary Settlement Act has been construed to refer to cases in which the root of title was a treaty. This will be found in *In re Vasudeo Harihar* (2). In order to hold that it was held under a treaty it must be shown either that the original title was under a term of a treaty which remained in force or that the treaty of cession guaranteed title. Nothing has been shown in the present case, as I have already said, and it is open to doubt whether Takli was not a part of the Peshwa's dominions along with the other two villages which are referred to in the same paragraph. I do not say that the terms either of the *Inam* Commission's decision or the summary settlement are so definite as to make it impossible to hold that this grant was for religious and charitable purposes. But the inference to which they give rise is that it was ordinary personal *inam*. There is no reference to the grant being for religious and charitable purposes as is contended for by the appellant.

Turning to the *sanad* itself it has been translated at page 67 of the record and is again translated by the learned District Judge at pages 8 and 9 of the judgment, and I do not think that it is necessary to set it out in full again, but the point to be noticed about it is that it does not expressly say that the grant is made for religious purposes. The contents are that the members of the family of the present plaintiffs made an application to the Holkar's Government representing that they celebrated the festival of Eknath Shasti and the death anniversary of the late Rama Bawa their uncle at large expense. There is an annual allowance of Rs. 360 from the *Sirkar* on which they could not manage and requesting that the grant of a village may be kindly made as a new *inam*, in charity. Thereafter the *sanad* goes on to say "Taking into consideration the learning and piety of the applicants and that the amount of the annual allowance does not serve the purpose of the subsistence of your family and the expenses of the festival, and recognizing that you are dependants of the *Sarkar* from old, it appears meritorious and desirable that for the provisions of your expenses, with the annual allowance, a village should be granted in charity as a new *inam*", and consequently the village in question was granted to them. It is nowhere stated in the *sanad* that the purpose of the grant is the maintenance of the festivals above mentioned nor is any stipulation made as to the portion of the income if any which should be allocated to the festivals as distinct from the expenses of the family. This distinguishes the case from those cases which have been quoted by the learned Counsel for the appellants such as the Chinchvad case, *Chintaman Balaji Dev* v. *Dhondo Ganesh Dev* (7) and the cases in *Irapa* bin *Malapa Naik* v. *Apasaheb Irbasapa Desai* (8), *Collector of Thana* v. *Hari Sitaram* (9) and *Rupa Jagshet* v. *Krishnaji Govind* (10), in which there was a grant to the *Devasthan* as such or in which the income was by the terms of the grant divided in certain proportions, a fixed proportion being set apart for the purpose of the maintenance of the temple or religious services. Some stress has been laid by the learned Counsel for the appellants on the fact that the word *Dharmartha* appears in two places in the *sanad* and it is argued that the grant must be considered to be for religious purposes. But if the grant were made to the *Brahmin* petitioners in consideration of their piety and learning, the grant would still be one which might be described by that word. I agree with the construction which the learned Counsel for respondents has put upon the *sanad*, *viz.*, that the grant appears to have been in favour of the *Brahmin* petitioners in view of their having performed certain religious functions and being unable to meet their expenses out of the grant already made to them. In this connection it may be observed that one of the plaintiffs has very clearly admitted, at page 72 of the record, in his deposition that there is another grant out of which the expenses of the festivals are met. This possibly may be the allowance from Par Sevgaon referred to in the *sanad*. It is not stated in the *sanad* that the revenues of the village or any part of them are to be devoted to the maintenance of the festivals in connection with the tombs of Eknath Shasti and Rama Bawa. This taken in conjunction with the finding of the *Inam*

(5) 29 B. 19; 6 Bom. L. R. 648.
(6) 61 Ind. Cas. 146; 23 Bom. L. R. 161 at pp. 181, 182, 186; 45 B. 463.
(7) 15 B. 612.
(8) 16 B 649.
(9) 6 B. 546.
(10) 9 B. 169.

Commission, the terms of the *sanad* under the summary settlement, and the manner in which the holders of the *inam* have dealt with the property as their private property, lead me to hold that the view taken by the learned District Judge on this point is correct and that the grant is not a grant of such a nature that it would be inalienable as being for the support of a religious institution or to meet the expenses of religious observances.

This being the case, the question of *res judicata* again comes in, because the High Court having held the mortgage binding on Eknath whose right of redemption has been declared to be for ever foreclosed, that decision would be binding on the plaintiffs who are his heirs. That is sufficient for the decision of the appeal but there is further the question of limitation.

The present suit is a suit for a declaration and injunction and as such falls under Art. 120 of the Indian Limitation Act, the limitation applicable being six years from the date when the cause of action arose. The cause of action in a suit to set aside an alienation arises when the alienation is made and not when the alienation becomes known to the plaintiffs. That has been held in *Venkatachella Reddiar* v. *Collector of Trichinopoly* (11). The alienation in this case was as long ago as 1875. The plaintiff attained majority in 1897 and his suit would be barred in 1900, three years later. It has been contended by the learned Counsel for the appellants that the Article applicable is Art. 144. That, however, applies to suits for possession and this is not a suit for possession but a suit for a declaration and injunction. It has been further contended that no cause of action arose to the present plaintiffs until 1921 when at the request of the mortgagees their names were added as *co-vahivatdars* along with Eknath. But as long ago as 1911 the High Court confirmed the decree in the redemption suit holding that Rs. 10,000 and odd were payable by the mortgagors *Inamdars* to the mortgagees Bagdes the present respondents Nos. 2 and 3, and again in 1917 on the application of the mortgagees the order declaring the right of redemption of the *Inamdars* to be for ever barred was made by the High Court. That is an order made in a suit to which Eknath was a party. He subsequently attempted unsuccessfully to get that order reviewed. It is difficult to see why in any case the cause of action should not have arisen to the plaintiffs when the alienation of the alleged *Devasthan* property by the *Inamdars* was asserted in a Court and held to be valid and binding on the mortgagors who are the uncles of the present plaintiffs.

There is, of course, in the present case no question of a temple or an idol. The objects of the so-called charity are only the celebration of the death anniversaries of Eknath Shasti and Rama Bawa. But that would not prevent the grant from mentioning that the revenues of the village were to be devoted to the expenses of the observance of those festivals if as a matter of fact the primary object of the grant was the maintenance of the festivals and not rather the maintenance of the family who conducted the festivals. In these circumstances I have no doubt that the finding of the lower Court in this point as regards the *sanad* is correct. That being so, as a question of the validity of the mortgage could not be raised by Eknath himself, it cannot be raised by the present plaintiffs who are his heirs Any interest, as I have already stated, which they claim in the alleged charity can only be derived by them from their relationship to the family of the grantees, and I have already referred to the statement in the judgment of the lower Court that it was ultimately admitted that the plaintiffs brought the present suit as presumptive heirs of Eknath. Lastly, a suit of this character is, in my opinion, one in which the cause of action arises at the date when the alienation of the so-called inalienable property is made, and, therefore, in any view of the case the suit is time-barred and the appeal must fail and is dismissed with costs.

Turning now to the cross-objections it has been objected that the learned District Judge was in error in fixing the value of the suit for the purpose of Pleader's fees at Rs. 13,000, *viz.*, ten times the income of the property; the average income is stated to be Rs. 1,300 and it is argued that as the defendants have lent money on mortgage at an average rate of six or six and a half per cent. the value of the property should be sixteen and a half years' purchase which would amount to Rs. 21,000. As regards this point the exact value of the property is uncertain. I do not think there are sufficient materials on record for differing from the view taken by the learned District Judge.

The second point taken is that the Judge

(11) 33 Ind. Cas. 45; 38 M. 1064 at p. 1070.

was wrong in refusing two sets of Pleaders' fees to defendants Nos. 2 and 3. It is contended that under the Bombay Pleaders Act the defendants having employed two Pleaders were entitled to two sets of Pleaders' fees. Sections 20 of the Bombay Pleaders Act says:—

"Where a party has, before the first hearing of a proceeding engaged more than one Pleader the fees of two pleaders may be taxed in the bill of costs in the following cases."

The present case falls under cl. (*a*) "in any original suit, of which the amount or value of the subject-matter exceeds Rs. 5,000". It is not disputed that there were two Pleaders apart from Mr. Patwardhan who conducted the case on behalf of the defendants. But the learned Judge says that one of the Pleaders was very junior and, therefore, the Judge in the exercise of his discretion did not allow the double sets of Pleaders' fees. The rule, however, is laid down in *Tulsi* v. *Omkar* (12), that in cases under s. 20, cls. (*a*), (*b*), and (*c*) of the Bombay Pleaders Act, 1920, the fees of two Pleaders shall be taxed in the bill of costs, unless the Court otherwise directs. The reason given by the lower Court for disallowing the fee of one Pleader on the ground that he was junior appears to me to be somewhat inadequate. I would, therefore, vary the decree by allowing two sets of Pleaders' fees so far as regards defendants Nos. 2 and 3 with costs in proportion. Defendant No. 4, the Secretary of State for India, is of course entitled to his costs.

The remaining applications may be dealt with briefly. The plaintiffs applied to amend their plaint on the ground that by reason of the death of Eknath during the pendency of the suit they became entitled to possession of the property as distinct from the declaration and injunction which they sought at the time the suit was instituted. That application came on for hearing with the appeal and has been objected to by the other side on the ground that it would involve the introduction of questions foreign to the suit as originally brought and might necessitate additional evidence apparently on such questions as adverse possession and the like. It was also suggested that there might be some question as to the relationship of the plaintiffs to Eknath but that position has not been at all expressed. I think in view of the result of the appeal this question has now lost all importance and that it is not necessary to allow the amendment. This application is dismissed with costs. Opponent No. 4 to get his costs separately.

Then the defendants made an application to this Court that security for costs might be taken from the plaintiffs as they were not residents of British India. A rule was issued in that application but no order has been passed as by consent it was to be brought on with the appeal. I may point out that the object of taking security for costs from an appellant is that if an order for security is made and is not complied with the appeal abates. But when an appeal has been heard and decided on the merits, as in the present case, the object of asking for security altogether disappears and, therefore, no order asking for security need be made. No order as to costs.

The remaining application is the one regarding the giving of security by the respondents for the revenues which they recovered from the village during the progress of the suit. For some reason or other this appeal has been five years before hearing. As security has been given the rule will be discharged with costs. The application has very little importance. Costs of this application will follow the result of the appeal.

Nanavati, J.—I entirely agree.

There is only one point on which I think it might be desirable to add a few observations. The central point in this appeal is the construction of the *sanad*. If the *sanad* of 1790 did not create a religious endowment in favour of any shrine or religious institution, it follows that the whole case of the appellants falls to the ground. The case rests on the basis that the *sanad* gives the *inam* for the purpose of a religious endowment and, therefore, the *inam* is inalienable. But if the true construction of the *sanad* is that the *inam* is a personal *inam* for the benefit of the grantees, then it is clear that appellants cannot succeed, whatever may be the result as to the contention on the other points in the case. Now it will be seen that in the earlier portion of the *sanad* the recital is made as to the representations on which the *inam* was sought and the last sentence of that paragraph runs:—

"Therefore, if the grant of a village were kindly made as a new *inam*, in charity, we shall arrange about our expenses from it, and invoke blessings for your prosperity."

That is to say the petitioners themselves asked for the *inam* in order to arrange about their expenses from the grant.

(12) 102 Ind. Cas. 661; 29 Bom L. R. 897; A. I. R. 1927 Bom. 399; 51 B. 492.

Then in the second paragraph what was taken into consideration by the grantor is also set out and there again it is stated that it appeared to the *Sarkar* meritorious and desirable that for the provision of their expenses with the annual allowance a village should be granted as a new *inam*. So that what was asked for and what was taken into consideration was the fact that the grantees had to be provided with their expenses.

And in the final clause of the *sanad* it is stated that "you, and your sons and grandsons, etc, from generation to generation, should enjoy the *inam*, along with the annual allowance." As the learned District Judge observes, the *Darbar* did not show the least interest in these festivals, or in the way in which the grantees were to use the income of the village. The grantor did not even by implication suggest that any portion, leave alone any definite portion of the income of the *inam* was to be devoted to the festivals which the petitioners were said to be in the habit of observing, and there is not a single clause which suggests that the grant was conditional on a continued celebration of those festivals. In these circumstances I think it is hopeless for the appellants to induce the Court to hold that the *sanad* confers the *inam* in favour of a religious endowment. It is quite clear that the *inam* was for the personal benefit of the grantees and their heirs and that being so, it was clearly alienable by the rightful holder for the time being.

The Chinchvad case, *Chintaman Balaji Dev* v. *Dhondo Ganesh Dev* (7) is clearly distinguishable as a definite portion of the revenues of the *inam* had been at some stage allocated for the purpose of the religious endowment leaving the balance for the benefit of the grantees' family. No argument can, therefore, be founded on this case, which could help the appellants.

R L. *Appeal dismissed.*

BOMBAY HIGH COURT.

First Civil Appeal No. 195 of 1925.
March 27, 1931.
BEAUMONT, C. J., AND MURPHY, J.

KALIDAS DAMODAR AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RUKSHAMANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Will—Construction—Charitable trust—Gifts in alternative—Previous gifts invalid but residuary gift valid—Effect—Persons entitled to manage or apply to Court to enforce trust—Death of trustees—Power of sole surviving trustee to appoint by Will.

Generally speaking, if a trust is of a charitable or public nature, the Advocate-General or the Collector is the only person who can apply to the Court to enforce the trust. In the case of a private trust it is the beneficiary interested who can apply. Where a Will provides for the funeral of the testator or the disposal of his body in the performance of which no person has any direct interest, no one can insist on these provisions being carried out. Even the nearest relative of the testator has in that capacity no *locus standi* to apply to the Court to enforce the provisions of the Will in which no one is directly interested. [p. 169, col. 2; p. 170, col. 2.]

Where a Will provides that if one of the trustees dies, the others may appoint any one in his place and no such appointments are made with the result that only one trustee is left behind, it is not open to such trustee to appoint new trustees by his Will either in his own place or in place of others for the simple reason that by the time the Will operates he ceases to be a trustee. [p. 170, col. 1.]

Where there are no trustees left, the heirs of the testator are the proper persons to manage the trust. *Kashinath* v. *Gangubai* (3), followed. [p 170, col. 1.]

A testator provided in his Will that the residue of his property should be spent in distributing brass vessels or in giving dinner to *Brahmans* in Shukaltirth or in providing water wells wherever there be scarcity of water and the surplus, if any, should be utilised in the *Sadavarta* of Shukaltirth. The objection directed against the Will was that the first two objects not being charitable the Will failed entirely:

Held, that the ultimate gift to *Sadavarta* of Shukaltirth was by itself a good residuary gift, and even if any of the previous gifts failed, the result was that the property in respect of which the gift failed fell into the residue and passed to the *Sadavarta*. [p 169, col. 1]

First Appeal from a decision of the First Class Subordinate Judge at Broach, in Civil Suit No. 110 of 1925.

Mr. *G. N. Thakor*, (with him Mr. *K. V. Patel*), for the Appellants.

Mr. *H. V. Divatia*, for the Respondents.

Beaumont, C. J.—This is an appeal from the First Class Subordinate Judge at Broach. The relevant facts are that the testator, one Dulab, died on February 20, 1902, having made a Will dated February 17, 1902, by which he appointed five persons as trustees. The last surviving trustee, one Gordhan, died on March 7, 1925. Gordhan by his Will appointed defendant No. 2, in effect, as trustee of the Will of the original testator. Defendant No 1 is the daughter and heir of Gordhan. The plaintiffs are the heirs of the original testator, Dulab, and they commenced this suit in the year 1925 and claimed, in the first place, that the Will of Dulab is invalid; secondly, and, in the alternative, that if the Will is valid,

then according to the true construction of cl. 6 thereof there is an intestacy as to residue and they are entitled under the Indian Succession Act.

The learned trial Judge held that the Will of Dulab was well executed, relying on the facts, first, that it was registered, secondly, that a certificate of succession was obtained, thirdly, on the oral evidence as to attestation, and, fourthly, on the lapse of time which had expired between the date when the Will was made and the date when it was challenged, and Mr. Thakor, in this Court, has agreed that it is not possible for him to challenge those findings.

The next point to determine is as to the construction of the Will. By cl. 4 the testator states that he is the owner of certain properties, and that the same are his own property, and are to be gifted and managed in the manner he proposed thereunder. Then, by cl. 5 he appointed five persons, including Gordhan, to be trustees. Then cl. 6 is the material clause, and by that clause the testator provides that as soon as he dies his trustees should own and possess and manage the properties, and then he provides as follows:—

"The funeral ceremony expenses of my brother Shivlal is left undone. If I am alive I shall do the same, else if I die, my trustees by a majority of votes as they think best according to the custom and my repute in the case should perform the funeral ceremony expenses both of my deceased brother's as well as of mine. Besides the said trustees should do by a majority of votes and as they think best, the Gorani N'at after the death of Bai Amba my aunt (father's sister) who is now living. None should object therein and all objections to the same shall be void."

Then there are some directions to pay legacies, which are not material, and then in sub-cl. (*iii*) of cl. 6 the testator provides:—

"Whatever properties are left after deductions (of expenses and payment of debts) as in paras. 1 and 2 should be sold of and moneys and credits be collected by the said trustees and out of the said collected amount, the trustees should by a majority of votes utilise the same, with the object of perpetuating my brother's as well as my name either in distributing brass (vessels) or in giving dinner to *Brahmins* in Sukaltirth, or in providing water wells wherever there be scarcity of water and if any amount is still left in surplus the same should be utilised in the Sadavarta of Shukaltirth."

And then cl. 7 provides:—

"If by chance any of the said trustees dies either before or after my death, the surviving trustees should appoint a new one in his place and that the said newly appointed trustee shall have the same authortiy and powers as the others."

Mr. Thakor on behalf or the plaintiffs says that the gift under sub-cl. (iii) of cl. 6 of the Will is void. He says that the direction to distribute brass vessels is not charitable and is too vague to be enforced, and he says that the direction to give dinner to *Brahmins* in Shukaltirth is also not charitable, and, being unlimited in point of time, is void. He agrees that the provisions for providing water wells and the gift to the Sadavarta are both charitable, but he relies on the principle which is, I think, established by the authorities that where gifts are in the alternative and some are charitable and some non-charitable then if the non-charitable gifts are void the whole gift is void.

We have been referred to Mulla's Hindu Law and certain cases therein referred to on the question whether a gift for giving food to *Brahmins* is charitable, the cases particularly referred to being *Lakshmishankar* v. *Vaijnath* (1) and *Dwarkanath Bysack* v. *Burroda Persaud Bysack* (2). I desire to keep an open mind as to that, because I think it is not necessary to decide the point, and I am not sure whether the cases go as far as is claimed. On my reading of the Will the ultimate gift by the words "and if any amount is still left in surplus, the same should be utilized in the Sadavarta of Shukaltirth" is by itself a good residuary gift, and therefore if any of the previous gifts fail the result is that the property in respect of which the gift has failed falls into residue and passes to the Sadavarta. That being so, Mr. Thakor's clients, the plaintiffs, have no interest in the residuary estate.

Mr. Thakor's next point is that even supposing that is so, and assuming that the defendants are the properly constituted trustees of the Will, nevertheless, his clients as the heirs of the testator, have a right to see that the provisions of the Will are carried out. I know of no authority for that proposition. Generally speaking, if a trust is of a charitable or public nature, the Advocate-General or the Collector—that is the officer corresponding to the Attorney-General in England—is the only person who can apply to the Court to enforce the trust. In the case of private trust it is the beneficiary interested who can apply. There are no doubt sometimes provisions in a Will, for instance as to the funeral of the testator or the disposal of his body in the performance of which no person has any direct interest. In such cases, so far as I am aware, there is no one who can insist

(1) 6 B. 24.
(2) 4 C. 443.

on these provisions being carried out. It is not, I think, the law that a person who claims to be the nearest relative of the testator has in that capacity a *locus standi* to apply to the Court to enforce the provisions of the Will in which no one is directly interested.

Then, the next point is as to whether the defendants are the properly constituted trustees of the Will. Clause 7 provides that on the death of a trustee the surviving trustees can appoint any one in his place. Originally there were five trustees, of whom four died, leaving Gordhan, and I have no doubt that Gordhan in his lifetime as the surviving trustee could have appointed new trustees, notwithstanding that cl. 7 refers to the plural "surviving trustees". But in my view cl. 7 does not authorise the last surviving trustee to appoint a new trustee by Will in his own place or in the place of the others. When the Will takes effect he has ceased to be a surviving trustee, and I think, therefore, that the language of cl. 7 does not cover that case, and that the defendants were not, therefore, properly constituted trustees of the Will.

Then, Mr. Thakor says that, if that is so, the plaintiffs, as the heirs of the testator, are the proper persons to manage his estate as the trustees, and for that he refers to a passage in Mulla's Hindu Law at page 440 and to a decision of this Court in *Kashinath* v. *Gangubai* (3). I think there is some force in that contention, and that it may well be that there being no trustees the plaintiffs are the persons entitled to manage the trusts of this Will But the defendants in their evidence say that they have handed over the whole property to the Sadavarta, and if they have done so, and if the Sadavarta is satisfied that they have got everything which they can get, then it seems to me that there is no trust left to manage. There is no evidence that the trustees, either the original trustees or the survivors of them, ever exercised the discretion given to them under cl. 6 (*iii*) of the Will to apply part of the estate in distributing brass vessels or in giving dinners to *Brahmins* or in providing water-wells. Having regard to the lapse of time and the impossibilty now of getting any evidence as to what the trustees did in the matter, I think, we must assume that the trustees elected not to exercise their discretion by using the testator's property in any of those ways. I think, therefore, that the position is that the Sadavarta of Shukaltirth has become the sole residuary legatee, and, as I say, if, in fact, they have got the whole of the residue then there is nothing to manage. But the evidence of defendant No 2 seems to me not very satisfactory. He says he has handed over the property to the Sadavarta's trustees, but he does not know their names and it is not suggested that he has executed any legal conveyance, and I am not prepared to assume that the property has all been correctly accounted for.

It seems to me impossible to pass a final order in this matter without ascertaining the views of the residuary legatee, that is to say, the trustees of the Sadavarta of Shukaltirth, and I think that inasmuch as the plaintiffs are asserting that they have a right to manage this property, it is for them to bring the residuary legatee before Court. I think therefore, that the appeal will have to stand over till April 16, in order to enable the plaintiffs to bring before the Court the trustees of the Sadavarta, and, if they think fit, the Advocate-General, and we can then find out what is the proper way of dealing with the matter.

The defendants who say that they have handed over the property to trustees of the Sadavarta should give every facility to the plaintiffs to enable them to find out who those trustees are and effect service upon them, and of course in dealing with the question of costs we shall have regard to the way in which the parties have behaved.

R. L. *Order accordingly.*

(3) 117 Ind. Cas. 523; 31 Bom. L. R. 319, confirmed in 129 Ind. Cas. 741; 32 Bom. L. R. 1687; A. I. R. 1929 Bom 193.

BOMBAY HIGH COURT.

Civil Reference No 11 of 1930.

January 30, 1931.

BEAUMONT, C. J., AND MURPHY, J.

THE COMMISSIONER OF INCOME-TAX, BOMBAY.

versus

MAJOR K. C. GOLDIE.

Income Tax Act (XI of 1922), ss. 2 (6), 4, 20, 48 —Sterling Companies registered in United Kingdom but carrying on business in India—Dividends received outside British India—Liability to income-tax—Illegal levy of tax—Right to refund—Certificate of principal officer in United Kingdom, validity of.

Dividends received outside British India from sterling companies registered and with their share register in the United Kingdom but, satisfying the definition of a company in s. 2 (6) of the Indian

Income Tax Act and assessed to income-tax in British India, are not to be taken into account as part of the total income of an assessee who resides outside British India for the purposes of income-tax assessment. [p. 172, col. 1.]

Where the assessee is a person liable to assessment to Indian income-tax in respect of part of his income, a refund of Indian income-tax is admissible in respect of the sums or dividends received by him from such companies. [*ibid.*]

Certificates under s. 20 of the Income-Tax Act, signed by the principal officer in the United Kingdom of such companies can be regarded as valid certificates for the purpose of s. 48 (1) of the Income-Tax Act and refund granted on their production.

Civil Reference made by the Commissioner of Income-Tax, Bombay Presidency.

Sir *Jamshed Kanga*, Advocate-General, with him Mr. *A. Kirke Smith*, Government Solicitor, for the Commissioner.

Mr. *Binning*, (with him Messrs. *Little & Co.*), for the Assessee.

Beaumont, C. J. - This is a Reference by the Commissioner of Income Tax under s. 66 asking for our opinion on three questions which he states in para. 8 of the case.

It appears that the assessee, Major Goldie, is entitled to income, derived from four sources set out in para. 4 of the case. The first is dividends paid in India by companies registered in British India. The second source is dividends paid in the United Kingdom by companies doing business in British India but registered in London and having their head offices in London, and, I understand, also having their share register in London, though that fact is not stated. The third source is interest earned in British India and the fourth source is income accruing, arising and received outside British India.

The questions arise in respect of the second source, *i. e.*, dividends paid in the United Kingdom by companies doing business in British India, but registered in London and having their head offices in London. The particular companies from which the income is derived are admitted to be companies within the definition contained in s. 2 (6) of the Indian Income Tax Act

The first question is, whether the assessee is liable to be assessed in respect of income derived from those companies, and it appears to me to be quite clear that he is not so liable. The companies themselves have paid income-tax in respect of income which accrues or arises in India, but the dividends which those English companies pay to the assessee, who is resident in England, are simply a debt payable by an English debtor to an English creditor, and the source from which the debtor obtains the money with which he pays is irrelevant. It seems to me clear that these dividends are not income which accrues or arises in British India, and they are plainly not received in British India. Therefore, by virtue of s. 4 of the Indian Income Tax Act, that income is not liable to assessment.

The second question which arises is as to whether the assessee is entitled to a refund under s. 48 of the Indian Income Tax Act That section is in these terms:—

"48 (1) If a shareholder in a company who has received any dividened therefrom satisfies the Income Tax Officer...that the rate of income-tax applicable to the profits or gains of the company at the time of the declaration of such dividend is greater than the rate applicable to his total income of the year in which such dividend was declared, he shall, on production of the certificate received by him under the provisions of s. 20, be entitled to a refund on the amount of such dividend (including the amount of the tax thereon) calculated at the difference between those rates."

There is no doubt that the present assessee, Major Goldie, is a shareholder in a company as defined by the Act who has received a dividend therefrom. Therefore, he is a person to whom, *prima facie*, the section applies. He has then got to satisfy the Income-tax Officer that the rate of income-tax applicable to the profits or gains of the company in question at the time of the declaration of such dividend (which was eighteen pies) is greater than the rate applicable to his total income of the year.

Now, in order to ascertain what his total income of the year is one has to look, first of all, at the definition in s. 2 (15) of the Indian Income Tax Act, which says:—

"'total income' means total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in s. 16;"

therefore, he must have a total income to which the Act applies, that is by virtue of s. 4 an income accruing, or arising or received in British India. If he has got such a total income, then it seems to me that he comes within the section. In the case of Major Goldie he has such an income. He is assessable in respect of the first source of income, being dividends paid in India by companies registered in British India, although having regard to s. 14 (2), if the company has paid the tax, the shareholder will not have to pay it over again. He is also assessable in respect of the third source of income, which is interest earned in British India. Therefore, it seems to me that he is entitled to claim a refund.

In ascertaining the amount of his total income for the purposes of calculating a refund the provisions of s 48 (4) have to be borne in mind. That sub-section does not contain, in my view, a further definition of the total income, but for the purposes of s. 48 it adds certain sources of income to the total income defined in s. 2 (15), and it provides that total income is to include, in the case of any person not resident in British India, all income, profits and gains wherever arising, accruing, or received, which, if arising, accruing or received in British India, would be included in the computation of total income under s. 16. So that for the purpose of ascertaining the total income under s. 48, you have to take the total world income, that is, in the case of Major Goldie, all the sums set out in para. 4 of the case, which I understand to be gross income before any deduction in respect of English or Indian income tax. As I understand from the case that this total world income would be liable to be assessed at the rate of twelve pies, and as the company has been assessed at the rate of eighteen pies I think that the assessee is entitled to a refund at the rate of six pies.

With regard to the actual questions put to us, we are disposed to think that they are too wide to be answered in the actual form in which they are put.

I propose to answer question (1) by saying that dividends received outside British India from sterling companies registered and with their share register in the United Kingdom but satisfying the definition of a company in s. 2 (6) of the Act and assessed to income-tax in British India, are not to be taken into account as part of the total income of the assessee for the purposes of income-tax assessment. No question of super-tax arises, and I do not propose to deal with that.

With regard to question (2), I think the answer should be that the assessee being a person liable to assessment to Indian income-tax in respect of part of his income, a refund of Indian income-tax is admissible in respect of the sums or dividends received by him from the companies referred to in the answer to question (1).

Question (3) has not been argued and it is admitted that the answer should be in the affirmative.

I think I ought to say, in view of the observations of the learned Commissioner appearing in the case, that the question whether the assessee would be entitled to the deduction claimed if he had no income assessable to tax under the Indian Income Tax Act does not arise, but my own view is that in such a case the shareholder has no total income to which the Act applies, and, therefore, s. 48 would have no application in such a case.

No order as to costs.

Murphy, J.—I would answer the questions in the same sense. Major Goldie's income consists of four items. Of these the first was a dividend paid in India by a company registered in British India, and the second a dividend paid in the United Kingdom by a company doing business in British India but registered in London and having its head office in London. The third an item of Rs. 10 interest paid him in India and the last income accruing wholly outside British India. Two of these are items on which income-tax would ordinarily be assessable in India, and one of which is totally exempt from the tax.

The question before us is whether the second kind or (*b*) income derived from the dividend paid by the company registered in England but doing business in India can be included within the definition of "total" income under s. 23 (3). This is a charging section only and refers to "total" income without defining it. The definition is in s 2 (15), and is as follows:—

"'total income' means total amount of income, profits and gains from all sources to which this Act applies computed in the manner laid down in s. 16;"

and s. 16 includes in total income sums actually exempted from the tax under the proviso to sub-s. (1) of s. 7, provisos to s. 8, sub-s. 2 of s. 14, and sums falling within s. 15. Major Goldie's (*b*) item of income would fall within sub-s. (2) of s. 14 as having already paid income tax in the hands of the company. But Major Goldie is not resident in India, and the dividend was paid to him by the head office of the company in England. I think that in those circumstances the Act does not apply to this item, and that it cannot be reckoned as part of his total income under the definition.

But, as pointed out by the learned Chief Justice, the questions put to us really turn on whether Major Goldie is or is not entitled under s. 14 (2) to a refund of the income-tax already paid on this dividend by the company, being the difference between the rate at which the company has paid, and the rate at which he would have to pay according to his total income.

Major Goldie has some income in India, which is assessable under the Act, though being below the minimum it would not in his case be taxed, and it seems to me that being an assessee, he is entitled to a refund of Indian income-tax on sums received by him as dividend from the company referred to under item (*b*) on his income.

I, therefore, answer the questions put to us as has been done by the Honourable the Chief Justice.

A. *Answer accordingly.*

BOMBAY HIGH COURT.

First Civil Appeal No. 364 of 1925.
February 9, 1931.
BEAUMONT, C. J., AND MURPHY, JJ.

THE ASSISTANT COLLECTOR, SOUTH SALSETTE—APPELLANT
versus
SAHPURJI CAWASJI—RESPONDENT.

Land Acquisition Act (I of 1894), s. 27 (2)—Costs of proceedings in higher Court—Discretion of Court.

Section 27 (2) of the Land Acquisition Act, is limited to the proceedings in the Court of first instance, and does not apply to proceedings in higher Courts. Costs of such proceedings are in the discretion of those Courts.

First Appeal from the decision of the Assistant Judge, Thana, in Reference No. 28 of 1921.

Sir *Jamshed Kanga*, Advocate-General (with him Mr. *P. B. Shingne*), Government Pleader, for the Appellant.

Messrs. *G. N. Thakor* and *Rodrique* (with him Mr. *A. A. Adarkar* with Messrs. *Daftary, Ferreira & Divan*,) for the Respondent.

[Judgment on the merits was delivered by Murphy, J.]

Beaumont, C. J.—In this case it has been argued that the question of costs is governed by s. 27 (2) of the Land Acquisition Act. That argument involves this that the words in sub-s. (2)

"When the award of the Collector is not upheld, the costs shall ordinarily be paid by the Collector,"

govern the whole proceedings both in the Court of first instance and in any subsequent Courts of Appeal. I think that is not the right view. I think s. 27 (2) is limited to the proceedings in the Court of first instance. The word 'upheld' would not be applicable to any other Court except the Court of first instance, because that is the only Court in which the question of upholding the Collector's award arises, and in any other Court the question would be as to whether the decision of the lower Court and not of the Collector should be upheld. Moreover, the claimant's argument would give rise to this singular result that if a Collector makes an award which is varied and not upheld in the District Court and the claimant then unsuccessfully appeals to this Court and then to the Privy Council the claimant would be entitled to the costs of these unsuccessful appeals. That cannot, I think, have been intended. I think, therefore, the costs are in our discretion.

A. *Order accordingly.*

BOMBAY HIGH COURT.

Second Civil Appeal No. 286 of 1928.
August 1, 1930.
PATKAR AND BARLEE, JJ.

BAI MANI AND OTHERS—DEFENDANTS—APPELLANTS
versus
USAFALI BHUDAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Debts—Criminal misappropriation by father—Son's liability—Pious obligation—'Avyavaharika' debt—Burden of proof—Civil case—Proof of crime—Quantum of evidence necessary—Legal representatives—Nature of liability.

Under the Hindu Law if a father's liability arises directly from a criminal act, *i. e.*, an act for which the father may or may not have been successfully prosecuted, but which can be presumed or proved to be criminal on the evidence on the record, the son would not be bound to pay the father's debt. [p. 175, col. 1.]

(Case-law discussed.)

Barlee, J.—In a civil suit the onus of proof of the commission of a crime is not so heavy as in a prosecution for that crime. [p. 175, col. 2.]

One cannot be personally liable for the debts of a deceased person; the liability can be placed only on the estate of the deceased. [*ibid.*]

Second Appeal against a decision of the Assistant Judge, Ahmedabad, in Appeal No. 47 of 1927.

Messrs. *G. N. Thakor* and *R. J. Thakor*, for the Appellants.

Messrs. *G. A. Phadnis* and *H. V. Divatia*, for the Respondents.

Patkar, J.—This was a suit brought by the plaintiff to recover from defendant No. 3 and the joint family estate of the other defendants the sum misappropriated by the deceased Bhimashankar Motiram who was the guardian of the minor appointed by the District Judge of Ahmedabad.

The learned Subordinate Judge passed a decree against the estate of the deceased Bhimashankar Motiram in the hands of the other defendants and the joint estate of defendants Nos. 3 and 4 and a personal decree only against defendant No. 3 on the ground that he had signed a statement on 17th August, 1925. Defendant No. 1 is the widow, defendant No. 2 the son, and defend-

ants Nos. 3 and 4 are the brothers of the deceased Bhimashankar. On appeal by the defendants no cross-objections were filed by the plaintiff, and the learned Assistant Judge varied the decree of the Subordinate Judge, and passed a decree against defendants Nos. 1 to 4 and made them personally liable.

It is urged in this second appeal that the decree, in so far as it made defendants Nos. 1, 2 and 4 personally liable in the absence of any cross-objections, was erroneous, that defendants Nos. 1, 3 and 4 were not liable personally for the debts of the deceased, and that the son defendant No. 2 was not liable to pay the debt of his father as it was tainted with illegality and immorality.

The learned Assistant Judge had no jurisdiction to vary the decree of the Subordinate Judge and pass a personal decree against defendants Nos. 1, 2 and 4 in the absence of any cross-objections. It is contended on behalf of the respondents that the lower Appellate Court had jurisdiction under O. XLI, r. 33, Civil Procedure Code, to pass a personal decree against defendants Nos. 1, 2 and 4. It appears, however, from the plaint that no personal decree was asked for against defendants Nos. 1, 2 and 4, but a decree was prayed for against the estate of the deceased Bhimashankar Motiram and against defendant No. 3. In the absence of any claim made in the plaint for a personal decree against defendants Nos. 1, 2 and 4, we think that the order of the Assistant Judge passing a personal decree against defendants Nos. 1, 2 and 4 was erroneous.

We do not agree with the view of the learned Judge that defendant No. 3 was liable personally for the money misappropriated by the deceased Bhimashankar simply on the ground that he made a statement in August, 1925. There was no consideration for the agreement contained in that statement, and we think that the learned Judge was wrong in passing a decree against defendant No. 3 personally.

We think that defendants Nos. 1 and 4 could not be liable personally for any statement made in the written statement. As regards the liability of defendant No. 2 to pay the debt of his father, there is a conflict of judicial opinion as to the meaning of the word *Vyavaharika* in the text of *Ushanas* cited in the Mitakshara, in the commentary on verse 47, and *Mayukha* Ch. 5, s. 4, p. 15. In the case of *Durbar Khachar* v. *Khachar Harsur* (1) it was held that the son was not liable to pay the debt of his father which was not *Vyavaharika*, *i. e*, a debt which the father ought not "as a decent and respectable man to have incurred," and the son is answerable for the debts legitimately incurred by his father and "not for those attributable to his failings, follies or caprices." This case has been considered by this Court in the subsequent cases of *Ramkrishna Trimbak* v. *Narayan* (2) and *Hanmant Kashinath* v. *Ganesh Annaji* (3), and has not met with approval in the decisions of the other High Courts *Chhakauri Mahton* v. *Ganga Prasad* (4), *Venugopala Naidu* v. *Ramanadhan Chetty* (5), and *Sumer Singh* v. *Liladhar* (6). *Ayavaharika* has been translated in *Durbar's case* (1) by Knight, J., "as unusual or not sanctioned by law or custom", by Mookerji, J., in *Chhakuri's case* (4) as "not lawful, usual or customary", and by Sadashiva Ayyar, J., in *Venugopala's case* (5) as

"not supportable as vaild by legal arguments and on which no right could be established in the creditor's favour in a Court of Justice."

The conflict of opinion is also reflected in the commentaries and translations. Apararka explains it as not righteous or proper, and Balambhatta as not for the benefit of the family. Colebrooke translated it as "debts for a cause repugnant to good morals," and Gharpure as "not legal or capable of being recovered by a suit." It is unnecessary to decide in the present case the precise meaning of the words "*Vyavaharika*."

With regard to the pious obligations of the son to pay the debt of his father, the matter has been fully considered by this Court in the case of *Hanmant Kashinath* v. *Ganesh Annaji* (3), where a distinction is made between the liability of the sons to pay the father's debt in respect of money which was misappropriated by the father and money for which the father was liable on account of breach of civil duty. The son is not liable to pay the debt when such debt consists of money misappropriated by the father, and in support of the proposition the cases of *Mahabir Prasad* v. *Bas-*

(1) 32 B. 348; 10 Bom. L. R. 297.
(2) 31 Ind. Cas. 301; 40 B. 126; 17 Bom. L. R. 955.
(3) 51 Ind. Cas. 612; 43 B. 612; 21 Bom. L. R. 435.
(4) 12 Ind. Cas. 609; 39 C. 862; 15 C. L. J. 228.
(5) 14 Ind. Cas. 705; 37 M. 458; 11 M. L. T. 427; 23 M. L. J. 61.
(6) 9 Ind. Cas. 624 33 A. 472; 8 A. L. J. 306.

deo Singh (7), *Pareman Dass* v. *Bhattu Mahton* (8) and *McDowell & Co.* v. *Ragava Chetty* (9) are pertinent. On the other hand, where the debt is incurred by the father on account of a breach of civil duty the son would be liable to pay the said debt though the father may be subsequently liable to be prosecuted for criminal misappropriation, according to the case of *Natasayyan* v. *Ponnusami* (10), *Kanemar Venkappayya* v. *Krishna Chariya* (11), *Gurunatham Chetty* v. *Raghavalu Chetty* (12) and 4 Ind. Cas. 1090, *Tirumalayappa Moodelliar* v. *Veerabudra* (13). The decision in the case of *Darbar Khachar* v. *Khachar Harsur* (1) has been criticized in *Chhakauri Mahton* v. *Ganga Prasad* (4) where it was held that the distinguishing line must be drawn between a criminal offence and a breach of civil duty and where the taking of money is not in itself a criminal offence, a subsequent misappropriation by the father cannot discharge the son from the liability. It would follow from the decided cases that if the liability arises directly from a criminal act, *i. e*, an act for which the father may or may not have been successfully prosecuted, but which can be presumed or proved to be criminal on the evidence on the record, the son would not be bound to pay the father's debt. I may, in this connexion, refer to the case of *Jagannath Prasad* v. *Jugal Kishore* (14). In the present case, the plaintiff alleged in the plaint that the amount was misappropriated by Bhimashankar. The removal of the money from the safe was in itself a criminal offence. In the case of *Hanmant Kashinath* v. *Ganesh Annaji* (3) a decree was passed against the father for his failure to account as a trustee and there was no evidence that the property not accounted for was criminally misappropriated by the father who admitted his position as a trustee and the receipt of the property, and the conduct of the father amounted merely to a breach of civil duty as trustee.

The liability in the present case appears on the facts proved in the case to be the direct consequence of an act of the father which would be clearly an offence of criminal misappropriation and therefore it would follow that the son defendant No. 2, would not be liable to pay the debt of the father incurred by means of criminal offence.

I think therefore that the decrees of both the Courts must be reversed and a decree will be passed in favour of the plaintiffs for the amount claimed from the estate of the deceased Bhimashankar Motiram in the hands of defendants Nos. 1 to 4. The plaintiffs and defendants Nos. 1 to 4 will bear their own costs throughout and defendants Nos. 1 to 4 will pay the costs of defendant No. 5 throughout.

Barlee, J.—The plaintiffs sued to recover from defendant No. 3 and the joint family estate of the other defendants, who are the widow and the son of Bhimashankar Motiram and his brothers, the sum which they alleged had been misappropriated by the deceased. The only question of fact at the trial was whether the deceased Bhimashankar had misappropriated money belonging to the plaintiff. The money had been in his charge. The plaintiff is a minor and the deceased was his guardian and the money admittedly was kept in the locked box. The deceased on 20th July 1925, suddenly fell ill and went on leave and died three days later. The news of his death was received at the *taluka kacheri* on 23rd Saturday. The box containing the plaintiff's money was opened on the 25th. In the interval between Bhimashankar's going on leave and the opening of the box, it had been in the keeping of one of the *mamlatdar's* clerks. In these circumstances it is contended by the learned Counsel for the appellants, *i e*, the members of Bhimashankar's family that there can be no inference that it was Bhimashankar who had abstracted the money from the box. It may be conceded that on this evidence a Criminal Court would probably not have found as a fact that Bhimashankar had abstracted the money. But this is not a criminal case, and the onus of proof on a private plaintiff is not nearly so heavy as the onus on the Crown. We cannot say, therefore, that no inference is possible from the evidence which is recorded in the case. That being so it is not permissible for us to interfere with the finding of fact.

For the purpose of this case, then, we must hold that Bhimashankar committed a criminal offence, and the only question before us is as to whether the members of his family, his widow, son and brothers, are personally liable as found by the learn-

(7) 6 A 234; A. W. N. 1884, 47.
(8) 24 C. 672.
(9) 27 M. 71.
(10) 16 M. 99; 3 M. L. J. 1.
(11) 31 M. 161; 17 M. L. J. 613
(12) 31 M. 472.
(13) 4 Ind. Cas. 1090.
(14) 89 Ind. Cas. 492; A. I. R. 1926 All. 89; 48 A 9; L. R. 6 A. 518 Civ.; 23 A. L. J. 882.

ed Assistant Judge. I agree entirely with my learned brother that there can be no personal liability on them. One person cannot be personally liable for the debts of a deceased person. I agree also that the liability can be placed only on the estate of the deceased.

The principal question which we have to decide concerns the liability of the deceased's sons's share in the family property. A son though under a pious obligation to pay the lawful debts of his father, is not bound to pay debts due to certain specific causes specified in the texts, and in particular is not bound to pay such as are termed *Avyavaharika*. This has been interpreted to mean:

"such debts as his father as a decent and respectable man ought not to have incurred," *Durbar Khachar* v. *Khachar Harsur* (1),

and the defendants respondent's learned Advocate has tried to bring the debt in suit within this category on the strength of a passage quoted in *Hanmant Kashinath* v. *Ganesh Annaji* (3), from the case of *Natesayyan* v. *Ponnusami* (10) where it was stated that

"upon any intelligible principles of morality a debt due by the father by reason of his having retained for himself money which he was bound to pay to another would be a debt of the most sacred obligation."

But in that case the retention of the money did not amount to a criminal offence and in *Hanmant Kashinath* v. *Ganesh Annaji* (3), Scott, C J., adopted the view of Mookerjee, J., in *Chhakauri Mahton* v. *Ganga Prasad* (4), that a distinction must be made between such acts as amount to offences and mere civil breaches of trust. In consequence the estate of the minor appellant is not liable for the debt due to his father's criminal breach of trust.

I agree that the decree of the lower Court must be modified as indicated by my learned colleague.

A. *Decree modified*

BOMBAY HIGH COURT.

Second Civil Appeal No. 325 of 1928.

November 4, 1930

PATKAR AND BAKER, JJ.

BALKRISHNA BHIMAJI BEKNALKAR —PLAINTIFF—APPELLANT

versus

RAMKRISHNA GANADHAR DIKSHIT— AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), ss. 7 (11) (cc), 12—Suit for possession against tenant holding over—Valuation—Decision as to class to which suit belongs —Appeal, competency of.

Section 12, Court Fees Act, applies merely to the valuation of the property for the purpose of calculating the Court-fee when there is no question as to the schedule of the Act with reference to which the valuation is to be made, and it does not apply to cases in which it is contended that the property has been wrongly valued and that the relief has been improperly estimated by putting it under a wrong article of the schedule in the Act. Therefore, an appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class. *Dada* v *Nagesh* (1), *Studd* v. *Mati Mahto* (2), and *Tara Prasanna Chongdar* v *Nrisingha Moorari Pal* (4), followed. *Vithal Krishna* v. *Balkrishna Janardan* (3), referred to. [p. 177, cols. 1 & 2.]

Per *Patkar, J.*—At any rate, the Court can interfere in such cases under s. 115, Civil Procedure Code, or s. 5 of Regulation II of 1827, if no appeal lies [p. 177, col. 1.]

Under s. 7 cl. (11) (cc), Court Fees Act, one year's rent is the proper valuation of a suit for recovery of immoveable property from a tenant, including a tenant holding over after the determination of the tenancy. [*ibid.*]

Second Appeal against a decision of the Assistant Judge, Belgaum, in Appeal No. 201 of 1924

Mr. *S. R. Parulekar*, for the Appellant.

Messrs. *G. P. Murdeshwar* and *M. M. Nadkarni*, for the 2nd Respondent.

Patkar, J.—This is a suit brought by the plaintiff to recover two years' rent and possession of the property with mesne profits and costs. The plaintiff paid Court-fee on Rs. 156-5-0. The learned Subordinate Judge held that he ought to have paid Court-fees on Rs. 3,000 on the ground that the net profits from the land during the next year before the date of presenting the plaint were Rs. 200 and that the value of the land was deemed to be 15 times the net profits under s. 7 cl. 5, sub-cl. (c), Court Fees Act, and on the plaintiff's failure to pay the Court-fee stamp the plaint was rejected. On appeal, the learned Assistant Judge confirmed the decision of the learned Subordinate Judge.

On second appeal, a preliminary point was raised on behalf of the respondent that where the Judge allots a particular kind of suit to any of the classes of the Court Fees Act, he has jurisdiction to decide the question of valuation and under s 12, Court Fees Act, on appeal would lie. It is urged that in cases falling under s. 7 cl. 4 the valuation rests with the plaintiff and under Art. 17, Court Fees Act, the valuation is fixed and therefore, in these cases the Court has no jurisdiction to decide the question of valuation and an appeal would lie but in other cases the Court has jurisdiction to decide the question and therefore, an appeal would not lie under s. 12, Court Fees Act. On behalf of th respondent reliance has been placed

on the decision in *Dada* v. *Nagesh* (1), where it was held that an appeal would lie from a decision on the question as to the class under which a suit falls, and reliance is also placed on the decision in *Studd* v. *Mati Mahto* (2). It appears somewhat difficult to reconcile the decision of the Full Bench in *Vithal Krishna* v. *Balkrishna Janardan* (3) with the remarks in the case of *Dada* v. *Nagesh* (1). It was held in *Dada's case* (1) that an appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class. The same view was taken in *Studd* v. *Mati Mahto* (2), and *Tara Prasanna Chongdar* v. *Nrisingha Moorari Pal* (4). If we follow the decision in *Dada* v. *Nagesh* (1) an appeal would lie against the decision of the Subordinate Judge wrongly assigning a suit to a particular class in the Court Fees Act. If, on the other hand, no appeal lies, the Full Bench decision has held that this Court can interfere in revision either under s. 622 corresponding to s. 115, Civil Procedure Code, or Regulation II of 1827 s. 5.

On the merits we have no doubt that the proper valuation for the present suit was Rs. 74-15 6 Rs. 51-5-0 is the amount of the arrears of two years' rent with interest and under cl 11 (cc), s. 7, Court Fees Act, one year's rent Rs. 23-10-6 would be the proper valuation of a suit for recovery of immovable property from a tenant, including a tenant holding over after the determination of tenancy. The plaint in the present case, therefore, would be properly valued if the Court-fees are paid on Rs. 74 15-6. As a matter of fact, the plaintiff has paid Court-fees on valuation of Rs. 156 5 0. We think, therefore, that the learned Judge was wrong in rejecting the plaint.

We would, therefore, reverse the orders of both the Courts rejecting the plaint and direct the Subordinate Judge to try the suit on the merits. Each party to bear his own costs throughout.

Baker, J.—I agree. It has been held by parctically all High Courts that s. 12, Court Fees Act, applies merely to the valuation of the property for the purpose of calculating the Court-fee when there is no question as to the schedule of the Act with reference to which the valuation is to be made, and it does not apply to cases in which it is contended that the property has been wrongly valued and that the relief has been improperly estimated by putting it under a wrong article of the schedule in the Act. This has been held by the Calcutta High Court in *In re Omrao Mirza* v. *Mary Jones* (5) and *Studd* v. *Moti Mahto* (2), by the High Court of Allahabad in *Chunia* v. *Ramdial* (6) and by the High Court of Madras in *Annamalai Chetti* v. *Cloete* (7) and *Kanaran* v. *Komappan* (8). Some difficulty might arise on account of certain expressions in the Full Bench case of *Vithal Krishna* v. *Balkrishna Janardan* (3). But as a matter of fact that case has been considered by this Court in *Dada* v. *Nagesh* (1), which expressly refers to it, and there is also the case of *Sardarsingji* v. *Ganpatsingji* (9), and the effect of all these cases is that an appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class. I, therefore, agree that the appeal lies.

That being the case, on the merits there can be no doubt that the suit in question is covered by cl. 11, s. 7, Court Fees Act, and therefore, the fees payable are to be calculated according to the amount of the rent of the immoveable property to which the suit refers payable for the year next before the date of presenting the plaint.

The order of the lower Court, is, therefore, wrong and it should be set aside.

A. *Order set aside.*

(1) 23 B. 486.
(2) 28 C. 334.
(3) 10 B. 610 (F. B.).
(4) 81 Ind. Cas. 763; A. I. R. 1924 Cal. 731; 51 C. 216; 39 C. L. J. 212; 28 C. W. N. 985.
(5) 12 C. L. R. 148.
(6) 1 A. 360; I Ind. Jur. (N. S.) 351.
(7) 4 M. 204.
(8) 14 M. 169.
(9) 17 B. 56; (1892) P. J. 144.

BOMBAY HIGH COURT.

Letters Patent Appeal No. 31 of 1929.
June 26, 1931.

PATKAR, ACTG. C. J. AND MURPHY, J.

VATSALABAI VINAYAK NIMKAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

VASUDEV VISHNU MUSALE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Family arrangement—Widow's estate under family arrangement, nature of—Succession to widow's estate.

In a family arrangement the compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is. The claim does not rest on contract only but upon a title acknowledged and defined by the contract. *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (6), followed.

[p. 182 col. 1]

The estate which a widow gets under a family arrangement is an absolute estate and forms part of *stridhan* and on her death devolves on her own her heirs and not on the heirs of her husband. *Debi Mangal Prasad Singh* v *Mahadvo Prasad Singh* (2), followed. [p. 181, col. 1.]

One *P* died separated from his brothers, the defendants in the present case, leaving behind certain self-acquired property, but the documents relating to it were in the name of the defendants. After his death the property was divided between the widow of *P* and the defendants. On her death her daughter's daughters claimed the property which had fallen to the share of their grandmother. The defendants pleaded that the property devolved on them:

Held, that the partition between widow of *P* and the defendants was in the nature of a family arrangement and as such the widow's estate was absolute and devolved upon the plaintiffs. [p. 181, cols. 1 & 2]

Letters Patent Appeal from a decision of Baker, J , in Second Appeal No. 458 of 1927, confirming the decree of the District Judge, Ratnagiri, in Appeal No. 312 of 1925, reversing that of the Subordinate Judge at Chiplun, in Civil Suit No. 32 of 1924.

The judgment of Baker,J. was as follows:— This case involves a point of Hindu Law. The facts are simple, and are set out in the judgments of the Courts below. The plaintiffs, who are the grand-daughters of one Parvatibai, sued to recover possession of the plaint property, their case being that the property is the *stridhan* property of Parvati, that Parvati's daughter Dwarkabai died during the lifetime of Parvati leaving no male issue, and plaintiffs as her daughters are Parvatibai's heirs. The defendants who are respectively the brother of the husband of Parvati, and his son contend that on the death of the widow, they, as reversioners of the husband of Parvati, are entitled to the property. It is admitted that if the property is the *stridhan* property of Parvati, her grand-daughters, the present plaintiffs, are the heirs, whereas if it was property of her husband, the defendants are the heirs. It seems that the husband of Parvati, and his brother, defendant No. 1, were separate, and after the death of Pandurang, the husband of Parvati, who died in 1894, a *farkhat* was passed between Parvati and defendant No. 1 and his son. This is Ex. 38, and the decision of this case will depend on the construction of that document. The first Court was of opinion that the language of the document was perfectly clear and conferred an absolute estate on Parvati in the share allotted to her. He, therefore, awarded the plaintiffs' claim. On appeal the District Judge of Ratnagiri was of a contrary opinion and he, therefore, ordered the suit to be dismissed. Plaintiffs make this second appeal.

Exhibit 38, which is a partition deed dated January, 20, 1902, passed by the present defendants to Parvati, the widow of the deceased brother of defendant No. 1, Pandurang, recites that Pandurang was the sole owner of certain properties and had become separated from the defendants twelve years before his death, his death having occurred seven years before. It then proceeds to allot certain property to Parvati subject to the payment of certain family debts. The important portion of the document is the concluding paragraph, which states:—

"We hereby declare that we have no right, title and interest whatsoever in the said property under any circumstances whether you adopt a son and give it to him or whether you give it to your daughter or whether you alienate to anybody in any way as full owner thereof."

The learned Judge of the first Court was of opinion that this conferred an absolute estate in the share allotted to her. The learned Judge of the Appellate Court held that Ex. 38 could not be considered to alter the character of the property for intestate succession. He says:—

"I grant that, in her lifetime, Ex. 38 gave Parvati an absolute right over the property. She could have alienated the same or given away the same to anyone. I also grant that as she was given an absolute power of disposal she could have even made a Will about the property according to her pleasure. But in the absence of any alienation by her in her lifetime or any Will made by her about its disposition, I think the property remained as the property held by Parvati as widow of Pandurang and inheritable by her husband's heirs and not her *stridhan* heirs, see *Kanni Ammal* v. *Ammakannu Ammal* (1), *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2)

"I can only read in Ex. 38 an intention to authorize Parvati to alienate or give away the property in her lifetime or to will it away but no intention to alter the character of the property so as to make it descendible to her *stridhan* heirs in case of intestate succession."

Now of the two cases before the learned District Judge, *Kanni Ammal* v. *Ammakannu Ammal* (1) has not been referred to in arguments and seems to have a very remote bearing, if any, on the point before the Court. It lays down that while one of two daughters cannot by any alienation alter the character of the daughter's estate so far as the right of survivorship or that of the reversioners is concerned, she may alienate her interest in the property or have that interest taken in execution of a decree against her. The bearing of this in the present case is not clear to me, and I need

(1) 23 M. 504.

(2) 14 Ind. Cas. 1000; 34 A. 234; 14 Bom. L. R. 220; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) M. W. N. 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121 (P. C.)

not further refer to this case. The other case, which is a Privy Council case, [*Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2)], lays down the following proposition. According to the Mitakshara there is no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. It was held, therefore, reversing the decision of the Courts in India that the share which the mother in a joint Hindu family obtains after the death of the father on partition of the joint family property between the mother and the sons, is not her *stridhan*, but is given her for her maintenance, and on her death it devolves upon the heirs of her husband and not upon her own heirs. The Privy Council in this decision, after referring to the cases by which it was held that property acquired by inheritance by a woman from her husband is of the same nature as property acquired on partition, say (page 242*):—

"If the share given to a widow on partition is given to her as a substitute for that to which she would be entitled upon inheritance, then, according to the foregoing authorities, it would seem reasonable that it should follow the same rule of descent and revert on her death to her husband's heirs. If, on the other hand, it is given to her by way of provision for her maintenance, it seems equally reasonable that when the necessity for her maintenance has ceased the property should revert to the estate from which it was taken. Of course, the members of a joint family effecting a partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her *stridhan*, so as to constitute a provision for her *stridhan* heirs; but, in the absence of any such intention, their Lordships do not feel justified in putting property acquired by a widow, on a partition of the joint estate, upon a footing different from that on which property coming to her by way of inheritance has been placed."

It follows, therefore, that the share acquired by a widow on partition does not become her *stridhan*, but should be regarded in the same light as property acquired by her as heir of her husband, unless there is an express intention to the contrary, and the learned Counsel for the appellants has rested his case mainly on the passage of the judgment of the Privy Council that I have just read, which is at the bottom of page 242. The present case is not precisely a case of inheritance or of partition. From the terms of Ex 38 it would appear that the necessity of a partition or rather of a partition deed between the brother of Pandurang and the widow of Pandurang, arose in this way. Although Pandurang was separate, as the document recites, from his brothers, and although the properties had been acquired by his exertions and were practically his self-acquisition, the documents relating to them appear to have been in the names of other members of the family. This will be found in the earlier portion of the *farkhat*. It recites:—

"While we were living jointly your husband the deceased Pandurang Vishnu acquired properties by his own exertions. The sale-deed as well as mortgage-deeds of the said properties were taken in the names of those who were present at home on various occasions, but irrespective of these documents your husband Pandurang is the sole owner of the said property. We acquired nothing by our own exertions"

The effect, therefore, of this *farkhat* is to admit that these properties are the self-acquisition of Pandurang, and although the deeds may be in the name of other members of the family, they as a matter of fact have no right to the property. Now, this is not precisely, in my opinion, a partition of a joint estate, but rather a recognition by the members that these properties are the separate self acquisitions of Pandurang, and as such would belong to him solely, and on his death, as he died separate from his brothers, his widow would succeed to them in the ordinary course under Hindu Law, but she would, under Hindu Law, succeed to them as the heir of her husband, and would only take a widow's estate in regard to them as laid down by the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2). The argument of the learned Counsel based on the observations of the Privy Council at page 242* is based on a partition by the members of a joint family agreeing that a portion of the property should be transferred to the widow by way of absolute gift. It seems to me that in order that there should be a transfer by the other members of the family of any property to the widow by means of an absolute gift, we must presuppose that the other members of the family had an interest in the property which they could transfer. I can quite see that supposing certain properties were the joint property of the family, so that the persons executing the *farkhat* had an interest according to their shares in that property, they can very well transfer it to the widow in any way they choose by resigning all their rights in it and thus making it her absolute property, and that it can be contended in such cases that such property would form her *stridhan*. But this is not quite a case of that character. As I read the *farkhat*, the admissions of the

*Page of 34 A.—[*Ed.*

defendants would show that the properties which they were transferring to the widow were properties in which they never had any interest from the beginning, that is to say, these properties were the absoulte property of Pandurang. They were his self-acquisition, and the other members of the family even in the period of jointness had no interest in them as they have admitted. What then is the result? The result, as it seems to me, is that the last paragraph of the Ex. 38, which I have already given, cannot be regarded as a family arrangement by which these persons gave these properties to Parvati in gift, for this reason that they had no interest which they could transfer by way of gift or otherwise, for you cannot of course make a gift of that which does not belong to you. The expressions at the end of the *farkhat* are merely designed to show that they have no claim upon this property, and it seems to me that Parvati took this property which belonged to her husband as her husband's heir. If that is so, it could not be her *stridhan*, as it would be property inherited by her from her husband under the ordinary Hindu Law and she takes a widow's estate in it, and on her death it would revert to her husband's heirs. For these reasons I am in agreement with the view taken by the learned District Judge, but not perhaps for precisely the same reasons. I admit that until a very short time ago I was prepared to hold that the concluding paragraph of Ex. 38 evidenced such a family arrangement as is referred to in *Debi Mangal Prasad Singh' case* (2) by the Privy Council, but on reading Ex. 38 again, I am decidedly of opinion that the admissions made by the male executants of that document show that they did not assert any title at all in those properties which were handed over to Parvati, and, as I have already said, there cannot be any question of a gift of property which does not belong to you. Therefore, the property must be taken to be property inherited by her from her husband, and that being so, under the ruling of the Privy Council, the property at her death would descend in the ordinary course, and does not become her *stridhan*.

For these reasons I confirm the decree of the lower Appellate Court, and dismiss the appeal with costs.

From this judgment a Letters Patent Appeal was filed by the plaintiff.

Mr. *Jayakar* (with him Mr. *K. A. Padhye*), for the Appellants.

Mr. *G. N. Thakor*, (with him Mr. *G. B. Chitale*), for Respondent No. 1.

Patkar, Actg. C. J.—This was a suit brought by the plaintiffs to recover possession of the property in suit by inheritance to their grandmother, Parvatibai, the widow of Pandurang, who died in the year 1924. Defendant No. 1 is the brother and defendant No. 2 is the nephew of Pandurang the husband of Parvatibai.

On January 21, 1922, there was a deed of partition, Ex. 38, between Parvatibai on the one hand and defendants Nos. 1 and 2 on the other, under which outstandings to the extent of Rs. 2,100 were allotted to the widow and she had to pay debts amounting to Rs. 1,500 to the creditors. The widow, therefore, got property woth Rs. 600. The defendants, on the other hand, got property worth Rs. 1,133 subject to the liability to maintain Rukhmabai, another widow in the family. The material portion of the document is as follows :—

"We hereby declare that we have no right, title and interest whatsoever in the said property under any circumstances whether you adopt a son and give it to him or whether you give it to your daughter or whether you alienate to anybody in any way as full owner thereof."

Parvatibai purchased the equity of redemption in the property in suit which was mortgaged to the family, and paid off the sub-mortgage in favour of a stranger out of her own separate property, and enjoyed the property as full owner from 1902 till her death in 1921.

The learned Subordinate Judge held on the construction of the document that Parvatibai was at liberty to bestow the property on her daughter or to dispose of it as owner in any way she liked, and that the executants had no right whatever over the property and that the document conferred, in terms, an absolute estate upon Parvatibai in the share allotted to her. He, therefore, came to the conclusion that the property was the absolute property of Parvatibai, and that the plaintiffs, her grand-daughters, were entitled to that property by inheritance and passed a decree in favour of the plaintiffs.

On appeal, the learned District Judge agreed with the construction of the learned Subordinate Judge so far as the power of alienation was concerned, and held that Ex. 38 gave Parvatibai an absolute right over the property, and that she could have alienated the same or given away the same to anyone, and that she could have willed it away at her pleasure, but he was of opinion that the

property remained as the property held by Parvatibai as widow of Pandurang and inheritable by her husband's heirs and not her *stridhan* heirs.

On second appeal, Baker, J., was at first inclined to hold that the concluding paragraph of Ex. 38 evidenced a family arrangement referred to in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2), but eventually came to the conclusion that the document, Ex. 38, should not be regarded as a family arrangement on the ground that the defendants had no interest which they could transfer by way of gift or otherwise, and, therefore, agreed with the view of the lower Appellate Court. Plaintiffs have filed this Letters Patent Appeal.

It is urged on behalf of the appellants that Ex. 38 is a partition-deed in which an absolute estate is given to the widow and falls within the remarks of the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2).

In construing the document, Ex. 38, we have to look to the circumstances existing in 1902, and not at the time of the present litigation. According to the document, Ex. 38, the property comprised in Ex. 38 was the self-acquired property of Pandurang. Pandurang had become separated from the defendants but the documents relating to the lands were taken in the name of the defendants, and it was agreed that the property of Pandurang should be partitioned between Pandurang's widow, Parvatibai, and the defendants. Property to the extent of Rs. 2,100, subject to the payment of debts of Rs. 1,500, was allotted to Parvatibai, and property worth Rs. 1,133 was allotted to the defendants subject to the right of maintenance of Rukhmabai.

It is contended on behalf of the respondents that the defendants could not alter the devolution of inheritance so far as the property of Pandurang was concerned, and that the document merely evidences an agreement by the defendants not to dispute the alienations made by the widow Parvatibai.

The question depends on the construction of Ex. 38. Parvatibai, described as the full owner of the property, is given a right to alienate property by sale, or mortgage, or by any way whatsoever, and the defendants declared that they had no right, title or interest under any circumstances. It has been held by the Privy Council in the cases of *Bhaidas Shivdas* v. *Bai Gulab* (3), *Shalig Ram* v. *Charanjit Lal* (4), and *Jagmohan Singh* v. *Sri Nath* (5) that where there are words indicating that an absolute interest is given to the widow, she takes an absolute property. It was observed in the last case that there is no magic in the use of any particular words or form of words and the document must be construed as a whole and if it confers the estate out and out with no reservation, right of alienation, would be included even if not expressly conferred. In Ex. 38 the power of alienation is expressly conferred. These decisions relate to Wills or gifts in favour of a wife or widow. But in the case of a partition deed between a Hindu widow and the other male members of the family, it was held by the Privy Council in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2) that the estate a widow gets by right of inheritance stands on the same footing as the estate acquired on partition subject to this condition that the members of the joint family effecting the partition may agree that a portion of the property shall be transferred to the widow by way of absolute gift, as part of her *stridhan*, so as to constitute a provision for her *stridhan* heirs. If this document is construed to be a partition-deed, we think that the absolute estate conveyed under Ex. 38 would fall within the remarks of the Privy Council at page. 131* in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2). It is, however, contended on behalf of the respondents that the document is not, in fact, a partition-deed, that the property belonged to Parvatibai's husband and the defendants had no right to give an absolute estate to the widow and had no right to alter the mode of devolution.

I think, however, in the circumstances of the present case, as the deeds relating to these lands stood in the names of the defendants there was a dispute between the parties as to the title relating to this property, and the document evidences a family arrange-

(3) 65 Ind. Cas. 974; 49 I. A. 1; 24 Bom. L. R. 551; 26 C. W. N. 129; 15 L. W. 412; 20 A. L. J. 289; 42 M. L. J. 385; 35 C. L. J. 314; 24 Bom. L. R. 551; 46 B. 153; A. I. R. 1922 P. C. 193 (P. C.)

(4) 128 Ind. Cas. 265; 32 Bom. L. R. 1578 at p. 1585; A. I. R. 1930 P. C. 239; 34 C. W. N. 1073; 59 M. L. J. 437; 32 L. W. 376; 7 O. W. N. 1069; 52 C. L. J. 466; 11 Lah. 645; 31 P. L.R. 384 (P. C.)

(5) 128 Ind. Cas. 270; 32 Bom. L. R. 1609; A. I. R. 1930 P. C. 253; 7 O. W. N. 922; 59 M. L. J. 446; 32 L. W. 605; (1930) M. W. N. 961; (1930) A. L. J. 1261; 35 C. W. N. 4; 52 C. L. J. 462 (P. C.)

* Page of 39 I. A.—[*Ed.*]

ment which settled the dispute between the parties and was binding on them.

It is urged on behalf of the respondents that Ex. 38 cannot be construed to be a family arrangement, because the defendants had no right to the property and that the property belonged to Parvatibai's husband. When there is a settlement of a dispute or a family arrangement it must be construed as a settlement of the dispute between the parties in whom there is presumed to be an antecedent title of some kind, according to the view taken by the Privy Council in *Rani Mewa Kunwar* v. *Hulas Kunwar* (6) (page. 166)*:—

"The compromise is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is. The claim does not rest on contract only, but upon a title to the land acknowledged and defined by the contract."

I may also refer in this connection to the case of *Krishnaji* v. *Motilal* (7). In *Ram Charan Ramanuj Das* v. *Gobinda Ramanuj Das* (8) it was held that when two parties enter into an agreement, whether it be of compromise or in some other respect, each procures the advantage of the agreement from the other, and no further advantage need be looked for to support the agreement. In the present case the defendants were not entitled to any property of Pandurang and under the agreement they were given property to the extent of Rs. 1,100. That, in our opinion, is suffiicient consideration for the agreement on the part of the defendants to give an absolute title to the widow under Ex. 38, and the document, Ex. 38, in our opinion, under the circumstances of the present case, must be regarded as a family arrangement between the parties. The documents relating to the lands stood in the name of the defendants and this circumstance would vest the apparent legal title in the defendants though the properties were the self-acquisitions of Pandurang, the husband of Parvatibai. There was, therefore, uncertainty as to the rights of the rival claimants, and Ex. 38 composed the disputes between the parties and must be considered as a family arrangement by a settlement based on the acknowledgment of a pre-existing title in the parties to the document. There was no intention to alter the devolution of the estate as at the date of the document Dwarkabai, the daughter of Pandurang, was living and would have succeeded to the property in any event. We think, therefore, that the estate which was given to the widow under Ex. 38 was an absolute estate and formed part of her *stridhan*, and, therefore, the plaintiffs as the granddaughters of Parvatibai are entitled to succeed to this property in preference to the defendants who are the reversioners.

With regard to the house in suit, it has been found by the learned Subordinate Judge that it was acquired by Parvatibai out of her own funds, and it appears from the evidence that he was in possession of independent means. We think that the view taken by the learned Subordinate Judge is right, and we would, therefore, reverse the decree of the lower Appellate Court and restore that of the Subordinate Judge with costs throughout on the respondents.

Murphy, J.—The question to decide is, who is the heir of Parvatibai who died in 1921, and the answer depends on the character of the property and the parties' previous dealing with it, for if it is *stridhan* it should go to her grand-daughters, and if not to the defendants, the reversioners of Parvati's deceased husband.

It appears that on Parvati's husband's death the greater portion of the property stood in the defendants' names was in their possession, and had been long enjoyed by them. It is obvious that as against the widow they were in a strong position. There is no direct evidence as to what happened, but it must have been what is clearly brought out by Ex. 38. This document opens with admissions made by defendants, much against their interest, in view of the facts I have mentioned in connection with their relation to the property. They admit that the property had been self-acquired by Parvatibai's husband, that he was separate from them, his brothers, at his death and that they had themselves no interest. It then recites an agreement to divide it with the widow, the greater part going to the defendants, while they recognise the widow's right to the remainder, to be dealt with as her absolute property, and not as widow's estate. At the time, the heir was Parvatibai's daughter Dwarkabai, but since

(6) 1 I. A. 157; 13 B. L. R. 312; 3 Sar P. C. J. 354; Rafique & Jackson's P. C. No. 27 (P. C.)

(7) 122 Ind. Cas. 66; 31 Bom. L. R. 476; A. I. R. 1929 Bom. 337; Ind. Rul. (1930) Bom. 98.

(8) 114 Ind. Cas. 571; 31 Bom. L. R. 715 at p. 719; A. I. R. 1929 P. C. 65; 33 C. W. N. 346; 29 L. W. 428; 49 C. L. J. 321; (1929) A. L. J. 414; 56 M. L. J. 636; (1929) M. W. N. 427 (P. C.).

* Page of I I. A.—[*Ed.*]

her death in 1911, Dwarkabai's daughters can only inherit her *stridhan*.

The original Court's view was that, by the agreement, the defendants had undertaken to allow the property going to Parvatibai to be hers absolutely, so far as they were concerned, and decreed the suit. The learned District Judge took another view, and reversed the decree holding that, though Parvatibai might have disposed of it in her lifetime, it remained the estate of her husband during her widowhood, and on her death reverted to his heirs. My learned brother, Baker, upheld this view on second appeal, but gave leave to appeal to a Bench. His view was that defendants had originally no interest to give away, and could, therefore, confer nothing on Parvatibai. But actually they had a paper title, documents and possession. It seems to me that the admissions in Ex. 38 were really part of a price for what they got, and the position really was that in consideration of getting a present portion they undertook to waive any right they might acquire in future as reversioners—that is, so far as they were concerned, to recognise that it became Parvatibai's absolutely. The terms of the instrument are very wide and as things have turned out, though the reversion was then a possibility it has now opened, and it seems to me that the case falls within the explanation in *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2). It is not, I think, a question of altering the devolution of property, only of an agreement for consideration not to claim the portion reserved to Parvatibai as reversioners, should the reversion open out and as such, I think, a perfectly legal settlement.

I agree with the learned Subordinate Judge's judgment whose decree should be restored and the appeal allowed.

A. *Appeal allowed.*

BOMBAY HIGH COURT.

Civil Application No. 1038 of 1930.

July 13, 1931.

PATKAR AND MURPHY, JJ.

BAI MANGU AND OTHERS—APPLICANTS

versus

THE BHARATKHAND COTTON MILLS CO. LTD.,—OPPONENTS.

Civil Procedure Code (Act V of 1908), s. 109—Letters Patent (Bombay High Court), cl. 39—Privy Council, leave to appeal to—High Court decree in pursuance of directions from Privy Council—Application for leave to appeal, whether competent.

Where the High Court in pursuance of the directions given by the Privy Council takes account between the parties and passes a decree on the basis of those accounts, an application for leave to appeal against such decree is not competent either under s. 109, Civil Procedure Code, or cl. 39 of the Letters Patent of the Bombay High Court as the decree cannot be said to have been passed on appeal to the High Court. [p. 185, col. 1.]

Clause 39 of the Letters Patent first refers to a final judgment, decree or order made on appeal *i. e.* made on appeal on the Original Side or under the Civil Procedure Code, or appeals from the *mofussil* and the latter part of cl. 39 refers to a final judgment, decree or order of the High Court in the exercise of its original jurisdiction made by individual Judges of the High Court or by a Division Bench from which an appeal does not lie to the High Court under cl. 15 of the Letters Patent. [*ibid.*]

Mr. *B. J. Desai* (with him Mr. *R. G. Rao*), for the Applicant.

Mr. *G. N. Thakor* (with him Mr. *B. J. Thakor*), for the Opponents.

Patkar, J.—This is an application for leave to appeal to the Privy Council from the decision of the High Court after taking accounts in pursuance of the directions given by their Lordships of the Privy Council.

The appeal to the Privy Council arose in connection with certain suits brought by one Kevaldas and his family and subsequently one Tulsidas to enforce certain deposit receipts given by the company on October 31, 1911. Kevaldas alleged that he agreed with the company to have preference shares allotted to him to the extent of the face value of the debts owing by the company to him and his nominees represented by the amount of the deposit receipts, with accrued interest and some addition to current account which was incurred between October 31, 1911, and the actual date of his resignation. The company contended that there was no binding agreement in that behalf and that in any event there was due to the company a sum exceeding the amount of the receipts and that no money was due to him on the cross claim of the company.

The Subordinate Judge found in favour of Kevaldas that there was a binding agreement to allot preference shares in satisfaction of the debt substantially represented by the deposit receipts and decreed specific performance accordingly. The High Court found against Kevaldas on both the points. The Privy Council held that at most the alleged contract with reference to the preference shares was mainly to satisfy a just claim, and if Kevaldas by reason of the cross claim had really nothing due to him, he was not entitled to the issue of preference shares, and inasmuch as the balance was in favour of the company, the suit failed.

The Privy Council after confirming the finding of the High Court that the company was entitled to recover repayment of the sum paid to Tulsidas, *viz*, Rs. 86,000, the parties were given an opportunity of agreeing to the figures if possible on the footing of the view expressed. All the parties agreed to the convenient procedure of expressing in one decree the financial result of the relations between the parties including the decrees standing against each party, and though the appellant substantially failed, the decree of the High Court was varied, and the High Court was directed to take an account to ascertain how much should be credited to Kevaldas in respect of the amount of the deposit receipts with interest and in respect of the dividends claimed to be deducted by the respondents in the execution schedule, the dividends to be credited as they fell due with interest, if any interest was payable under the articles. On the other hand, the company were entitled to be credited with the payment to Tulsidas and to the decree of Rs. 1,46,453, with interest less the sums realised in execution. Marten, C. J. and Murphy, J., thereupon, on April 1, 1930, gave certain directions to the Commissioner as to the manner in which the account should be taken, and on April 14, confirmed the Commissioner's report and directed the plaintiff to pay to the defendant company the sum of Rs. 1,33,723-6 10 with interest at six per cent. from March 31, 1930. The final decree passed by the High Court, therefore, in pursuance of the directions given by the Privy Council to take an account between the parties.

It is urged on behalf of the opponents that the application for leave to appeal to the Privy Council does not fall under s. 109, cl. (*a*), of the Civil Procedure Code, as it is not a judgment, decree or order passed on appeal by the High Court, nor does it fall under cl. 39 of the Letters Patent on the ground that it is not a final judgment, decree or order of the High Court made on appeal. It is contended on behalf of the applicants that though the decision of the High Court is not a judgment, decree or order passed on appeal within the meaning of s. 109, cl. (*a*), or the first part of cl. 39 of the Letters Patent, it is a final judgment, decree or order of a Division Court from which an appeal shall not lie to the said High Court under the provisions contained in cl. 15 of the Letters Patent, and, therefore, an appeal would lie to the Privy Council on the ground that it is a final decree or order passed in appeal, though not strictly on appeal, by the High Court.

The decree passed by the High Court is in pursuance of the directions of the Privy Council and is not passed on appeal by the High Court. If the High Court had sent down the case to the Subordinate Judge for disposal, and an appeal had been filed by any of the parties against the decision of the Subordinate Judge, the judgment or decree passed by the High Court would have been a judgment or decree passed on appeal. A judgment, decree or order passed by the High Court in its appellate jurisdiction is not necessarily a judgment, decree or order passed on appeal.

The question is discussed in the case of *Secretary of State for India in Council* v. *British India Steam Navigation Company* (1). The relationship of a superior and inferior Court and the power on the part of the former to review the decisions of the latter must be present in order to constitute jurisdiction on appeal: see *Chappan* v. *Moidin Kutti* (2). We are not concerned here with the precise point decided in these cases to the effect that an order passed by the High Court in the exercise of the revisional jurisdiction was an order made on appeal within the meaning of cl. 39 of the Letters Patent.

In Wharton's Law Lexicon, 13th Edition, "appeal" is defined as the judicial examination of the decision by a higher Court of the decision of an inferior Court. According to Stroud's Judicial Dictionary, Vol. 1, page 98,

> "an appeal is the right entering a superior Court and invoking its aid and interposition to redress the error of the Court below."

See *Attorney-General* v. *Sillem* (3).

In the present case the order passed by the High Court was in pursuance of the directions given by the Privy Council and was not passed in any proceedings taken by the parties in order to review or modify the decision of an inferior Court. In *Rajah Enaet Hossein* v. *Ranee Rowshun Jahan* (4) a distinction is made between a final judgment, decree or order made in the exercise of the appellate jurisdiction and one made on appeal, and it was held that an order made by a High Court in an application to review its judgment in a case of appeal to the Privy Council previously

(1) 9 Ind. Cas. 183; 13 C. L. J. 90 at pp. 93-97; 15 C. W. N. 848.
(2) 22 M. 68 at p. 80; 8 M. L. J. 231 (F. B.)
(3) (1864) 10 H. L. C. 704 at p. 724; 10 Jur. 446; 10 L. T. 434.
(4) 10 W. R. 1; 1 B. L. R. 16 (F. B.).

heard was not an order made on appeal within the meaning of cl. 39 of the Charter so as to enable the Court to admit an appeal against such order to Her Majesty in Council. A similar view was taken in *Sunder Koer* v. *Chandishwar Prosad Singh* (5).

I think, therefore, that the judgment, decree or order from which the application for leave to appeal is made in the present case is not one made on appeal though it was made in its appellate jurisdiction in pursuance of the directions given by the Privy Council presumbly with the consent of both the parties. The application, does not, therefore, fall under s. 109, cl. (*a*), of the Civil Procedure Code, or the first part of cl. 39 of the Letters Patent.

This position is not seriously contested on behalf of the applicants, but it is contended on their behalf that the judgment, decree or order of the Court in the present case was a final judgment, decree or order of a Division Court from which an appeal does not lie to the said High Court under the provisions contained in cl. 15. I think that cl. 39 of the Letters Patent first refers to a final judgment, decree or order made on appeal *i. e.*, made on appeal on the Original Side or under the Civil Procedure Code on appeals from the *mofussil*, and the latter part of cl. 39 refers to a final judgment, decree or order of the said High Court in the exercise of its original jurisdiction made by individual Judges of the High Court or by a Division Bench from which an appeal does not lie to the said High Court under cl. 15 of the Letters Patent. It is contended on behalf of the applicants that cl. 39 deals with three categories of cases, first, a judgment, decree or order made on appeal; secondly, made in exercise of its original jurisdiction, and, thirdly, by a Division Court from which no appeal lies under cl. 15 of the Letters Patent, and it is, therefore, contended that though the present judgment, decree or order is not passed on appeal, it is a judgment, decree or order of a Division Court from which no appeal lies under cl. 15 of the Letters Patent. I think that cl. 39 deals only with two categories of cases, first, judgment, decree or order made on appeal, and, secondly, made in exercise of original jurisdiction whether by individual Judges or by a Division Court from which no appeal lies under cl. 15 of the Letters Patent. This view is consistent with the decision in *An Attorney, In re* (6), where it was held that cl. 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter not being of criminal jurisdiction, if it is a final judgment, decree or order of the Court made on appeal or in exercise of orginal jurisdiction.

I think, therefore, that the present application does not fall either under cl. (*a*) of s. 109 of the Civil Procedure Code or cl. 39 of the Letters Patent. The only remedy, in my opinion, for the applicants is to apply for special leave to appeal to the Privy Council.

For these reasons I would discharge the rule with costs.

Murphy, J.—The first question in this application is whether under the provisions regulating appeals to His Majesty's Privy Council we have power to grant leave to the petitioners.

These proceedings are the last tangle of a web of litigation in which one Kevaldas, formerly the agent of the Bharatkhand Cotton Mills at Ahmedabad, has involved himself and the Mill. The many disputes have been going on since 1909. They culminated in three appeals to His Majesty in Council which were consolidated into Privy Council Appeal No. 118 of 1927, and were disposed of by their Lordships on November 1, 1929, the result being a variation of this Court's decrees, by deleting paras. 2 and 5 of the final one. As their Lordships were unable to obtain the precise figures to find place in the final decree, they were pleased to direct that this was a task which must devolve on the Courts in India and the matter so came before a Division Bench of this Court of which I was a member, judgment being delivered by the Honourable the Chief Justice (Sir Amberson Marten) on April 1, 1930 and April 14, 1930—the second judgment being on the report of the Commissioner for taking accounts. The main points arising for decision then were, whether a sum of Rs. 47,672 recovered in execution in March, 1920, should be paid towards principal, or go to reduction of interest, the decision being in favour of the second alternative; whether interest should be allowed on dividends, a question decided in the negative; and, lastly, whether interest on the deposit receipts should be simple or compound, the answer given being that it should be simple.

(5) 30 C. 679.

(6) 22 Ind. Cas. 324; 41 C. 734; 19 C. W. N. 593.

Lastly, it was decided that the accounts on these lines should be taken by the Commissioner of this Court. Accounts were accordingly taken and the Court adopted the learned Commissioner's report, and made a decree for Rs. 1,33,723-6-10. These findings are the petitioner's grievance, expressed in a petition covering fifty-one paragraphs. Seth Kevaldas did not appear before the Commissioner, for reasons stated in the petition, and those proceedings were *ex parte*.

Mr. B. J. Desai for the petitioners has frankly admitted that owing to the nature of the proceeding in this Court, the question whether petitioners have a further right of appeal, or not, is not free from doubt; and we have not been able to find a precedent.

The provisions of ss. 109 and 110 of the Civil Procedure Code cover orders passed "on appeal." The decree in question was made under the direction of their Lordships of the Privy Council in pursuance of that Court's decree, and did not come before this Court "on appeal," it having already dealt with the matter on appeal. Mr. Desai accordingly leans more towards making out his clients' right to be granted leave by cl. 39 of the Letters Patent. *Prima facie*, the provisions of cl. 39 apply to proceedings on the Original Side of this Court rather than to matters coming to it from the District and Subordinate Courts in the Presidency, as does this one—but this objection is probably not insuperable.

Sections 109 and 110 seem to me clearly not to apply. This Court's decree does not fall under cl. (*b*) and cannot come within cl. (*a*) for it was not passed "on appeal" unless we hold that it is really a continuation of the three original appeals, which, in view of the intervening decree of a higher Court, cannot be the case. In a sense, it may be said to be a final decree, a preliminary one only having been made by His Majesty's Priyy Council; but here again it is not on appeal. I believe the case does not fall under cl. (*c*) either.

The provisions of cl. 39 of the Letters Patent are as follows, omitting now unnecessary expressions and phrases:—

"may appeal to Us,...in any matter...from any final judgment, decree, or order of the [said High Court... *made on appeal*, and from any final judgment, decree, or order made in the exercise of original jurisdiction by Judges of the said High Court, or of any Division Court, from which an appeal shall not lie to the High Court under the provisions contained in the fifteenth clause of these presents."

Mr. Desai's argument has been that there are three classes of cases contemplated:

(*i*) orders made on appeal,

(*ii*) in exercise of original jurisdiction,

(*iii*) in exercise of either original or appellate jurisdiction by a Division Court from which there is no appeal to the High Court.

He would bring this order within the last class, and so base the petition now in question.

I think that the clause cannot be read in this way—the plain intention of the clause is—I believe—to make provision for two classes of cases only, and the third class can only be extracted from it by reading in what is not there, for the expression "made in the exercise of original jurisdiction" appears to govern the following clause "or by any Division Court," which is not, I think, a third term, importing orders not made on appeal or in the exercise of original jurisdiction, but all other orders, whether in the first, or second class made by a Division Court. Had this been the intention it would have been easy to express it clearly otherwise, and since it has not been done, I must conclude that it was not the object of the Letters Patent.

I agree, therefore, with the order propounded by my learned brother Patkar, J.

R. L. *Rule discharged.*

BOMBAY HIGH COURT.

First Civil Appeal No. 303 of 1928.

March 26, 1931.

BEAUMONT, C. J. AND MURPHY, J.

CHATRABHUJ TULSIRAM MARWADI —PLAINTIFF—APPELLANT

versus

AMBARSING HARJI AND OTHERS —DEFENDANTS—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 34—Interest subsequent to date of suit—Power to award though not claimed in plaint.

Having regard to the terms of s. 34, Civil Procedure Code, the Court has power to award interest after suit whether claimed specifically in the plaint or not.

First Appeal against a decision of the First Class Subordinate Judge at Dhulia.

Mr. *Oka*, (with him Mr. *A. A. Adarkar* for Mr. *M. V. Bhat*), for the Appellant.

Judgment—This is an appeal from an order of the First Class Subordinate Judge of Dhulia. The plaintiff was suing on the promissory note for a sum of Rs. 6,725 and interest at 12 per cent. per annum. The

learned Judge gave judgment for the plaintiff holding that the amount claimed on the promissory note had been advanced in cash and not as the defendants contended merely in account and at the end of his judgment he says:—"Since the plaintiff has not claimed any interest subsequent to the date of the suit, I pass no order for the payment of any such interest to him." Then the actual order he makes is that the defendants do pay to the plaintiff the amount claimed and costs by annual instalments of Rs. 900 each and then there are provisions as to the dates of payment of the instalments and as to what is to happen if default is made. The judgment was given on November 8, 1927, and apparently on November 15, 1927, the Pleader for the plaintiff made an application to the learned Judge to alter his order in respect of interest after suit. The plaintiff's case was that it was intended that interest after suit should be asked for in the plaint and such interest would have been asked but for a mistake of the Pleader's clerk in copying the plaint. The application was heard by the learned Judge on February 19, 1928 and he then says:—"It is a pity that the applicant's Pleader did not read the plaint before he filed it in Court or while the evidence was being recorded. Had he taken care to read the plaint at least when the evidence was being recorded and made even an oral request to the Court that his client desired to claim subsequent interest also and that the same might be awarded by the Court, the Court would certainly have considered that request." Then the learned Judge goes on to point out that interest subsequent to the date of the suit is discretionary and he says he has exercised his discretion against the plaintiff and that he has no power to alter his order and that if the applicant is not satisfied, his remedy lies in appeal. But it is to be noticed that the learned Judge does not say in his supplemental judgment that had he appreciated that he had power to give interest subsequent to suit, though not asked for in the plaint, he would have done so at any particular rate. Had he said that, it would have helped us in dealing with this matter. If the learned Judge meant to say by his original judgment that he had no jurisdiction to grant interest after the suit because it was not asked for in the plaint, I think he was wrong because it seems to me that having regard to the terms of s. 34 of the Civil Procedure Code the Court has power to give interest after suit whether claimed specifically in the plaint or not. But that is not the fair result of the original and supplemental judgments. I think the learned Judge exercised his discretion, and in so doing took into account the fact that interest after suit had not been claimed. I do not think that he meant to say that his sole reason for refusing interest after suit was that it was not claimed and that he would have given it had it been claimed. The defendants were agriculturists and the order for payment is by instalments and I am not satisfied that the learned Judge would have made the same order for payment by instalments if he had been awarding interest after suit. The matter is a discretionary one and I do not think there is any ground here on which we can properly interfere with the discretion exercised by the learned Judge. The appeal, therefore, must be dismissed.

A. *Appeal dismissed.*

BOMBAY HIGH COURT.

Criminal Application No. 202 of 1931.
August 10, 1931.

BEAUMONT, C. J. AND BARLEE, J.

HARI MORESHVAR JOSHI—

PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), Sch. II—Penal Code (Act XLV of 1860), s. 124-A—Sedition case, trial of—Courts competent to try—Magistrate's discretion as to forum *of trial—Consideration governing discretion—Interference with Magistrate's discretion by High Court—Accused, right of.*

Under the Criminal Procedure Code, Sch. II, an offence under s. 124-A, Penal Code, is triable by the Court of Session, Chief Presidency Magistrate, District Magistrate or a Magistrate of the first class specially empowered. The Magistrate has a discretion to decide in what way the case shall be tried having regard to the alternatives given by the schedule. The Magistrate must have regard to the importance of the case and to the fact that the maximum penalty under the section is transportation for life. He must consider also whether if he sends the case to the Court of Session there will be Jury or assessors and in that connection he may consider which of the two tribunals his own or the Court of Session is the more satisfactory tribunal for deciding the case. Though the Magistrate's discretion is subject to review by High Court, the High Court will not interfere with his discretion except on certain definite grounds. *Emperor* v. *Krishnaji Prabhakar* (1), commented upon. [p 188, col. 1.]

The Legislature does not provide that in every case in which the trial at Sessions will enable the accused to have a Jury he is entitled to that privilege. [p. 188, col. 2.]

Mr. *Munshi* (with him Messrs. *Manilal Kher, Ambalal* and *K. N. Dharap,*) for the Applicant.

Mr. *P. B. Shingne*, Government Pleader, for the Crown.

Beaumont, C. J.—In this case the petitioner is about to be charged under s. 124 A of the Indian Penal Code, the nature of the offence being that he made a speech in which it is alleged that there were seditious passages, and he now applies that the First Class Magistrate, Alibag, in whose Court the case is pending, may be ordered to commit the case to the Court of Session at Thana for trial.

Now, under Sch. II to the Criminal Procedure Code it is provided that the method of trial for offences under s. 124-A may be either the Court of Session, Chief Presidency Magistrate, District Magistrate or Magistrate of the First Class specially empowered by the Local Government in that behalf. In the present case the matter has been inquired into by a Magistrate of the First Class specially empowered by the Local Government at Alibag, and he has expressed the view that if he thinks a *prima facie* case is made out against the accused he will frame a charge and try the case himself. Now, it seems to me that under the Criminal Procedure Code the Magistrate has a discretion to decide in what way the case shall be tried having regard to the alternatives given by the schedule. No doubt that discretion must be exercised in a judicial manner. The Magistrate must have regard to the importance of the case and to the fact that the maximum penalty under the section is transportation for life, though if he tries the accused himself he cannot give a longer term of imprisonment than two years. He must consider no doubt also whether if he sends the case to the Court of Session there will be Jury or assessors and in that connection he may consider which of the two tribunals, his own Court or the Sessions Court is the more satisfactory tribunal for deciding the case. No doubt also his discretion is subject to review by the High Court. But if we are asked to review the Magistrate's discretion we can only do so on certain definite grounds, and as far as I can see, no grounds are suggested in this case which would not apply to practically every case under s. 124-A.

We were much pressed with the decision of this Court in *Emperor* v. *Krishnaji Prabhakar* (1). In that case the seditious statement had been published in the accused's newspaper which had a very wide circulation, and therefore, on the facts the case is distinguishable from the present case. Both the learned Judges who decided that case disclaimed the intention of laying down a rule that in every case under s. 124-A the proper tribunal was a Sessions Court. But with all deference to the learned Judges I am bound to say that some of their reasons seem to me to tend to that result. They rely, for instance, on the fact that under s. 124-A the maximum penalty is transportation for life, and they express the view that a Jury is the more appropriate tribunal for cases under the section. We have, however, to face the fact that the Legislature has not seen fit to provide that in every case in which the trial at Sessions will enable the accused to have a Jury he is to be entitled to that privilege. It seems to me that if we interfere with the discretion which the learned Magistrate has exercised in this case we shall in effect be striking out of the schedule of the Code the provision that offences under s. 124-A may be tried by a Magistrate.

We have no jurisdiction to do that, and, in my opinion, there is no ground on which we can interfere with the discretion of the Magistrate. The application is, therefore, dismissed.

Barlee, J.—I agree. Mr. Munshi's first argument was that the accused, who is an editor of a newspaper and a publicist of some distinction in Maharashtra should be given the benefit of a Jury trial on that account. I cannot agree with him that the position in life of an accused person should weigh with us in any way.

His second argument was that a Jury will be better able to understand the case since its decision will depend upon the interpretation of speeches and an estimate of the probable effect which the words used by the accused if they are proved to have been used by him, must have had on the general public. This argument, too, I cannot accept. It seem to me, from my experience of Juries in the *mofussil* that a trained First Class Magistrate of experience is far more likely to be able to understand the evidence and to interpret it correctly than a chance collection of gentlemen who have no training in such matters.

The real question in these matters is, in which Court will there be the fairer trial, or rather, as the onus is on the applicant, whether it is likely that the trial before the First Class Magistrate, Alibag,

(1) 119 Ind. Cas. 666; 53 B. 611; 31 Bom. L. R. 602; A. I. R. 1929 Bom. 313; 30 Cr. L. J. 1090; Ind. Rul. (1929) Bom. 538.

will be at all unfair? This, I take it, is the real reason for his application. Mr. Munshi very properly has not said anything against the Magistrate, but after all the Magistrate is a Government servant, and in a case in which Government are peculiarly concerned, naturally an accused person may have some apprehension that there will be some bias in favour of the Government in the mind of the Magistrate. This view I can sympathize with, but in my opinion it cannot prevail. We must take the law as it stands and the law is that a case of this nature may be tried by a First Class Magistrate, a Government servant, in spite of the fact that in all such cases Government are directly interested. There is no provision for a Jury trial as no doubt there would have been, had the Legislature thought that in such cases an accused person should be given the benefit of trial by a Jury of his own countrymen. For this reason I agree with his Lordship the Chief Justice that we cannot accede to the request of the applicant.

R. L. *Application rejected.*

BOMBAY HIGH COURT.

First CIVIL Appeal No. 299 of 1926.
September 16, 1930.
PATKAR AND BROOMFIELD, JJ.
THE SECRETARY OF STATE FOR INDIA—DEFENDANT—APPELLANT
versus
HUSENABU DAUDBHAI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Bombay Revenue Jurisdiction Act (X of 1876), s. 11—Scope and object of—'Fact', meaning of—Order by City Survey Officer whether an act—Civil suit, when lies.

Section 11, Bombay Revenue Jurisdiction Act, is applicable to an order or decision of a City Survey Officer. The word 'act' in s. 11 of the Act is wide enough to cover a judicial or a *quasi*-judicial act *i.e.*, the passing of an order or decision by a Revenue Officer. [p. 189, col. 2.]

Section 11 requires that all appeals allowed by law must be availed of before a civil suit can be filed for the object of the section is to protect the Government from being exposed to law suits out of the orders of its subordinate officers before its superior officers have been afforded the opportunity of considering and it may be, of disallowing the executive orders of its subordinate officials. [*ibid.*]

Where an order by a City Survey Officer has been confirmed on appeal to the Collector, a civil suit is competent for no further appeal to Commissioner is necessary to be filed in such cases. [p. 191, cols. 1 & 2.]

First Appeal from the decision of the District Judge, Broach and Panch Mahals in Civil Suit No. 15 of 1925.

Mr. *B. G. Rao*, Assistant Government Pleader, for the Appellant.

Mr. *A. A. Adarkar*, for Mr. *M. H. Mehta*, for the Respondents.

Patkar, J.—The question urged on behalf of the appellant in these appeals is whether the suits are barred under s. 11 of the Bombay Revenue Jurisdiction Act X of 1876. The learned District Judge held that s. 11 of the Bombay Revenue Jurisdiction Act did not apply because s. 11 contemplates an act *i. e.*, a positive act of dispossession and would not cover an order or decision by the City Survey Officer. We think the learned District Judge erred in holding that the section did not apply to an order or decision by the City Survey Officer. The word "act" is wide enough to cover a judicial or a *quasi*-judicial act, *viz.*, the passing of an order or decision by a Revenue Officer. Section 11 of the Bombay Revenue Jurisdiction Act contemplates the presentation of all such appeals allowed by law before bringing the suit. All such appeals would refer to appeals against the act or omission. Section 203 of the Bombay Land Revenue Code, Bombay Act V of 1879, prescribes an appeal against the decision or order passed by a Revenue Officer. Section 11 of the Bombay Revenue Jurisdiction Act would be rendered nugatory if the contention that act does not include an order or decision were accepted. In *Natha bin Naroji* v. *Secretary of State for India* (1), it was held that passing an order is clearly an act and so comes within the provision of s. 11 of the Bombay Revenue Jurisdiction Act. The section is not a complex statute of limitation for protection of Government, but the object, as stated in *Ranchod* v. *Secretary of State for India* (2) is to protect Government from being exposed to law suits arising out of the orders of its subordinate officers before its superior officers have been afforded the opportunity of considering, and, it may be, of disallowing the executive orders of its subordinate officials.

In *Dayal* v. *Secretary of State* (3), where a suit was filed for reversal of order of the Collector directing removal of an encroachment and for an injunction, it was held that the omission to file an appeal from the Collector's order to the Revenue Commissioner or Government barred the suit under s. 11 of the Bombay Revenue Jurisdiction Act.

(1) (1896) P. J. 341.
(2) 22 B. 583 at p. 587.
(3) 59 Ind. Cas. 122; 22 Bom. L. R. 1089.

In *Sakharam* v. *Secretary of State* (4) it was held that s. 11 of the Bombay Revenue Jurisdiction Act did not apply in the circumstances of that case, because the act or omission which was the cause of action was not an order or decision in respect of which there was a right of appeal under the Bombay Land Revenue Code. The result would have been different if the act was an order or decision against which there was a right of appeal. As a matter of fact, appeals had been presented though beyond the period of sixty days, and it would appear from page 335* that the District Judge felt that he would not be justified in relying on the bar under s. 11 of the Bombay Revenue Jurisdiction Act on the authority of *Ranchod's case* (2). The act complained of in that case appears to be an act of Government in giving the river bed for cultivation and was not an order or decision of a Subordinate Officer against which an appeal lay.

In *Nathuram* v. *Secretary of State* (5), the decision is based on the ground that there was no order of a Revenue Officer, the plaintiffs were allowed to continue to hold the land rent-free, no opportunity was given to the plaintiffs to put forward their case, and no order or decision was passed but only notice of demand to pay assessment was given all of a sudden.

It has been held in *Anant Nulkar* v. *Secretary of State* (6), following the decision in *Dongar walad DagaduPatil* v. *Secretary of State* (F. A. No. 252 of 1915, decided by Beaman and Heaton, JJ., on January 30, 1918, Unrep.) that if an act is preceded by an order, s. 11 would apply. In *Dongar walad Dagadu Patil* v. *Secretary of State* (F. A. No. 252 of 1915 decided by Beaman and Heaton, JJ. on January 30, 1918, Unrep.) it was held that the plain meaning of s. 11 is that where acts are done under the orders of the Revenue Authorities, no suit will lie in respect of such acts until the aggrieved party has exhausted his rights of appeal against the order or orders, and that the intention was to prevent the aggrieved party from running prematurely to Courts before they had obtained the final decision of the highest Revenue Authority to whom they could go for much more summary justice. In *Bhikhabhai Doslabhjee* v. *Secretary of State* (1919 F. A. No. 2 of 1916, decided by Macleod, C. J. and Heaton, J., on July 28, 1919, Unrep.) the same view was taken and it was observed as follows :—

"This undoubtedly is a suit against Government on account of an act of a Revenue Officer, the act being the issuing to the plaintiff of a notice under s. 202 of the Land Revenue Code requiring him to vacate certain land. Now no appeal whatever was presented in this matter to any superior Revenue Officer. But such an appeal might have been presented as is enacted by s. 203 of the Land Revenue Code which provides for appeals against decisions or orders passed by Revenue Officers. In all probability there was a decision by a Revenue Officer in this case though it does not appear to be on record."

It is urged on behalf of the respondent that s. 11 of the Bombay Revenue Jurisdiction Act does not apply because the City Survey Officer is not a Revenue Officer. The Survey Officer appears to be a Revenue Officer, and is included in Chap. II of the Bombay Land Revenue Code, and is described as a Revenue Officer in several sections of the Bombay Land Revenue Code. Whether the City Survey Officer is a Revenue Officer has not been decided in any of the decisions which have been brought to our notice. The question has to be decided by reference to the duties of the City Survey Officer under Bombay Act IV of 1868, or s. 131 of the Bombay Land Revenue Code, or s. 50A of the Bombay District Municipal Act III of 1901, and by reference to the definitions of "land revenue" and "Revenue Officer" in the Bombay Land Revenue Code and the Bombay Revenue Jurisdiction Act. In *Secretary of State* v. *Yemnappa Sangappa* (F. A. No. 34 of 1923, decided by Macleod, C.J. and Coyajee, J., on March 3, 1925, Unrep.), the question was considered but not decided, and in *Valavbhai Mithabhai* v. *Secretary of State* (F. A. No. 105 of 1925, decided by Macleod, C. J. and Coyajee, J., on February 3, 1926, Unrep.) it was held that it was not proved that the City Survey Officer was a Revenue Officer. It is not, however, necessary to decide the point in the present appeals, for, we think, the argument on behalf of the respondents based on the notice in these cases is well-founded. The notice given in these cases runs as follows :—

"If any person desires to appeal against the above-mentioned order he should appeal in the prescribed manner to the Collector within 60 (sixty) days from the date of the said order. If no suit in a civil Court is filed within one year from the date of the final decision of such appeal or if no appeal is preferred from the date of this order, no civil Suit can be instituted in any Court to set aside or vary the said order."

It was held in *Secretary of State* v. *Yamnappa Sangappa* (F. A. No. 34 of 1923 decided by Macleod, C.J. and Coyajee, J. on March

(4) 28 Bom. 332; 6 Bom. L. R. 125.
(5) 67 Ind. cas. 842; 24 Bom. L. R. 402; 46 B. 811; A. I. R. 1922 Bom. 274.
(6) 33 Bom. L. R. 213.

*Page of 28 Bom.—[*Ed.*]

3, 1925 (Unrep.) that such a notice having misled the parties in not filing the appeal against the order, the defendant, the Secretary of State, should not rely on s. 11 as a bar to the suit. A similar view was taken in the case of *Chunilal* v. *Secretary of State* (F. A No. 215 of 1925 decided by Mecleod, C. J. and Coyajee, J., on January 21, 1926, Unrep.) and the case of *Annapurnabai Krishnarao* v. *Secretary of State* (F. A No. 190 of 1926, decided by Patkar and Baker, JJ., on August 13, 1930, Unrep). In the present case we are informed that except in one case (F. A. No. 300 of 1926) the parties appealed first to the District Deputy Collector and then to the Collector, though it appears from the plaint in Appeals Nos. 301 and 432 that appeals were only filed to the District Deputy Collector. The facts in the cases to which I have referred are somewhat different from the present case, for in those cases the parties did not appeal at all. But in the present case the parties first appealed to the District Deputy Collector and in most of the cases appealed to the Collector. The wording of the notice, which is similar to form "O" at page 74 of Anderson's Land Revenue Rules and similar to the notice in the cases referred to above, leaves it to the wish of the party to appeal against the abovementioned order and suggests that if he desired to appeal, he should appeal to the Collector within sixty days from the date of the said order, and if no suit is filed within one year from the date of the final decision of the appeal, no civil suit can be instituted in any civil Court to set aside or vary the said order. The notice is likely to mislead the party into believing that it was optional to file an appeal, and in case the party desired to appeal it would be sufficient if an appeal is filed to the Collector.

We, therefore, think that the argument advanced on behalf of the appellant that the bar under s. 11 should apply on account of the failure to file appeals to the Commissioner is not well-founded. Further, it appears from the City Survey Manual at page 46, para. 112, that

"appeals against the decisions of enquiry officer lie to the Collector only, and the power of hearing them cannot be delegated and they must be preferred within sixty days prescribed by the Code."

The City Survey Officer is not a direct subordinate of the Collector, and an appeal would lie to the Collector under the Government Notification No. 14447 dated November 29, 1927. We are not satisfied in these cases that further appeals to the Commissioner were necessary to be filed, and having regard to the terms of the notice in the present case we think that the appellant cannot rely on the bar under s. 11 of the Bombay Revenue Jurisdiction Act. We are, therefore, of opinion that the present suits are not barred by s. 11 of the Bombay Revenue Jurisdiction Act.

Broomfield, J.—I agree. The District Judge was, in my opinion, clearly wrong in his view that the order of the enquiry officer was not an act within the meaning of s. 11 of the Bombay Revenue Jurisdiction Act. I think that matter is sufficiently clear even without authorities. The word "act", being derived from the Latin "*actum*", means "a thing done." Webster's Dictionary quotes this passage from Holland's Jurisprudence. "Jurisprudence is concerned only with outward acts. An 'act' may therefore be defined for the purposes of the science as a determination of will producing an effect in the sensible world." The passing of an order or the making of a decision is just as much an act, *i.e.*, a thing done, as the physical act of dispossession, for instance, mentioned by the learned District Judge. Moreover, the authorities on the point are perfectly clear. There are numerous decisions, besides that in *Dayal* v. *Secretary of State* (3) which the District Judge rather surprisingly thought he was at liberty not to follow. We have been referred to some unreported decisions of this Court in *Dongar walad Dagadu Patil* v. *Secretary of State* (F. A. No. 252 of 1915, decided by Beaman and Heaton, JJ. on January 30, 1918, Unrep.) *Bhikhabhai Doolabhjee* v. *Secretary of State* (F. A. No. 2 of 1916, decided by Macleod, C. J., and Heaton J., on July 28, 1919, Unrep). *Sakharam Gopal* v. *Secretary of State* (F. A. No. 9 of 1915, decided by Heaton and Shah, JJ., on August 22, 1917 (Unrep.) and *Anant Nulkar* v. *Secretary of State* (6). There is also the decision in *Sakharam* v. *Secretary of State for India in Council* (4). The *ratio decidendi* there appears to be that the *only* kind of act which can be referred to in s. 11 is an order or decision, because the Land Revenue Code does not provide an appeal from any physical act but only from orders and decisions. The ruling in *Nathuram* v. *Secretary of State* (5) has been cited by both the parties to the argument before us. It appears to me, however, to be very clearly in favour of the view that "act" in s. 11 means "order". The decision in that case would apparently

have been precisely the reverse of what it was, and s. 11 of the Bombay Revenue Jurisdiction Act would have been held to apply, if there had been there the kind of order which we have in the present case. It would be easy to refer to any number of authorities, and I may mention *Abaji* v. *Secretary of State for India* (7) and *Ranchod* v. *Secretary of State for India* (2), in which it has been held by implication that an order, such as we have in this case, is an "act" within the meaning of s. 11. Indeed, I doubt very much if any authority could be found in which that section has been applied where the "act" referred to was not an order or a decision.

Though the reasons given by the District Judge are unsatisfactory, his decision is correct on other grounds. In each of these cases it appears that the enquiry officer issued a notice in the form "C" given at page 74 of Anderson's Land Revenue Rules. That being so the same doubts and difficulties arise as in the case which was dealt with by this Court in *Secretary of State* v. *Yemnappa* (F. A. No. 34 of 1923, decided by Macleod, C.J. and Coyajee, J., on March 3, 1925 Unrep.) *Chunilal* v. *Secretary of State* (F. A. No. 215 of 1925, decided by Macleod, C. J. and Coyajee, J., on January 21, 1926 Unrep.) and *Annapurnabai Krishnarao* v. *Secretary of State* (F. A. No. 190 of 1926, decided by Patkar and Baker, JJ., on August 13, 1930, Unrep.) The form of notice has been given by my learned brother. It is clearly a very ambiguous and misleading document. It might reasonably appear to the recipient of such a notice that it was not necessary for him to appeal at all and that it would be sufficient if he brought a suit within one year of the enquiry officer's order; and so in one of the cases to which I have just referred, *Secretary of State* v. *Yemnappa*, (F. A. No. 34 of 1923, decided by Macleod, C. J. and Coyajee, J on March 3, 1925, Unrep), it was held that the party had been misled and that s. 11 of the Bombay Revenue Jurisdiction Act should not be applied although in that case no appeal had been filed at all. Further, the recipient of such a notice might reasonably suppose that even if he did appeal—and the parties in these cases all of them did appeal—the appeal lay to the Collector and to no other authority. The District Judge says that ignorance of the law is no excuse, but supposing that the parties concerned had shown the utmost caution that could be expected from them, and had looked up the City Survey Manual and the notifications of Government in the matter, they would have found in the first place the provision in para. 112 of the Manual which states that appeals lie to the Collector *only*. They would have next found the notification of Government No. 14447 dated November 29, 1917, in which the Collector has been appointed to hear and determine appeals from the orders of an enquiry officer, without any mention of any further appellate authorities. It appears to me that the position of the present parties is much stronger than the position of the parties in *Secretary of State* v. *Yemnappa* (F. A. No. 34 of 1923, decided by Macleod, C. J. and Coyajee, J., on March 3, 1925, Unrep) and as it was held that s. 11 should not be applied there *a fortiori* it could not be applied in the present case. For, here, after all, the parties have adopted both the alternative remedies which appear to be offered to them by the notice in question.

As regards the other points in the case I do not think I need add anything to what my learned brother has said, except that I may refer to the decision of this Court in *Valavbhai Mithabhai* v. *Secretary of State* (1926 F. A. No. 105 of 1925, decided by Macleod, C. J. and Coyajee, J., on February 3, 1926, Unrep) In that case this Court held that s. 11 of the Bombay Revenue Jurisdiction Act could not be applied because Government had not satisfactorily proved that a Survey Officer is a Revenue Officer within the meaning of the Bombay Revenue Jurisdiction Act. We have listened to a long argument on the question whether assuming that an enquiry officer is a Revenue Officer any appeal would lie under the provisions of the Land Revenue Code from the decision of the Collector, who has been appointed by Government to hear and determine appeals from the enquiry officer's orders. On the materials placed before us, the point can only be said to be extremely doubtful and we might, therefore, have disposed of the preliminary point before us on the same lines on which it was disposed of in *Valavbhai Mithabhai* v. *Secretary of State* (1926 F. A. No. 105 of 1925 decided by Macleod, C. J. and Coyajee, J. on February 3, 1926, Unrep), *viz.*, that Government has failed to prove that the case can be brought within the provisions of s. 11 of the Bombay Revenue Jurisdiction Act.

(7) 22 B. 579.

R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

Original Side Appeal No. 90 of 1930.

January 29, 1931.

CURGENVEN AND CORNISH, JJ.

M. K. SRINIVASAN AND OTHERS—APPELLANTS

versus

WATRAP S. SUBRAMANIA AYYAR AND OTHERS—RESPONDENTS.

Company—Directors, appointment of—Poll, demand of—Poll not taken—Original meeting continuance of—Suit by share-holders for declaration that appointment of Directors is invalid, competency of.

The Directorate of a Life Insurance Company was composed of two policy-holders' Directors elected by the policy-holders and of a certain number of share-holders' Directors. The Ordinary General Meeting for the election of share-holders' Directors was fixed for the 13th October, 1930. The Articles of Association had contained a provision that the number of share-holders' Directors should be six and that two should retire in rotation their places being filled by election at the meeting. But the number had been by amendment of the articles reduced to five and it was provided as a special case, that at the General Meeting of 1930 the six Directors should vacate office and that no more than five should be elected in place of them. At the meeting held on 13th October, 1930, votes were taken by show of hands and five persons were declared elected. A poll was then demanded and the Chairman then directed that it should be held at the Company's Office on 20th October, and appointed the manager of the Company Returning Officer for the purpose of taking it. On October 16th the two policy-holders' Directors appointed two other persons thus bringing the Directors up to four. On the 20th October the Returning Officer did not appear and no other arrangement being made for holding the poll, the share holders who had assembled dispersed. No other attempt was made to take a poll and the four persons at that time claiming to be Directors after a couple of days co-opted 3 more Directors, thus bringing their number up to the maximum. Four of the share-holders filed a suit praying *inter alia* that these appointments might be declared invalid and that the Court should direct a poll to be taken to elect the five share-holders' Directors :

Held, that the taking of a poll was a mere enlargement of the meeting at which it was demanded and the original meeting continued until the poll had been taken. [p. 195, col. 2.]

Held, further, that so long as the meeting continued the five Directors' posts remained vacant and neither the provision for the automatic re-election of the old Directors on failure of their posts being filled up in the meeting, nor the provision enabling Directors to appoint any duly qualified person as Director could come into operation. [p. 196, col. 2.]

Held, also, that as the five persons were installed as Directors in contravention of the articles the mode of constituting them was *ultra vires* the Board of Directors and the suit by some of the share-holders who had been deprived of their fundamental privilege of choosing their own management was competent. [*ibid.*]

Held, also, that plaintiffs were entitled to maintain the suit even though the share-holders under the articles could by special meeting remove the Directors from the office by three-fourths majority, [p. 199, col. 1.]

Appeal from the judgment and decree of Mr. Justice Waller, dated the 25th November 1930 and passed in the exercise of the Original Civil Jurisdiction of the High Court, in C. S No. 491 of 1930.

Messrs. *V. V. Srinivasa Ayyangar* and *K. Venkataramani*, for the Appellants.

Messrs. *T. R. Venkatarama Sastri*, *K. Narasimha Ayyar*, *N. S. Rangaswami Ayyangar*, *T. R. Srinivasa Ayyangar*, *U. Ramachandran*, *V. C. Gopalaratnam*, *K. S. Rajagopala Ayyangar*, *R. V. Raghava Thathachari* and *S Panchapakesa Sastri*, for the Respondents.

Curgenven, J.—The suit out of which this appeal arises relates to a Company known as the United India Life Assurance Co, Ltd., and the circumstances which gave rise to the dispute are briefly these. The Directorate of the Company is composed of two policy-holders' Directors, elected by the policy-holders, and of a certain number of share-holders' Directors. The Ordinary General Meeting for the election of share-holder's Directors was fixed for the 13th October 1930. The Articles of Association had contained a provision that the number of share-holders' Directors should be six, and that two should retire in rotation, their places being filled by election at the meeting. But this number had been by amendment of the Articles reduced to five, and it was provided, as a special case, that at the General Meeting of 1930 the six Directors should vacate office and that not more than five should be elected in place of them. At the meeting the 3rd defendant, who was at the time the Chairman of Directors, took the chair, and, it being decided to fill all five vacancies, a vote was taken by show of hands, and five persons were declared elected. A poll was then demanded, and the Chairman directed that it should be held at the Company's Office on Monday the 20th October between the hours of 4 and 6 P. M. and appointed the Company's Manager, Mr. Church, Returning Officer for the purpose of taking it. In thus allowing a week to elapse before the poll was taken, the Chairman incurred the disapproval of the 1st plaintiff, one of the share-holders, who addressed to him on the 15th, a letter protesting against his action, and pointing out that, since all the share-holders' Directors had retired on the 13th, the share-holders must during the interval remain wholly unrepresented, and the operations of the Company come to a standstill, because the two policy-holders' Directors were below the minimum number authorised to transact business.

This letter was certainly most provocative in tone, and perhaps explains, though it may not justify, what happened next. On the 16th the two policy-holders' Directors appointed two other persons—the Chairman himself and the 4th defendant—thus bringing the number of Directors up to four, the minimum number required by Art. 88 to act in the name of the Company. It will be for consideration whether this action was within their powers. It evoked from the 1st plaintiff another letter, written the day before the date fixed for the poll, condemning this procedure and expressing the apprehension that advantage was intended to be taken of it to hold a poll only in respect of the three remaining vacancies. What happened,—whether by accident or design we are not now concerned to inquire—more than justified his misgivings. On the 20th, at the appointed time, a number of share-holders assembled at the office of the Company, but neither did the Returning Officer appear, nor were any other arrangements made for holding the poll. They waited there and eventually dispersed. The explanation given is that Mr. Church was unable to attend through sudden illness, and that a message which he sent to the Chairman in the course of the afternoon was not delivered as the Chairman had shortly before left Madras on a visit to a sick relative. No further attempt was made to take a poll, and indeed, whether rightly or wrongly, the four persons at that time claiming to be Directors—defendants Nos. 1 to 4—two days later took the line best calculated to demonstrate their refusal to adopt that course by 'co-opting' three more Directors, defendants Nos. 5 to 7, thereby bringing their number up to the maximum. The four plaintiffs, as share-holders, filed their suit on the 24th October, praying *inter alia* that these appointments might be declared illegal and invalid, and that the Court should direct a poll to be taken to elect five share-holders' Directors to the existing vacancies.

The learned Judge who tried the suit, Waller, J., has dismissed it upon a preliminary issue. He finds indeed that the co-optation, in two stages, of the five share-holders' Directors was *ultra vires*, but that, assuming it to have been so, the Company, and not individual share-holders, should have been the plaintiffs. Further, he considers that the Articles of Association provided the share-holders with an alternative remedy, and that at least until that had proved infructuous the Court should not intervene. All the plaintiffs appeal against this decision, which is supported in varying ways by the several defendants, whose points of view may be gathered from the contents of their written statements. The 1st and 2nd defendants, the two policy-holders' Directors, endeavour to justy their action in co-opting the 3rd and 4th defendants, and then, with these defendants, co-opting the defendants Nos. 5 to 7. The Chairman (3rd Defendant) contends that even if this procedure was not legal, those of the new Directors who were previously in Office,—all except the 4th Defendant—may be deemed to have continued by virtue of the terms of Art. 68 (*g*). The 4th defendant, the sole newcomer to the office has—perhaps to give scope to this alternative—since resigned. The 5th and 6th defendants denounce the act of co-opting them as unlawful, but claim to be still in office under Art. 68 (*g*).

It has become clear to me that the crucial questions of law upon the answers to which a correct decision depends in this case are, firstly, what determines the duration of an ordinary general meeting for the election of Directors, and, secondly, what is the nature of the process known as taking a poll. The rules governing these matters are not, I think, in any respect peculiar to this Company. Article 37 gives the Directors power to fix the annual Ordinary General Meeting, and Art. 42 provides for the election of Directors at it. Such election is to be, in the first instance by show of hands. If at least three members demand a poll, the Chairman shall grant it. Article 49 empowers the Chairman to take it and runs as follows :

"If a poll is demanded as aforesaid it shall be taken in such manner and at such time and place as the Chairman of the meeting directs, and either at once or after an interval or adjournments or otherwise, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded. The demand for a poll may be withdrawn."

Put shortly, the view pressed upon us by Mr. T. R. Venkatarama Sastri on behalf of the respondents is that the process of holding the poll is a detached portion of the general meeting, or is at any rate a 'meeting' within the meaning of the Articles of Association, and that when that 'meeting' comes to an end, whether or not the poll has been taken, the general meeting also terminates, and there exists no power to revive it, either on the part of the Chairman or of the Directors; and if for some reason the poll has not been

taken and no Directors elected, there exists no further power to do these things. It will be at once evident—indeed no better illustration is needed than the present case—how completely subversive these doctrines would be of the rights of election possessed by the share-holders. Fortunately they appear to be based upon fundamentally erroneous conceptions. The original meeting in law continues until the Chairman has carried out the direction given to him by the share-holders to take a poll. It is a notional metting, not dependent for its existence and continuity upon the share-holders being actually in session and business being transacted. The actual process of holding the poll is not a 'meeting' at all. It differs in several of its features from any meeting of share-holders. For example, the Articles provide that every such meeting shall be held at the Office of the Company, whereas Art. 49, reproduced above, empowers the Chairman to take the poll at such place as he may direct. The person appointed to conduct the poll, unlike the Chairman of a meeting, need not be, and indeed in the present instance was not, a share-holder of the Company. His functions in no way resemble those of a Chairman of a meeting, and are, as has been pointed out in *Harben* v. *Phillips* (1), purely ministerial. The operation of taking a ballot, too, has little resemblance to such a meeting,—each share-holder may come at any time between the hours fixed, record his vote, and go away. It is only the result of the poll which forms part of the meeting at which the poll was demanded by being deemed to be a resolution passed on it. 'The taking of a poll,' said Brett, L. J., in *The Queen* v. *Wimbledon Local Board* (2), is a mere enlargement of the meeting at which it was demanded.' In the same case Cotton, L J, observes,

"A poll is not a new meeting, but it is a mode of ascertaining the sense of the meeting which is continued for that purpose. The meeting of rate-payers did not come to an end, for the poll which was demanded has never been held."

In *Shaw* v. *Tati Concessions Limited* (3), Swinfen Eady, J., after remarking that the taking of a poll is not a meeting, continues: 'The true legal position is this. This is no adjourned meeting but the original meeting continues for the purpose of taking the poll until the poll is closed.' For the principle that the poll is not complete, and therefore the general meeting endures, until the share-holders have had an opportunity of voting, I may refer to the *Queen* v. *The Vestryman etc., of St. Pancras* (4). The position was defined with clearness by Russell, J., in *Spiller* v. *Mayo Development Co., Ltd.* (5) in settling a question of the validity of certain proxies. 'It was well settled', he said, 'that the taking of a poll was not a meeting of the company in the strict sense, but was in law a mere continuation of the meeting at which the poll was directed to be taken.' No authority has been cited to us for the position which the respondents assume, which requires that the taking of the poll is in law a meeting convened by the Chairman, from which the inference sought to be drawn is that if the Chairman makes default in holding the meeting, the share-holder's only remedy is to take the poll themselves, unless they resolve to adjourn the meeting to some other day. I doubt whether in face of the wide powers delegated in this respect to the Chairman, the share-holders would be legally competent to do this. But it is unnecessary to decide that point, especially in the present case, where it appears to have been almost physically impossible for them to adopt this course. Ballot papers had indeed been printed, but they were locked up in the Manager's safe, and key was not accessible. The assembled share-holders had no official record of the names of the eleven candidates standing for election. It would probably appear, had the case been fully heard, that there were other obstacles. They took the only course apparent to them, and dispersed without recording their votes. Even on the theory that a gathering of share-holders recording their votes is a meeting, it is difficult to contend that any meeting took place here. When and by virtue of what act did it begin, and when terminate? Having brought matters to this *impasse* by the break-down of the arrangements which it was his duty to render effectual, the Chairman would now ask the Court to dismiss the claim of these persons on the ground that, as matters fell out, their only course was to assume his functions and proceed with the election, failing which they must suffer disenfranchisement until the time should arrive for another annual

(1) (1883) 23 Ch. Dn. 14; 48 L. T. 334; 31 W. R. 173.
(2) (1882) 8 Q. B. D. 459; 51 L. J. Q. B. 219; 46 L. T. 47; 30 W. R. 400.
(3) (1913) 1 Ch 292; 82 L, J. Ch. 159; 108 L. T. 487; 20 Manson 104; 57 S. J. 322; 29 T, L. R. 261.
(4) (1839) 113 E. R. 317; 11 A. D. & E 15.
(5) (1926) W. N. 78; 61 L. J, 301.

general meeting. The alternative view, more commendable alike to the terms of the Articles and to common sense, is that, the Chairman having been enjoined by the share-holders to hold a poll and having under Art. 49 ample power to carry out their wishes, should have persisted in his attempts to do so until they were successful. I have heard no argument which, upon the true theory underlying these proceedings, encourages me to hold that, when the first attempt broke down, he was *functus officio*.

Let us now see by what machinery it is proposed to carry on the business of the Company in the meanwhile. It is sought to justify the action of the two policy-holders' Directors in the first place, and of themselves and their two co opted directors in the second, in filling up the places upon the Directorate, by recourse to the provisions of Art. 68 (*h*), which enables Directors to appoint any duly qualified member as Director either to fill a casual vacancy or as an addition to the Board. Alternatively the powers conferred by Arts. 86 and 88 are invoked, though a perusal of those Articles will show that they do not enlarge the powers derivable from Art. 68 (*h*). The contesting defendants in their written statements justified the action taken upon one or other of these grounds, but before us such a position has been virtually abandoned and is obviously untenable. A casual vacancy means in general any vacancy occurring by death, resignation or bankruptcy and not by effluxion of time: (Palmer's Company Precedents, 13th Edn., Part 1, page 720, *York Tramways Company* v. *Willows* (6) and *Munster* v. *Cammell Company* (7).) Article. 69 defines the different modes in which such a vacancy arises. The occasion for appointing a Director 'as an addition to the Board' will only arise when the share-holders have abstained from filling one or more of the sanctioned posts of Director. The rule has no application to present circumstances. The Article upon which reliance is now placed is No. 68 (*g*), which runs thus:

"If at any ordinary general meeting at which an election of Directors ought to take place, the place of any retiring Director is not filled up, such Director shall, if willing to continue in Office, be deemed to have been re-elected at such meeting unless it shall be determined at such meeting to leave the vacancy or vacancies unfilled."

I leave on one side the argument, special to the circumstances of this case, that since six Directors retired and only five posts were sanctioned for the future, no one retiring Director could be said to have a 'place' into which he could be deemed to be re-elected. The claim may, I think, be disallowed upon more general grounds. Nor is it necessary to point out that, to declare these so-called co-optations valid by virtue of this provision, a perversion of it to a use that can never have been in contemplation would have to be countenanced. It is a necessary condition of its application that the ordinary general Meeting should have come to an end without an election of Directors, indeed, it was with the object in view of rendering its application possible that the arguments to which I have already referred were with some strenuousness advanced. So long as the meeting exists, it appears that under the Articles, as they now stand, the Directors' posts remain vacant. It was to save any inconvenience arising from this that a provision existed in the Articles before amendment that the outgoing Directors should continue until their successors were elected (see old Art. 64), but whether by inadvertance or intention this has not been reproduced. If, as I hold, the General Meeting has never been closed, this provision for automatic re-election admittedly can have no application, and the five Directors' places may still be filled up by election.

The remainder of the arguments addressed to us represent an attempt to prevent the Court from interfering. It would seem that in a case where the share-holders have, through no fault of their own, been deprived of their fundamental privilege of choosing their own management, and where that management has passed into the hands of persons with no legal title to enjoy it, if ever there were a case for the Court's interposition it must be this. Since, however, the learned trial Judge has taken a different view, and since the question has been elaborately argued before us, it is advisable that we justify the course we propose to take by reference to authority. The questions raised are, firstly, can an individual share-holder sue for the reliefs asked for by the plaintiffs, and, if so, secondly, ought the Court to interfere, having regard to such other remedies as may be available? It is worth while to repeat here the nature of the reliefs asked for. The plaintiffs sue for a declaration that they and the other share-holders are entitled to elect five

(6) (1882) 8 Q. B. D. 685 at p. 694; 51 L J. Q. B. 257; 46 L. T. 296; 30 W. R. 624.

(7) (1882) 21 Ch. Dn. 183; 51 L. J. Ch. 731; 47 L. T. 44; 30 W. R. 812.

share-holders' Directors, and for a direction that a proper election by poll be ordered; as a necessary preliminary they ask also that it may be declared that the appointment of persons to fill the vacancies by co-optation illegal and invalid. In substance therefore the suit is one to establish and enforce the right of a share-holder to exercise his vote. Now in examining the authorities, it will be found that the cases may be grouped according as the injury complained of is an injury to the share-holder, by infringing his individual rights or only an injury to the Company in which the share-holder holds an interest. Cases falling within the former category may again be divided into those which relate to an injury to one or some only of the share-holders, and those which have arisen from a breach of duty towards all the share-holders; for it does not necessarily follow that, where all the share-holders (except those of them who contrive the injury) are affected, an individual share-holder is precluded from suing. The test depends upon the nature of the wrong alleged. An instance of a case where some only of the share-holders were denied their legal rights is *Pender* v. *Lushington* (8) which arose from a poll at which the Chairman ruled out certain votes which should have been included. Jessel M. R., in deciding that the action could be maintained by the single share-holder who brought it observed; 'He is a member of the Company, and whether he votes with the majority or the minority, he is entitled to have his vote recorded, an individual right in respect of which he has a right to sue'. Other cases which fall within the same class are *Pulbrook* v. *Richmond Consolidated Mining Company* (9) and *Henderson* v. *Bank of Australasia* (10). The class which concerns us here, however, relates to acts in derogation of the rights of all the share-holders, and is represented by a number of instances of suits brought by individual share-holders. In *Mosely* v. *Koffyfontein Mines, Ld.* (11) the plaintiff sued the Company and Directors on behalf of himself and the other share-holders to restrain the unauthorised issue of capital. It was a matter affecting the share-holders as a body, but the plaintiff was allowed to sue because, as Fletcher Moulton, L.J., put it, 'it must be the right of a share-holder by reason of his being a share holder to bring an action to stop such a proceeding.' It is to be observed that in such a case the Company itself, by resolution of its members, could also have sued to restrain the Directors from such an act. Another case involving a breach of duty by the Directors towards the whole body of share-holders is *Alexander* v. *Automatic Telephone Company* (12). Lindley, M. R., decided that it was not a matter of mere internal management—a description which it has been sought to apply to the conduct of the defendants in the present case—and that a suit by some of the share-holders was unobjectionable in form. *Baillie* v. *Oriental Telephone and Electric Co. Ltd.* (13) related to a failure on the part of the Directors to make a frank disclosure to the share-holders on the circumstances in which they claimed extra remuneration. It was argued that the plaintiff, a share-holder, was not entitled to sue to impeach the validity of a special resolution, but the Court of Appeal disallowed the objection on the ground, expressed by Swinfen Eady, J., that even a majority of the share-holders could not legalise an invalid act and prevent action being taken to set it aside. This case bears upon the further question we have to decide,—the remedy, if any, open to the plaintiffs at the hands of the company. In *Hoole* v. *Great Western Railway Co.* (14) the power of the Railway Company to issue additional shares was in dispute. The question of the proper parties to the action was raised and Sir John Rolt, L J., saw no reason why any single share-holder should not be at liberty to file a bill to restrain the Company from exceeding its powers. 'If one individual having an interest complains of an act of the whole Company or the executive of the whole Company as being illegal, there is as a general rule, no necessity for any other share-holders being present.'

The other line of cases, in which it has been held that the company, not the share-holder, is the party to complain, opens with *Foss* v. *Harbottle* (15) decided by the Court of Chancery in 1843. This was a suit brought by two share-holders against the

(8) (1877) 6 Ch. Dn. 70; 46 L. J. Ch. 317.
(9) (1878) 9 Ch. Dn. 610; 48 L. J. Ch. 65; 27 W. R. 377.
(10) (1890) 45 Ch. Dn. 330; 59 L. J. Ch. 794; 2 Meg. 301.
(11) (1911) 1 Ch. 73.
(12) (1900) 2 Ch. 56; 69 L J. Ch. 428; 82 L. T. 400; 48 W. R. 546; 16 T. L. R. 339.
(13) (1915) 1 Ch. 503; 84 L. J. Ch. 409; 112 L. T. 569; 31 T. L. R. 140.
(14) (1868) 3 Ch. App. 262; 17 L. T. 153; 16 W. R. 260.
(15) (1842) 67 E. R. 189; 2 Hare 461; 62 R. R. 185.

Directors and some others alleging that the Directors, as Directors, had bought for an excessive price certain lands from themselves as private individuals, and to find money for the purchase had mortgaged the Company's property in a manner unauthorised by the Act of Incorporation. Objection was taken that an individual share-holder could not sue, and the learned Vice Chancellor, while conceding that in certain circumstances a suit might properly be so framed, agreed that this was not such a case. The injury alleged was an injury to the Corporation as a whole, inflicted upon it as a *cestui qui trust*, by its trustees, and it was for the Corporation to deal with it. The purchase was not void but only voidable, and if the Corporation should choose to ratify it no individual share-holder could resist such action. 'The very fact that the governing body of proprietors assembled at the special general meeting may so bind even a reluctant minority is decisive to shew that the frame of this suit cannot be maintained whilst that body retains its functions.' It might be that the mortgages were void, as *ultra vires*, but that would not in the circumstances dispose of the question, because, since the money received was expended in the manner stated, if the Corporation approved the Directors' action in making the purchases it could not complain of the manner in which they raised the money. The principles on which this case was decided were thus that there was no infringement of the individual rights of a share-holder, only a possible injury to the Company as a corporate body; and secondly, since it would lie with the Company to ratify it must also lie with it to challenge, whether by suit or otherwise. The same principles were applied by Lord Cottenham, L. C., in *Mozley* v. *Alston* (16) where two shareholders complained of the omission of the twelve Directors to ballot out four of their number in order that four others might be elected in their stead. This case does certainly in some respects resemble the case now before us; but it is perhaps permissible to surmise that since 1847, when *Mozley* v. *Alston* (16) was decided some modification of the attitude then taken up by the Court of Chancery has taken place, in the same way as Lord Cottenham himself recognizes that a relaxation was apparent in his own day "to meet the exigencies of modern times." The observations of Swinfen Eady, L. J., upon this case in *Baillie* v. *Oriental Telephone and Electric Company Ltd.* (13) suggest that the stringency of the rule laid down in these two earlier cases has been relaxed in more modern times. The remaining case of this class cited to us, *Macdougall* v. *Gardiner* (17) dealt with what was at the most an irregularity and not an illegality, James, L. J., expressly excluding illegal, oppressive or fraudulent acts from the scope of the principles on which he acted. Even, therefore, adopting the position assumed by these earlier Chancery cases in all its rigour, I do not find reasons in them to nonsuit the plaintiffs here.

Nor do I think that the contesting respondents are on any better ground in contending that the plaintiffs should have availed themselves of facilities for rectifying the position afforded by the Articles of the Company. The learned trial Judge considered that it was open to the shareholders by special resolution to remove the so-called Directors from Office a course dependent upon securing a three-fourths majority. The reasonableness of referring the plaintiffs to such a procedure has not been pressed upon us in appeal, and indeed it hardly seems right to tell a share-holder who complains of acts committed in defiance of the Articles of Association that the enforcement of his legal rights is dependent upon securing such a majority. Mr. T. R. Venkatarama Sastri prefers to adopt the position that a mere majority of shareholders would be able to validate the acts performed *ultra vires* by the Chairman and his party but here again I think that he bases his arguments upon a fallacy. It is no doubt true that if the Directors of a Company act *ultra vires*, and if what they have done would be within the power of the Company, acting within its Memorandum and Articles of Association, to do, the Company can ratify the action taken. It cannot so ratify it by a simple majority if by a general resolution it could not sanction such a course. The effect of the cases cited to us has been thus summed up by Lindley (6th Edn. Vol 1, page 769).

".....If Directors or share-holders have done or are about to do that which is a fraud upon the minority, or is wrong, even if sanctioned by a majority then an action by some of the members on behalf of themselves and others or by a member suing alone may be sustained for otherwise the dissentients would be without redress".

It is surely enough to point out that even a majority cannot act in breach of rules

(16) (1847) 41 E. R. 833; 1 Phillips 790; 16 L. J. Ch. 217; 65 R. R. 520.

(17) (1875-6) 1 Ch. 13 L. J. Ch. 27.

which they have agreed shall regulate their actions. "The articles", observed Swinfen Eady, J., in *Boschoek Proprietary Company Limited* v. *Fuke* (18) "until altered, bound the share-holders in general meeting as much as the board", the case being one of an attempted confirmation of a Director not possessing the necessary qualifications. The Indian Companies Act gives statutory force to this principle by providing in s. 21 that the Memorandum and Articles shall bind the Company or the members thereof to the same extent as if they respectively had been signed by each member and contained a covenant on the part of each to observe all their provisions. Accordingly to say that the course taken in the present case could have been ratified by the vote of the majority is equivalent to saying that the Articles permit the election of Directors to be made otherwise than at the Ordinary General Meeting as Art. 68 (*f*) provides and otherwise than by submission of the names of all eligible candidates to the choice of the voters. It is evident that a resolution proposing that a certain five persons be appointed Directors is not only unauthorised by the Articles but would be a departure not only in form but in effect from the accepted procedure.

I have come to the conclusion, therefore, that the only course compatible with enforcing the rights to which the plaintiffs are entitled under the Articles of Association is to declare that the so-called co-optation of defendants Nos. 3 to 7 to the vacant posts of Directors is illegal, and that the share-holders are entitled to elect five of their number to those vacancies. The 3rd defendant, as Chairman, will be directed to proceed with the operation of election and to take a poll after due notice to all share-holders and within ten days of the date of this judgment. Defendants Nos. 1 to 3 and 7 will pay the plaintiffs' costs here and below and each defendant will pay his own costs. In view of the importance of the case we fix the Advocate's fee for the appeal at Rs. 1000. The actual costs of printing will also be included in the costs.

Cornish, J.—I agree that the co-option of defendants Nos. 3 and 4 on the 16th October and of defendants Nos. 5, 6 and 7 on the 23rd October as Directors cannot be justified under Arts. 68 (*h*) or 86 of the Articles of Association and was *ultra vires*. Defendant No. 4 filed a written statement claiming to be of the Directorate by reason of his co-option by defendants Nos. 1 and 2, but we are told that he has since withdrawn from that body.

Defendants Nos. 5 and 6 by their written statements have repudiated their supposed co-option. They claim that as retiring Directors they continue in office till their successors are actually elected, or that by virtue of the provision of Art. 68 (*g*) they are to be deemed to have been re-elected. These two defendants together with defendants Nos. 3, 7 and 8 are five of the six share-holders' Directors who under the Articles of Association were due to retire at the Ordinary General Meeting on the 13th October. Defendants Nos. 3 and 7 also rely on Art. 68 (*g*). Defendant No. 8 has not put in a written statement. The learned Counsel for defendants Nos. 5 and 6 has not pressed the first part of his clients' contention and I think it is untenable. "A Director" said Sargant, J., in *In re Consolidated Nickel Mines Ltd.* (19) does not ordinarily step into an office which is perpetual unless terminated by some act, but into an office the holding of which is limited by the terms of the Articles." By Art. 63 the six share-holders' Directors vacated office at the Annual General Meeting on the 13th October. Having vacated their office at the meeting there could be no question of their still continuing in the office when a poll was pending to fill up the vacancies caused by their retirement. The provisions of Art. 68 (*g*) then have to be considered. This says "if at any Ordinary General Meeting at which an election of Directors ought to take place, the place of any retiring Director is not filled up, such Director shall, if willing to continue in Office, be deemed to have been re-elected at such meeting, unless it shall be determined at such meeting to leave the vacancies unfilled." It has been suggested that Art. 68 (*g*) can have no application because there were six Directors due to retire but under the amended Articles only five vacancies to be filled. But admittedly one of these gentlemen had written to the Chairman on the 13th October stating that for reasons of health he was not standing for election, and I do not see how a person who has withdrawn his candidature for election could be regarded as capable of being deemed to have been re-elected under the provisions

(18) (1906) 1 Ch. 148; 75 L. J. Ch. 261; 94 L. T. 398; 54 W. R. 359; 13 Manson 100; 22 T. L. R. 196.

(19) (1914) 1 Ch. 883; 83 L. J. Ch. 760; 111 L. T. 243; 21 Manson 273; 58 S. J. 556; 30 T. L. R. 447.

of Art. 68 (*g*). There would, therefore, be no objection on that ground to the five retiring Directors who were seeking re-election having the benefit of this Article.

The question is, whether, in view of what happened on the 20th October, there has been such a failure to elect Directors as will entitle defendants Nos. 3, 5, 6, 7 and 8 to claim to have been re-elected in pursuance of Art. 68 (*g*). In other words, has the meeting at which the election of Directors ought to have taken place terminated without the vacancies being filled up? Now it is beyond dispute that when the share-holders arrived at the Company's premises for the poll, which had been fixed by 3rd defendant, the Chairman, to be held there between the hours of 4 and 6 P. M. it was not until 5-20 P. M, that they learned that the Returning Officer appointed to take the poll was unable to attend. No arrangements had been made for any other person to conduct the poll. The Assistant Manager who was on the premises reported that he had no instructions in the matter; and it is admitted by the Returning Officer that the proxies and voting papers for the poll were locked in a safe of which he had the key, and were not available because the 3rd defendant, to whom he sent the keys when he reported his inability to attend, was absent from Madras and did not get his message until 6-45 P. M. that evening. It has been contended that, in spite of all this, the assembled share-holders had the remedy in their own hands that under Art. 44, they might have chosen one of their number to be Chairman in the absence of the 3rd defendant and have proceeded with the business of the poll, using such pieces of paper for the purpose of voting papers as might have been available; or that under Art. 46, they might have resolved to adjourn the meeting to some other date for the taking of the poll. Articles 44 and 46 in terms apply to Ordinary General Meetings. In my opinion an assembly of share-holders for purpose of recording their votes at a poll had no power to fix some other date than that already fixed for the holding of the poll. The position, when a poll has been demanded and directed to be taken at a future date, is that the meeting subsists in contemplation of law until the poll has been taken; or, as Lord Justice Brett expressed it, "the taking of the poll is a mere enlargement of the meeting at which it was demanded." *The Queen* v. *Wimbledon Local Board* (2). See also *Shaw* v. *Tati Concessions Ltd.*, (3) and *Spiller* v. *Mayo Development Co. Ltd.*, (5). In the last mentioned case Russel, J., said :—"It was well settled that the taking of the poll was not a meeting of the Company in the strict sense, but was in law a continuation of the meeting at which the poll was directed to be taken." Article 49 regards the taking of the poll in the same sense; for it says, "The result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded." The conclusion upon these authorities is, the legal conception of the meeting being that it continues for the purpose of taking the poll that the meeting continues for that purpose only and for no other purpose or business.

The last question, therefore, resolves itself into this,—has the breakdown of the arrangements for the poll on the 20th October put an end to the taking of a poll? I do not think so. In my opinion the words in Art. 68 (*g*) "If at any Ordinary General Meeting at which an election of Directors ought to take place", imply that it must be possible for the poll to be taken at the appointed time and place. There must at least be a reasonable opportunity to the voters and to the candidates of having the poll taken ; See *Reg.* v. *St. Mary's Lambeth* (20). In the present case it is to be observed that there were eleven candidates for the five vacancies. And if unforeseen circumstances have arisen to prevent the poll being taken, then I think that, not only has there been no termination of the election but that it became the duty of the Chairman, the 3rd defendant, (and he had the power under the Articles) to appoint some other time for the taking of the poll. The rule is, that if a poll is demanded it must be taken, and this is so even though the Chairman refuses to grant the poll: *The Queen* v. *Wimbledon Local Board* (2). Article 49 is equally emphatic. It says: "If a poll is demanded as aforesaid (*i. e.*, at the General Meeting) it *shall* be taken"; and it goes on to provide that it is to be taken, "in such manner, and at such time and place as the Chairman of the meeting directs and either at once, or after an interval or adjournment, or otherwise". The language of the Article leaves no doubt in my mind that it was open to the 3rd defendant as Chairman, and indeed obligatory upon him, when he learned

(20) (1838) 8 Ad. & E. 357; 3 N. & P. 416; 1 W. W. & H. 398; 2 Jur. 566; 47 R. R. 613.

that the poll could not be held on the 20th to appoint another date for it.

Finally it has been objected that the matter being one of internal management of the Company's affairs the Court has no jurisdiction to interfere, and that the plaintiff's suit is unsustainable. It was upon this objection that the learned trial Judge dismissed the suit. A number of authorities have been cited to us. I do not think it necessary to refer to them in detail because the law upon the subject has been compendiously stated by Lawrence, L.J., in *Cotter* v. *National Union of Seamen* (21) at page 107* as follows:—

"If an act is *intra vires* the Corporation, and therefore, one which could be sanctioned by the majority of the corporators properly assembled in General Meeting, the Court will not entertain any proceedings to restrain the doing of the act resolved upon unless such proceedings are brought by the majority of the corporators and *in the name of the corporation itself*."

It has been contended that, assuming defendants Nos. 3, 5, 6, 7 and 8 have usurped the office of share-holders' Directors, this was a matter capable of confirmation by the Company in General Meeting—though no meeting of the Company has in fact sanctioned it. In other words, the argument is that the Company, which means, of course, a majority of the general body of share-holders, could by a resolution override the Articles which require Directors to be elected, and resolve that these five gentlemen, who have contrived to step back into office without an election should remain there. I do not think that this would be *intra vires* a General Meeting of the share-holders, for the Articles until altered (and this, according to s. 20, Indian Companies Act, can only be done by special resolution), bind the share-holders in General Meeting as much as the Board: See *Boschoek Proprietary Co. Ltd.* v. *Fuke* (18). It seems to me that the principle of that case governs this case where five gentlemen have been installed as Directors in contravention of the Articles. Such a mode of constituting Directors would be equally *ultra vires* the Board and the Company to sanction. This being the case, and there being no adequate remedy open to the plaintiffs under the Articles, I think it falls within the rule that the Court has jurisdiction to entertain a suit by share-holders against the Company in respect of an infringement of their individual rights as share-holders when the interests of justice so require: *Baillie* v. *Oriental Telephone and Electric Co.* (13).

For these reasons, I agree that there should be a declaration that defendants Nos. 3, 5, 6, 7 and 8 are not Directors of the Company, and with the order directing the 3rd defendant as Chairman to take the poll.

N. S. & R. L. *Order accordingly.*

(21) (1929) 2 Ch. 58; 88 L. J. Ch. 323; 141 L. T. 178; 73 S. J. 206; 45 T. L. R. 352.

*Page of (1929) 2 Ch.—[*Ed*].

MADRAS HIGH COURT.

Original Side Appeal No. 108 of 1929.

September 17, 1931.

BEASLEY, C. J., AND CORNISH, J.

THE MUNICIPAL COUNCIL OF VIZAGAPATAM—DEFENDANT—APPELLANT

versus

THE TEA DISTRICTS LABOUR ASSOCIATION—PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (V of 1920), s. 92—Benefit society—Assessment to company's tax—Contributions of members, whether capital—'Income', 'capital' 'paid-up capital,' meanings of.

Where an association formed for the purpose of gathering recruits for estates and contributed to by its members who paid a subscription on a fixed scale and a capitation fee for each recruiter and each recruit, was assessed to company's tax under s. 92, of the Madras District Municipalities Act:

Held, that there was a distinct difference between 'income' and 'capital', that the contributions of the members of the association were income and not capital and as the association had no 'paid-up capital' within the meaning of s. 92 of the Madras District Municipalities Act, it could not be assessed to company's tax under that section. [p. 202, col; 2.]

Appeal from the judgment and decree of Mr. Justice Waller, dated the 1st October, 1929, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court, in C. S. No. 721 of 1928.

Mr. *B. Satyanarayana*, for the Appellant.

Messrs. *King* and *Patridge*, for the Respondents.

Judgment.—This is an appeal from the judgment of Mr. Justice Waller. The facts of the case are as follows. The respondent association, namely, the Tea Districts (supply) Association is an association of persons formed for certain purposes, the main purpose being to gather recruits for tea estates for various parts of India and one of the gathering grounds being in or close to the appellant Municipality. The objects of the association are fully set out in the Memorandum of the Association and its Articles. The association is con-

tributed to by its members who pay a subscription on a fixed scale and a capitation-fee of Rs. 5 for each recruiter and Rs. 12 for each recruit. Each estate which is represented in the association makes an advance of Rs. 75 to cover the expenses of the recruiters. For the moment, we prefer to call these payments by the members of the association their contributions. The association has a branch in the appellant Municipality and under s. 92 of the Madras District Municipalities Act (V of 1920) the appellant Municipality assessed the respondent association to companies tax for the half years ending 30th September, 1925,31st March, 1926 and 30th September, 1926 and served upon the respondent association notices demanding payments of the sums of Rs. 125 for each of the half-years already mentioned making a total sum of Rs. 500. The respondent association paid the amount demanded under protest and stating that they would file a suit in due course for the recovery of the amount paid by them under protest. The amount is a small one but as the respondent association had been similarly assessed by other Municipalities this suit and the other suits were, by order of the High Court, transferred here for a decision. Mr. Justice Waller allowed the respondents' suit because he held that the respondents were not assessable under s. 92 of the Madras District Municipalities Act by reason of the fact that they had no paid-up capital. Upon all other points he appears to have been in favour of the appellants.

The only point argued before us here to day was whether the respondent association had a paid-up capital upon which it could be assessed. It is important to observe that the words used in s. 92 are "paid-up capital." Admittedly this is not a company but a mere benefit society; and it is not necessary—and so Mr. Justice Waller has held—that before a benefit society can be assessed under this Act it should carry on business within the Municipality for profit. What we have to deal with here is the question as to whether or not the respondent association has any paid-up capital upon which it can be assessed. Mr. B. Satyanarayana in his very able agrument contends that the contributions by the members to which we have already referred constitute the paid-up capital of it. He argues that it is quite clear that the association carries on business within the limits of the appellant Municipality. He further argues that no association or company can carry on business without capital so to do and that any money it derives from its own members or from outside must necessarily be the capital of the company with which to transact business. He argues that it is not right, as our learned brother Waller, J., in the Court below did, to give a strict interpretation to the words appearing in the section, namely, "paid-up capital" and invites us to give to those words a liberal construction and hold that any money received by a company, a benefit society or an association which enables it to carry on its business must necessarily be capital. We are of the opinion that Mr. Justice Waller was quite right in applying to those words the technical meaning which usually is applied to those words. We find them in the section in question used in relation to a company and we decline to apply any other meaning to those words "paid-up capital" than that which is usually applied to them. Paid-up capital means so much of the authorised or stated capital of a company which its share-holders or subscribers have paid up. In this case it appears to us that the contributions of the members of the association were in no sense capital. They were the subscriptions of the members of the association to the association and as such were the "income" and not the "capital" of the association. There is a distinct difference between "income" and "capital" and in our view this was the income of the association which enabled it to carry on its business within the limits of the appellant Municipality. The Legislature has chosen to say that where a company or a benefit society carries on business within a Municipality it is to be assessed on its paid-up capital. But if the company or the benefit society has no paid-up capital it follows that it cannot be assessed. Under these circumstances, in our view, the judgment of Mr. Justice Waller in the Court below was quite correct. This appeal must, therefore, be dismissed with costs.

N. S. & A. *Appeal dismissed.*

MADRAS HIGH COURT.

Second Civil Appeals Nos. 1718 AND 1719 of 1926.

March 18, 1931.

VENKATASUBBA RAO, J.

DARBHAMULLA SUBBAMMA—

PLAINTIFF—APPELLANT

versus

VALIVETTI VEERAYYA AND OTHERS—

DEFENDANTS—RESPONDENTS.

Partition Act (IV of 1893), ss. 2, 3, 4, 6, scope of—Operation of s. 4, conditions for—Inherent powers of Court in partition cases.

There is a broad distinction between ss. 2, 3 and 6 of the Partition Act forming a group on the one hand and s. 4 on the other. Section 4 applies to the case of a dwelling house a share of which has been transferred to a stranger and three conditions must be fulfilled before s. 4 comes into operation (1): the suit must relate to a dwelling house of an undivided family, (2) some share in it must have been transferred to the stranger and (3) the stranger transferee must have sued for partition. In the case of the other sections, one of the parties to the dispute may or may not be a stranger. Even if the subject of the dispute is a dwelling house unless there be a stranger transferee s. 4 does not apply. [p. 203, col. 2.]

What s. 3 contemplates is a request by a party for the sale of the whole property. The section favours the smaller share-holder at the expense of the larger and the fact of a person owning a large share is a disability under the section since such a person is precluded from offering to buy the interest of the party owning the smaller share. This is the reason why the Courts have wherever possible striven to avoid this result. *Ramprasad* v *Mukandi* (1) and *Angamuthu Mudaliar* v. *Ratna Mudliar* (2), referred to. [p. 204, col. 1.]

If a sale is directed under s. 2 and s. 3 does not apply, the sale is nevertheless one governed by the Partition Act and s. 6 relates to such a sale. [p. 204, col. 2.]

Independent of Partition Act, a Court has inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition. *Basantakumar* v. *Moti Lal* (3), referred to. [*ibid.*]

Appeal against the decree of the Court of the Subordinate Judge, Narasapur, in A. S. Nos. 67 and 68 of 1925 preferred against the decrees of the Court of the District Munsif, Bhimavaram, in O. S. Nos. 267 and 268 of 1922 respectively.

Mr. *K. Venkataramaraju*, for the Appellant.

Messrs. *N. Rama Rao* and *P. Panini Rao*, for the Respondents.

Order.—The Courts below have not paid the slightest attention to the Sections of the Partition Act which they profess to apply. Section 3 of that Act has always been a source of trouble, but even that fact cannot excuse the total disregard by the lower Court of even the other provisions of the Act.

The facts may be briefly stated. The joint family to which these appeals relate consists of six members, the father, the 1st defendant and the sons, defendants Nos. 2 to 6. The 2nd defendant, conveyed his sixth share in some items to the plaintiff in O. S. No. 267 of 1922 for Rs. 200. He similarly sold his interest in certain other items to the plaintiff in O. S. No. 268 of 1922 for Rs. 800. Each alienee has filed a suit claiming his share in the items alienated. In their written statement, the defendants offered to buy the plaintiff's share at a valuation. In each case, the lower Courts, purporting to apply the Partition Act, have fixed the price of the plaintiff's interest and directed her to receive the amount in lieu of her share in the items conveyed. The plaintiffs question the correctness of this order.

I shall first consider the various sections of the Act before examining whether the orders can be sustained. In the first place, there is a broad distinction between ss. 2, 3 and 6, forming a group, on the one hand, and s. 4 on the other. Clause 1 of the last mentioned section runs thus:

"Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee, sues for partition, the Court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder, and may give all necessary and proper directions in that behalf."

It applies to the case of a dwelling-house a share of which has been transferred to a stranger. Three conditions must be fulfilled before s. 4 comes into operation.

(1) the suit must relate to a dwelling-house of an undivided family:

(2) some shares in it must have been transferred to a stranger: and

(3) the stranger transferee must have sued for partition.

In the case of the other sections, one of the parties to the dispute may or may not be a stranger. Even if the subject of the dispute is a dwelling-house, unless there be a stranger transferee, s. 4 does not apply.

Having adverted to this important distinction, I shall now refer to the group consisting of ss. 2, 3 and 6. Section 2 says that if it appears to the Court that for certain reasons, selling the property is more beneficial than dividing it by metes and bounds, the Court on the request of the share-holders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds. Then comes the question, who can claim the benefit of

s. 3? It expressly enacts that when the request mentioned in s. 2 proceeds from a certain party, some share-holder other than that party, may apply under s. 3. It is difficult to understand why the rule has been so enacted. Mr. Justice Coutts-Trotter refers to "the practical inconvenience, almost the absurdity, of the results" following from such a rule. (See O. S. No. 750 of 1919 on the file of the High Court). In 116 Ind. Cas. 851 *Ramprasad* v. *Mukandi* (1), the learned Judges rightly point out that the effect of this section is to favour the smaller share-holder at the expense of the larger. The fact of a person owning a large share, is by this section made a disability and he is precluded from offering to buy the interest of the party owning the smaller share. For instance, if *A* owns nine-tenths and *B* one-tenth of an item, the section regards *A* as being a person under disability although if, of the two persons, one should be favoured, *A* would appear to have a much better claim than *B*. But strangely the section enacts quite the contrary. The Courts naturally, whenever possible, strove to avoid this result. For instance, it has been held that an application under s. 3 is too late, if made after the sale has been ordered under s. 2. See *Angamuthu Mudaliar* v. *Ratna Mudaliar* (2) which reverses the decision of Mr. Justice Coutts Trotter, already referred to). Again, where a plaintiff owning two-thirds share offered to buy up the share of the defendant on payment of a stated sum, it was held that this was not a request strictly falling within s. 2 and, therefore the terms of the s. 3 did not come into play at all: [*Ramprasad* v. *Mukandi* (1) already cited]. What s. 3 contemplates is a request by a party for the sale of the whole property. In the case just cited, the party applied not that the whole property should be sold but that his co-sharer's interest might be sold to him at a valuation. These two cases show how strictly ss. 2 and 3 have been construed. In my opinion, the rulings, with great respect, are perfectly correct. I may remark in passing, that in *Angamuthu Mudaliar* v. *Ratna Mudaliar* (2) the learned Judges overlooked that the order for sale being one by consent, cannot rightly be described as one covered by s 2. It seems to me with great deference, that the judgment would have been more correct (though the result would not have been different) had the sale been deemed as one falling entirely outside the Partition Act. In the other case mentioned above, *viz.*, *Ramprasad* v. *Mukandi* (1) the learned Judges finding that the application did not conform to the provisions of s. 2 held, as I have just observed (and in my opinion rightly), that the Partition Act did not apply. It is well to bear in mind in this connection that independent of the Partition Act, the Court has an inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition. 11 Ind. Cas. 370 [*Basantakumar* v. *Moti Lal* (3)].

Then the question arises, if a sale is directed under s. 2 and s. 3 does not apply what is the position? The sale is nevertheless one governed by the Partition Act and s. 6 relates to such a sale. Clause 3 of that section runs thus:—

"If two or more persons, of whom one is a share-holder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the share-holder.

Incidentally, this shows beyond all doubt that share-holders and strangers alike may bid at the sale: (See *Angamuthu Mudaliar* v. *Ratna Mudaliar* (2).

To elucidate the points to which I have referred, I may notice three further cases cited at the Bar. In *Atul Chandra* v. *Bhusan Chandra* (4), the plaintiff was the 14 annas sharer and the defendant, the 2 annas residue co-sharer. The plaintiff applied that he might be allowed to buy up the defendant's share at a valuation, or, in the alternative, that the property might be sold to the highest bidder and the proceeds distributed. The defendant thereupon asked under s. 3 for leave to buy at a valuation the plaintiff's share. The question arose as to who could apply under the last mentioned section, the plaintiff or the defendant The Court rightly held, reversing the judgment of the District Judge, that the defendant had the right. But with respect, the decision seems on another point to be wrong. The plaintiff's application was not of the kind contemplated by s. 2 and it should have been held that the Partition Act did not apply to the case. In 24 Ind. Cas. 27 [*Jamnadas* v. *Mulchand* (5)], the plaintiff was interested in two-thirds of the property and

(1) 116 Ind. Cas. 851; A. I. R. 1929 All. 443; (1929) A. L. J. 651.

(2) 91 Ind. Cas 516; 48 M. 920; 22 L. W. 323; 49 M. L. J. 411; (1925) M. W. N. 786; A. I. R. 1925 Mad. 1234.

(3) 11 Ind. Cas. 370; 15 C. W. N. 555 *note*; 6 C. L. J. 8 *note*.

(4) 97 Ind. Cas. 690; 44 C. L. J. 47; A. I. R. 1926 Cal. 1190

(5) 24 Ind. Cas. 273.

applied for a sale under s. 2. It was held (and this is correct) that the right to buy out, was vested under s. 3 in the defendant. Having held this, the Court directed the property to be sold but added by way of a rider, that the defendant's right was unaffected to apply under s. 3 to buy up the plaintiff's share at a valuation. This is the comment I wish to make on this case. Either the defendant applied before or after the sale was directed under s. 2. If before, he possessed the right, if after, he was too late. But the learned Judge ordered a sale, which course would have been right, had the defendant not applied; but at the same time, the Judge gave him leave to buy out, which pre supposes that he made a valid application. In *Mahabir Rai* v. *Mahadev* (6), the plaintiffs owned two-sevenths and the defendants five-sevenths of a certain house. The latter applied under s. 2. The former thereupon made a request under s. 3. The learned Judge, having stated these facts, observes:

"It became imperative on the Courts below to follow the procedure enjoined by s. 3, cl. 2, Partition Act."

This is intelligible only upon the footing that disputes arose among the plaintiffs *inter se*, as otherwise cl. 2 could have no operation : [See *Angamuthu Mudaliar* v. *Ratna Mudaliar* (3), already cited].

Now, let me deal with the facts of the present case. Judged by these principles the terms of the defendants' request, do not fulfil the requirements of s. 2. The lower Courts ought therefore to have held that the Partition Act does not apply. Let us grant that their request was a valid one. Even then, the Courts below ought not to have given them leave to buy up the plaintiff's share, for the right to buy out (if it did exist) would vest in the latter and not in the defendants. But as a matter of fact, the plaintiff did not apply under s. 3. Even granting, therefore, that the action of the lower Courts was otherwise justifiable, the only order they could have made was one under s. 6. Moreover, the Courts below entirely ignored the distinction that exists between the items which form the dwelling-house and the other items in the suit. They applied the same rule to both sets of properties. In every respect, they thus disregarded the provisions of the Partition Act.

I shall now deal separately with each of the items to which the two suits relate.

(6) 103 Ind. Cas. 367: A. I. R. 1927 All. 686.

(Here his Lordship directed the preparation of a scheme of partition with reference to those items).

N. S & A. *Order accordingly.*

MADRAS HIGH COURT.

Civil Appeal No. 14 of 1926.

October 15, 1931.

VENKATASUBBA RAO AND PAKENHAM WALSH, JJ.

NIMMAGADDA RAMIAH—PLAINTIFF—APPELLANT

versus

NIMMAGADDA MAHALAKSHMAMMA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law — Joint family — Self-acquisitions—Burden of proof—Existence of ancestral property, effect of—Adoption—Bequest to adoptive mother assented to by natural father before adoption—Validity.

It cannot be presumed from the mere fact that a Hindu father was possessed of some ancestral property that all his subsequent acquisitions are joint family property. *Kannammal* v. *Ramathilakammal* (1), referred to. [p. 206, col. 1.]

The natural father's assent cannot validate a bequest by the adoptive father in favour of the latter's daughter. *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (5), relied on. [p. 206, col. 2]

A bequest by the adoptive father in favour of the adoptive mother in a Will executed prior to adoption if assented to by the natural father before adoption, would be valid and binding on the adopted son if it is fair and reasonable. *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (5) and *Raju* v. *Nagammal* (7), referred to. [p. 207, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Bapatla, in O. S. No. 47 of 1923.

Mr. *M. Venkatasubbiah* for The Advocate-General, for the Appellant.

Mr. *P. Somasundaram*, for the Respondents.

Judgment.—With the lower Court's finding, that the plaintiff was adopted by Subbiah, during his life-time and not by his widow, after his death, we must agree. The adoption was made the on 11th of February, 1911, and Subbiah died on the 9th of March, 1911. Subbiah, by his Will, executed in August, 1910, made certain dispositions in favour of his daughter, the 2nd defendant. One of the points argued is—was the plaintiff's natural father aware of this Will before the adoption in question and did he assent to its provision? The lower Court has, in effect, found, that he acquiesced in them and that, but for such acquiescense, Subbiah would not have taken the plaintiff in adoption. In other words, the finding is, that there was an ante-adoption arrangement between Subbiah

and the plaintiff's natural father. The plaintiff attained majority in 1921 and brought the suit in 1923. The lower Court, holding that the arrangement was fair and reasonable, dismissed the plaintiff's suit.

The plaint refers to 12 items of immovable property. On behalf of the respondents, it is contended that Items Nos. 4, 5 and 8 are Subbiah's self-acquisitions. This contention is in our opinion, well-founded. In 1902, Subbiah and his brother entered into a partition of their family properties. The partition deed does not mention these three items. It is not disputed that they were acquired by Subbiah subsequently. The plaintiff puts his case thus. Some properties fell to the share of Subbiah at the partition; it must be, therefore, assumed that he purchased the items in question from the income of those properties. In other words, the contention is, that when it is shown that a Hindu father was possessed of some ancestral property, all his subsequent acquisitions must be presumed to be joint family property. With this contention, we cannot agree. In 97 Ind. Cas. 632 [*Kannammal* v. *Ramathilakammal* (1)] (a decision of this Court), the law is thus stated:

"The party alleging that the property held by an individual member is joint family property must show that the family was possessed of some property with the aid of which the property in question could have been acquired. If this is shown and only then, the onus shifts to the party alleging self-acquisition, to affirmatively make out that the property was acquired without any aid from the family estate. This is clearly laid down in *Ram Kishan Das* v. *Tunda Mal* [2], Chamier, J., lays down two propositions:

(1) There is no presumption that a family has any joint property.

(2) There is no presumption that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed some property by means of which the property in question could have been acquired.

In *Narayana Rao* v. *Seshamma* (3) Sir John Wallis, C. J. and Seshagiri, Iyer, J., quoted with approval the observations of Chamier, J., and accepted that learned Judge's view. In a recent case of this Court, 71 Ind. Cas. 130 *Vadamalai Pillai* v. *Subramania Chettiar* (4), the same view was again taken. It is unnecessary to cite further cases. The law on the point may now be taken as being clearly settled."

Following this case, we accept the finding of the lower Court that Items Nos. 4, 5 and 8 are the self-acquisitions of Subbiah. (Items Nos. 2 to 5 in the judgment is an obvious mistake for Items Nos. 4, 5 and 8).

The plaintiff cannot succeed in regard to these items.

Of the 12 items referred to in the plaint, Items Nos. 1, 10, 11 and 12 were bequeathed to the plaintiff himself and his right to those items is not disputed.

The question then remains, is the plaintiff entitled to the other five items? (Items Nos. 2, 3, 6, 7 and 9). We must hold, following *Krishnamurthi Ayyar* v. *Krishnamurthi Ayyar* (5) that the natural father's assent does not validate the bequest of these items to the 2nd defendant. The respondents do not seriously dispute this, and we must hold that the plaintiff is entitled to these items.

The plaintiff claims also the movables and the outstandings left by Subbiah. These were by the Will in question, bequeathed by Subbiah to his widow the 1st defendant. The plaintiff cannot under the very decision quoted above question this bequest. Their Lordships first explain how the matter stands on principle. What then are the results that follow from its strict application They first consider the case of a disposition? made *inter vivos* by the adoptive father. They then deal with the case when the disposition is by Will and the adoption is subsequently made by the widow. Then, in regard to the third and last case, they thus observe:—

"But it is quite different when the adoption is antecedent to the date at which the disposition is meant to take effect. The rights which flow from adoption are immediate, and the disposition if given effect to, is inconsistent with these rights and cannot of itself *vi propria* affect them."

That is to say, when the adoption is made prior to the disposition which is to take effect subsequently, the rights flowing from the adoption take precedence of the disposition. This, then, is the result, if the matter is looked at from the point of view of strict principle. Their Lordships were, however, prepared to admit an exception to this rule on the ground of custom. Referring to the third case mentioned above they proceed:—

"It will be seen from these that in their Lordships' opinion the only ground on which such arrangement can be sanctioned is custom."

What is the arrangment that is referred to in this passage? The answer is clearly that which is dealt with under third head Their Lordships then go on to observe:—

"They are of opinion that there is such a consensus of decision in the cases with the exception

(1) 97 Ind. Cas. 632; A. I. R. 1927 Mad 38.
(2) 10 Ind. Cas. 543; 33 A. 677; 8 A. L. J. 723.
(3) 26 Ind. Cas 33; 27 M. L. J. 677.
(4) 71 Ind. Cas. 130; 16 L. W. 936; (1923) M. W. N 57; A. I. R. 1923 Mad. 262.
(5) 101 Ind. Cas. 779; 50 M. 508; 26 L. W. 186; A. I. R. 1927 P. C. 139; 29 Bom. L. R. 969; 53 M. L. J. 57 25 A. L. J. 945; 45 C. L. J. 620; 4 O. W. N. 621; 31 C. W. N. 910; 26 L. W. 186; (1927) M. W. N. 469; 39 M. L. T. 52; 8 P. L. T. 719; 54 I. A. 248 (P. C.).

of the case of *Jagannadha* v. *Papamma* (6) that they are fairly entitled to come to the conclusion that custom has sanctioned such arrangements in so far as they regulate the rights of the widow as against the adopted son. It seems part of the custom that one *sine qua non* of such an arrangement should be the consent of the natural father."

From these passages the inference is obvious that an arrangement made for the benefit of the widow would be treated as valid and be protected. To this extent, the rule resting on principle is relaxed. "But", says the plaintiff's learned Counsel, "this exception applies not to an adoption made by a person during his lifetime but by his widow after his death." This contention receives no support from the judgment; on the other hand, the passages we have quoted have the very opposite tendency. Then the Counsel relies upon the words in the last paragraph of the judgment, namely, "Their Lordships consider that the Will here can have no effect." Those words are not to be taken as meaning that they decided that the widow had no right. Indeed, the widow in that case had enjoyed the right conferred upon her and died. The rights in question under the Will were those of the respondents in the case. Who were those respondents? The answer is to be found in the opening paragraph of the judgment where they are thus described:—

"Persons who were connections, but were in no case within the degrees entitled to maintenance and who are respondents in the present suit."

Then the only remaining question is, can the particular provision in this Will in favour of the widow be upheld? The judgment above referred to of the Judicial Committee has been fully considered and explained in *Raju* v. *Nagammal* (7). It was there held that an arrangement by which the widow gets some part of the estate absolutely, would be upheld provided it is fair and reasonable. In this case, we are satisfied that the bequest of the movables and the outstandings to the widow satisfies the requirement. The plaintiff's suit to this extent, must therefore, fail.

In the circumstances of this case, we are not prepared to allow the plaintiff mesne profits. By the Will in question, Subbiah bequeathed to the plaintiff some properties belonging to his wife the 1st defendant. Now that the plaintiff elects to dispute the Will he is bound to surrender them to the 1st defendant their owner; but he has been enjoying them so long and is bound to account for their profits. Moreover, the 1st defendant was maintaining the plaintiff till some time previous to the suit. She has incurred legitimate expenses both on her own behalf and on behalf of the plaintiff. In any account that may be ordered to be taken, she must get credit for the sums she spent as well as for the income from her properties enjoyed by the plaintiff. We do not think any useful purpose will be served by directing these cross accounts to be taken. The claim to mesne profits is, therefore, disallowed.

We are asked to record the statement made on behalf of the plaintiff that he claims no interest under the Will in the properties belonging to the 1st defendant bequeathed to him thereunder and that he is not at present in possession of any of them. We accordingly record that statement. We may note that, but for this statement, we would not have passed a decree in his favour.

The lower Court's decree is modified to the extent indicated in this judgment. In the circumstances, we direct each side to bear its costs throughout. The suit was brought *in forma pauperis* and we direct the plaintiff to pay the Court Fees due to the Government, which are hereby declared to be a first charge on the properties decreed in his favour.

We make no order as to costs as regards the Memorandum of Objections.

N. S. & A. *Decree modified.*

(6) 16 M. 400; 3 M. L. J. 193.

(7) 113 Ind. Cas. 449; 52 M. 128; 29 L. W. 77; (1928) M. W. N. 732; A. I. R. 1928 Mad. 1289.

MADRAS HIGH COURT.

Civil Revision Petition No. 873 of 1928.

August 10, 1931.

CURGENVEN, J.

ADHIKARI LAKSHMAMMA—PLAINTIFF—PETITIONER

versus

GOOLE APPADU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration— Agreement to abide by decision of majority, meaning of—All arbitrators not taking part in proceedings—Validity of award—Duty of party to protest — Taking chance of favourable decision—Estoppel—Revision against awards—Maintainability—Civil Procedure Code (Act V of 1908), s. 115.

An agreement to abide by the majority of a certain number of arbitrators does not mean that the arbitration may be conducted by a majority or by less than the full number of arbitrators,

But if some of the arbitrators are absent it is the duty of the parties to object at that time and not to allow the proceedings to go on with less than the full number of arbitrators.

If a party having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, submits to the arbitration going on and allows the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award. *Chowdhri Murtaya Hossain* v. *Bibi Beehunhissa* (2), followed.

Revision is generally objectionable in cases of awards and a Court should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. *Ghulam Khan* v. *Muhammad Hassain* (3), referred to.

Civil Revision Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise the decree of the Court of the District Munsif Parvathipur, in O S. No. 237 of 1926.

Mr. *S. Subrahmanya Sastri*, for the Petitioner.

Mr. *Y. Suryanarayana*, for the Respondents.

Judgment.—This was a suit referred to arbitration and the finding of fact is that out of five arbitrators one was absent during the examination of one of the witnesses. The learned District Munsif is of opinion that the terms of reference provided for such a contingency inasmuch as the parties agreed that the opinion of the majority should be accepted. But it is one thing to say that and quite another thing to say that the parties agreed that the arbitration might be conducted by a majority, or by less than the full number of arbitrators. This view of the lower Court has not been supported here and it must be found on the authority of *Thammiraju* v. *Bapiraju* (1) that it was incumbent on each of the arbitrators to be present at each of the meetings and that accordingly, if the matter stood there, the award would be liable to be set aside as illegal. The learned District Munsif has, however, also found that, if there was any irregularity from this case, the plaintiff has waived it. He notes that the plaintiff's next friend was present on each occasion and has admitted that he took no notice of the circumstance that one of the arbitrators was on one occasion absent. It was his business to object at the time and not to allow the proceedings to go on and terminate. The principle has been laid down by the Privy Council in *Chowdhri Murtaya Hossain* v. *Mussamat Bibi Beehunnissa* (2). "The appellant," their Lordships say, "having a clear knowledge of the circumstance on which he might have founded an objection to the arbitrators proceeding to make their award, did submit to the arbitration going on and allowed the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, and it is too late for him after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award." This seems to me to be precisely what the plaintiff's next friend did, and I cannot say that in accepting his conduct as an answer to the objection the learned District Munsif has gone beyond the discretion vested in him. There is clearly no question here of exceeding his jurisdiction.

Exception is then taken to the manner in which the arbitrators have dealt with the B and D Schedule properties. As regards the B Schedule property, it is said that they have not decided as between the plaintiff and the defendants to whom it belongs and as regards the D Schedule, that their decision was in conflict with admissions actually made by the defendants. It is to be observed, however, that these objections were not taken in the memorandum filed by the plaintiff upon the award and I see no reason accordingly why I should allow them to be taken now.

It only needs to be added that the Privy Council have held in *Ghulam Khan* v. *Muhammad Hassan* (3) that revision is generally objectionable in cases of awards, and I think that on the principles laid down in that case a Court should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. I have not in anyway been shown how the latter condition is satisfied.

The Civil Revision Petition is dismissed with costs.

N S. & A *Petition dismissed.*

(1) 12 M. 113.

(2) 3 I. A. 209 at p. 220; 26 W. R. P. C. 10; 3 Suther 342; 3 Sar. 663 (P. C.).

(3) 29 C. 167; 29 I. A. 51; 4 Bom. L R. 161; 12 M. L. J. 77; 6 C. W. N. 226; 8 Sar. 154; 25 P. R. 1902 (P. C.).

OUDH CHIEF COURT.

First Civil Appeal No. 1 of 1931.
November 2, 1931.

HASAN, C. J. AND BISHESHWAR NATH SRIVASTAVA, J.

Khan Sahib WAJID ALI KHAN—
DEFENDANT—APPELLANT
versus
JAFAR HUSAIN KHAN AND ANOTHER—
PLAINTIFFS—RESPONDENTS.

Muhammadan Law — Divorce — Words implying divorce—Express words for effecting divorce—Talak, *what is.*

The words 'I give up all relations and would have no connection of any sort" addressed by a Muhammadan husband to his wife are not express within the meaning of the Hanafi Muhammadan Law to effect a divorce nor are they understood in that law as implying divorce. Among Indian Muhammadans they are frequently used for the purpose of dissociating oneself from the company or the presence of the addressee, of relieving such a person from the obligation of rendering service to the user and also for the purpose of withdrawing restraints from the movements of addressee. The express words for effecting divorce are well known to be *talak* and its grammatical variations. These words are terms of art and the technical meaning which they have acquired by usage is freedom from the bondage of marriage and not from any other bondage. Once they are used they must be given effect to according to their technical import and evidence as to any intention to the contrary is not permissible according to the Hanafi Muhammadan Law. [p. 211, col. 2; p. 212 col. 2.]

First Appeal against a decree of the Additional Subordinate Judge, Hardoi, dated the 10th November, 1930.

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the Appellant.

Messrs. *M Wasim*, *Manni Lal* and *Siraj Husain*, for the Respondents.

Judgment.—This is the defendant's appeal from the decree of the Additional Subordinate Judge of Hardoi dated the 10th of November, 1930.

Musammat Saghir-un-nisa was married to the defendant, Wajid Ali Khan, on the 12th of March, 1909, according to the Hanafi Muhammadan Law at Shahabad in the District of Hardoi. She died on the 11th of May 1928 and the plaintiff No. 1, Jafar Husain Khan, is her brother and *Musammat* Mahmud-un nisa, plaintiff No. 2, is her sister. It is admitted that the plaintiffs and the defendant are the sole heirs-at-law of *Musammat* Saghir un-nisa entitled to share in equal moieties in the inheritance.

The plaintiffs' case is that *Musammat* Saghir un-nisa's dower was fixed at Rs. 80,000 as a deferred dower at the time of her marriage with the defendant. The plaintiffs are thus entitled to recover Rs. 40,000 from the defendant. They also claim from the defendant certain ornaments the value of which they stated to be Rs. 1,063-8. Lastly they asked for a sum of Rs. 25,000, only by reason of the insufficiency of the defendant's means. In defence the defendant pleaded that the amount of dower fixed at the marriage was only Rs. 10,000, that *Musammat* Saghir-un-nisa had relinquished her claim for dower, whatever the amount, by executing a document dated the 4th of February, 1924, that early in December, 1921, the defendant had irrevocably divorced *Musammat* Saghir-un-nisa and that, therefore, counting the period of limitation for a claim for dower from December, 1921, the present suit was barred by time. The Court was also asked to determine the reasonable amount of dower under s. 5 of the Oudh Laws Act, 1876, for which a decree might be passed against the defendant.

On the question of the amount of dower fixed at the marriage of Saghir-un-nisa with the defendant the finding of the learned Additional Subordinate Judge is that it was Rs. 80,000. The issue as to the release of dower has been decided by him in the negative and against the defendant. On the question of the alleged divorce in December, 1921, his finding is again in the negative and against the defendant. As to what was the reasonable amount of dower, having regard to the means of the husband and the status of the wife, for which a decree should be made in favour of the plaintiffs in the present case, his finding is that the defendant is possessed of property of the value of at least Rs. 90,000 and his opinion on this issue is that Rs. 30,000 was the reasonable amount of dower within the meaning of s. 5 of the Oudh Laws Act. Finally, he decreed the plaintiff's suit for their half share of Rs. 15,000. As regards ornaments, he has found that the plaintiffs are entitled to a decree of Rs. 125 for their share in the value of the ornaments. Except the last-mentioned finding, every other finding of the learned Additional Subordinate Judge has been challenged before us.

There is no documentary evidence whatsoever to show as to what the amount of dower was but it is agreed that it was fixed at the marriage. The plaintiffs have, therefore, produced witnesses to prove that the dower was fixed at Rs. 80,000. On the other hand, the defendant has also examined witnesses in support of his case as to the amount of the dower. At the hearing of the appeal the record of the evidence produced on both sides was read to

us *in extenso*. The conclusion at which we have reached is that the finding of the learned Additional Subordinate Judge is correct and must be accepted. The plaintiff's witnesses are Israr Husain Khan, Abdus Sattar Khan, Muhammad Raza Khan and Amir Husain Khan. All these four witnesses were present at the marriage. Amir Husain Khan acted as a Vakil at the marriage and Muhammad Raza Khan was a witness. Abdus Sattar Khan is the nephew of *Musammat* Saghir-un-nisa and Israr Husain Khan joined the marriage as a friend of the defendant. The *Qazi* who recited the formula is now dead. The learned Additional Subordinate Judge has answered some of the criticisms advanced on behalf of the defendant against the testimony of these witnesses and has accepted their evidence as reliable and worthy of credence. In the arguments before us nothing was urged which would induce us to disagree with the learned Additional Subordinate Judge in his opinion as to the trustworthiness of the plaintiffs' witnesses. He has also given reasons for forming the opinion that the fixing of the amount of dower at Rs. 80,000 was in consonance with the probabilities and the circumstances of the case. He has pointed out that one Hakim Khadim Husain Khan, who was a holder of the title of Khan Bahadur, an Honorary Magistrate and one of the most respectable men of Shahabad, acted in *loco parentis* at *Musammat* Saghir-un-nisa's marriage. Her father had died. She was the first cousin of Khadim Husain Khan and the marriage took place at his house. The evidence on both sides agrees that the amount of dower was settled by him. In the case of Khadim Husain Khan's own daughters like sum of money, that is Rs 80,000 had been fixed as the dower. The learned Additional Subordinate Judge has pointed out to the fact that *Musammat* Saghir-un-nisa's sister's dower, that is the plaintiff No. 2's, was also settled at Rs. 80,000. We are of opinion that these are sufficiently weighty grounds in support of his finding.

On the side of the defendant he himself went into the witness box and produced five more witnesses in support of his allegation as to the amount of the dower. Obviously the evidence of the defendant himself cannot be accepted without strong corroboration. Such a corroboration is not available out of the testimony of his witnesses, all of whom have been disbelieved by the learned Additional Subordinate Judge. He has examined the statements of these witnesses with great care and rejected them as unworthy of belief. The result of his consideration of the evidence as a whole is thus stated by him:

> "Thus it would appear that the evidence of the plaintiff with regard to the amount of dower is much more worthy of belief than the defendant's evidence which could not impress me."

We affirm this finding.

The plea of the relinquishment of dower has a short history behind it. The defendant filed two written statements in this case; the first on the 17th of April, 1930. This written statement has unfortunately not been translated and printed for the record of this appeal. In para. 12 of this written statement it was stated that *Musammat* Saghir-un-nisa had relinquished her claim for dower in favour of the defendant long before her death. No mention was made of any deed of relinquishment. The defendant filed a second written statement on the 14th of May, 1930, and in para. 12 of that written statement he mentioned a deed of release with reference to its date, the 14th of February, 1924. Along with this written statement the defendant produced in Court what purported to be the original deed of relinquishment. It was brought on the record of the case and marked as Ex. A-3. The plaintiffs then asked for a certified copy of it and received it. Subsequently the defendant also obtained a certified copy of the same. After this the original (Ex. A 3) disappeared from the record of the case. The defendant then substituted the certified copy which he had obtained and which was also marked as Ex. A-3. In the circumstances certified copy has been accepted as admissible in evidence in proof of the issue relating to the relinquishment. As to the loss of the original the learned Additional Subordinate Judge is of opinion that it was "to the advantage of the defendant for the plaintiffs have been deprived of the opportunity of disproving its genuineness by comparison of signature of Saghir on the original with her other signatures." He further points out that the amount of dower is not mentioned in this deed of release. This fact, he thinks, raises strong suspicion against the authenticity of the release. The learned Additional Subordinate Judge further comments on the fact that in the deed of release the marriage is stated to have taken place 20 years before its execution. This will place the marriage in

February, 1901, while as a matter of fact it took place in March, 1909, but, says the learned Additional Subordinate Judge, "the present suit was instituted 20 years and some months after the marriage." He, therefore, opines that the deed of release was fabricated after the institution of the suit. The recital in the deed of continuous happy relations between the defendant and *Musammat* Saghir-un-nisa is also untrue according to the learned Additional Subordinate Judge. As to the direct evidence of proof of the deed of release furnished by the testimony of the defendant and his three witnesses, Obaidullah, Muhammad Ahmad and Muhammad Tahir Khan, the learned Additional Subordinate Judge is of opinion that it is unworthy of credence. He has examined the evidence in details and has given reasons for his opinion. We are not prepared to disagree with him. We, therefore, maintain the finding that the release is not proved.

The question as to the means of the husband for ascertaining the reasonable amount of dower has been considered by the learned Additional Subordinate Judge with care and caution. We adopt his finding that the dower in the present case should be fixed for the purpose of s. 5 of the Oudh Laws Act at Rs. 30,000 only. It now remains to consider the plea of divorce.

The question of divorce has been argued before us mainly as a proposition of law. So far as the facts are concerned we were asked in the first instance to accept the defendant's and his witnesses' testimony to the effect that the defendant pronounced the well-known formula of *talaq* thrice in rapid succession, that is to say, he actually said "*main ne tumko talaq dia*" (I have divorced thee). We agree with the learned Additional Subordinate Judge that it is impossible to accept this evidence as true. We also accept his view of the events as they happened. This view is supported by a letter of *Musammat* Saghir-un-nisa dated the 3rd of December, 1931, (Ex. 9). Exhibit 12 is the envelope containing Ex. 9 and bears postmark "Bhopal 3rd December, 1921." The letter is in the handwriting of *Musammat* Saghir-un-nisa herself and was addressed to her brother, Jafar Husain. On the record of the case it has come from the custody of Jafar Husain. We hold in agreement with the learned Additional Subordinate Judge that only so much of the facts in connection with the question of divorce are proved as are proved by the contents of this letter.

It appears that one fine morning when the defendant was ready to leave his house for his office he found that his breakfast was not ready. Thereby he lost temper and addressing *Musammat* Saghir-un-nisa said that "He was entirely giving up all relations and would have no connection of any sort with her." As to the true import of these words *Musammat* Saghir-un-nisa asks in this letter the opinion of his brother as to whether they amounted to an irrevocable divorce. So far as we can gather anything from this letter as to the estate of her own mind it is clear that she never treated the utterances of the defendant as a final divorce. The defendant in his evidence in the case says:

"I really never intended to divorce her. Excepting sexual intercourse I treated Saghir in all respects after divorce till her death exactly as I treated her before the divorce. Saghir was unfit for sexual intercourse on account of her illness from 1918 till her death. There was no change in the treatment of Saghir too towards me before and after divorce."

After the death of *Musammat* Saghir-un-nisa the defendant performed the obsequies as if she was his undivorced wife. Thus it is clear that there was no divorce either in thought or in action: but it is argued that the words used by the defendant as evidenced by the contents of the letter amount in law as a complete divorce. This is the question which we have to decide. The latest pronouncement of their Lordships of the Judicial Committee is contained in the decision of *Ma Mi* v. *Kallander Ammal* (1). Sir John Wallis, in delivering the judgment of the Judicial Committee, said:—

"According to that law (Muhammadan Law), a husband can effect a divorce whenever he desires. He may do so by words without any *talaknama* or written document, and no particular form of words is prescribed. If the words are 'express' or well understood as implying divorce, such as *talak*, no proof of intention is required. If the words used are ambiguous the intention of the user must be proved."

With reference to this pronouncement argument was addressed to us that the words used by the defendant in this case are not ambiguous and if they are not ambiguous divorce would come into effect in spite of the defendant's intention to the contrary.

We have already rejected the evidence that the defendant used the word '*talak*' in addressing *Musammat* Saghir-un-nisa on that particular morning. The words which we have found on the authority of the letter (Ex. 9) to have been used were "I give

(1) 100 Ind. Cas. 1; 4 O. W. N. 301; 54 I. A. 61; 25 A. L. J. 65; A. I. R. 1927 P. C. 15; (1927) M. W. N. 80; 32 M. L. T. 41; 25 L. W. 342; 28 P. L. R. 109; 5 R. 18; 52 M. L. J. 376; 6 Bur. L. J. 40; 45 C. L. J. 263; 8 P. L. T. 280; 31 C. W. N. 621; 29 Bom. L. R. 800 (P. C.)

up all relations and would have no connection of any sort". These words are certainly not 'express' within the meaning of the Hanafi Muhammadan Law to effect a divorce nor are they understood in that law as implying divorce. The express words are well known to be *talak* and its grammatical variations, the root being composed of letters (*tu, lam, q*). These words are terms of art and the technical meaning which they have acquired by usage is 'freedom from the bondage of marriage' and not from any other bondage. Once they are used they must be given effect according to their technical import and evidence as to any intention to the contrary is not permissible according to the Hanafi Muhammadan Law. Several illustrations of the express formula *talak* are given in Hedaya: *Anta talaqun* (Thou art the objective of divorce); *Mutalliqa* (Thou art divorced); *Talaqtuka* (I have divorced thee). In Hedaya the reason for treating these expressions as terms of art is given as follows:—

Fakana sarihan wa innahu yoqeburrajate binnasse wala yaftaqera illanneyate leannahu sarihan fehe beynalabatil-istemale.

(Therefore they amount to express divorce. To this is attached reversibility and such a divorce is free from the question of intention because usage preponderates). Now it is clear that the word '*talaq*' with its grammatical variations has acquired this technical meaning by reason of usage. It may be a moot question whether the same meaning must always be attached to those words when used by the Urdu speaking Muhammadan community of India. The question assumes a more serious importance when words other than *talaq* are found to have been used by a member of the same community. We on our part are unable to affirm that apart from the word '*talaq*' there are words of Urdu used by the Musalmans of India bearing the same technical meaning as the word '*talaq*' bears. We find this question raised in an Urdu translation of Hedaya by Maulana Syed Ameer Ali printed in Newal Kishore Press, Lucknow.

It is interesting to note that even in the use of the word *talaq* the change in phonetics alters the meaning. Hedaya says—

Lau qala anta mutliqa betaskinettae la yakuna talaqan illa binniyate.

(If it is said *mutlaqa* with *sukun* on *ta* then this is not divorce without the intention). All this shows how much the legal effect of the use of the word '*talaq*' depends upon the accuracy of its form and the usage which has clothed it with that technical connotation. We are not aware of and we have tried in vain to find in Arabic text books of Muhammadan Law any other word than '*talaq*' as a well understood expression implying divorce without proof of intention or circumstances. All other expressions are treated in the books not under *Talaq-i-sarihi* (express divorce) but under *Talaq-i-kinaya* (implied divorce). The expression of the latter class are always regarded as ambiguous and the meaning of 'divorce' is given to them only on proof of the accompanying intention or the surrounding circumstances. This is certainly so in the Hanafi Muhammadan Law though there is some difference in this respect between that law and the Shafai Law.

The Chapter on divorce in Hedaya begins by saying *Attalaqo ala zerbaine sarih wa kanaya* (there are two kinds of *talaq*, express and by implication). After having dealt with the former the Hedaya proceeds:

Ammazzarbussani wa howat kanayato—La yaqaa behattalaque illa binniyate au bedalalatilhale.

(Now as to the second class, and they are *Kinayas* which do not effect divorce without intention or the force of surrounding circumstances). Under this heading several forms of expressions are given which may or may not have the effect of a divorce according to the intention and the circumstances. It is not possible to identify the expressions used in this case in Urdu with any of the expressions dealt with by the auther of Hedaya in Arabic. One thing is however clear that it is not shown by proof nor is it within our knowledge that the words used by the defendant in this particular case have acquired by usage the meaning which the word '*talaq*' bears among the Muhammadans of India. At the best they may be used with the intention of effecting a divorce or they may be used without such an intention. We are clearly of opinion that they are ambiguous and as it is admitted that the intention of the user of those words was not to effectuate a divorce the words must be treated as innocuous altogether. Amongst the Indian Muhammadans they are frequently used for the purpose of disassociating oneself from the company or the presence of the addressee, of relieving such a person from the obligations of rendering service to the user and also for the purpose of withdrawing restraints from the movements of the addressee.

Amongst the expressions given under

the heading of 'divorce by implication' in Hedaya are certain expressions which when used in anger constitute divorce even in the absence of any intention to effect a divorce and on this part of the book great reliance was placed by the learned Advocate for the defendant in support of his arguments. The particular passage in Hedaya is as follows :—

"*Kaqaulehi etadi wa ikhtiari wa amreka beyadeka fainnahu la yasdiqo feha leannal aqabe yadullo ala iradatittalaqe.*"

(In expressions such as 'count', 'choose', 'your work is in your hands' intention against divorce will not be affirmed because anger indicates that divorce was intended). It is argued that in the circumstances in which the defendant used the expressions aforementioned they establish a divorce.

We are of opinion that this is not the meaning of the passage which we have just now quoted. When read with the context it will be found that the passage is used in relation to the question of assent on the part of the wife or exclamations of contumely or reproach on the part of the husband. It is also clear from the context of the passages preceding the one just now quoted that expressions such as these when used by a husband in reply to *a requisition of divorce* are construed to effect a divorce as they cannot bear a construction of denial; but apart from this we are quite clear in our mind that expressions such as the defendant used in the present case in Urdu are never, among the members of the community to which he and his deceased wife belonged, understood *proprio vigore* to effect a divorce. It will be seen that we have refrained from referring to Hamilton's Hedaya because it was suggested in *Asha Bibi* v *Kadir Ibrahim Rowther* (2) that it may not be a correct translation of the original Arabic text, being a translation of the Persian version of Hedaya. We ourselves do not agree with this suggestion. Whenever we had occasion to refer to Hedaya in its original Arabic form we have found that the translation by Hamilton is not only accurate but is also best in form and elegance, if we may respectfully say so.

On the above grounds we agree with the learned Additional Subordinate Judge on the above question also and dismiss the appeal with costs.

R. L. *Appeal dismissed.*

(2) 3 Ind. Cas. 730; 53 M. 22; 6 M. L. T. 295; 20 M. L. J. 1.

OUDH CHIEF COURT.

First Civil Appeal No. 15 of 1930.

April 22, 1931.

BISHESHWAR NATH AND KISCH, JJ.

SHEO RAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

Raja PASHUPAT PARTAB SINGH

PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Bengal Alluvion and Diluvion Regulation (XI of 1825), ss. 2, 3, 4, scope of—Alluvion and diluvion—River separating land from one estate and joining to another—Land identifiable—Property in such land—*Dhardhura, *custom of—Essentials.*

When there is no local usage of the nature referred to in s. 2, Bengal Alluvion and Diluvion Regulation, and a river by a sudden change of its course separates a considerable piece of land from one estate and joins it to another estate without destroying its identity and preventing its recognition, such land on being clearly recognised remains the property of its original owner. Where the evidence falls very far short of proving a clear and definite usage immemorially established that the main channel of the river dividing two villages shall be the constant boundary line between them, whatever changes may take place in the course of the river so as to bring the case within the purview of s. 2, Bengal Alluvion and Diluvion Regulation, the case falls within the purview of ss. 3 and 4 of that Regulation. [p. 214, cols. 1 & 2; p. 218, col. 2.]

Where a large area is taken away from one village to another, the party claiming accretion must satisfy the Court by clear and definite evidence not only that there is a general custom of *Dhardhura*, but also that such custom contemplates such far-reaching consequences as the transfer of a very large tract of recognisable land from one village to another as a result of a sudden change in the course of the river. [p 215, col. 1.]

First Appeal against a decree of the Subordinate Judge, Fyzabad, dated the 26th November, 1929.

Messrs *A. P. Sen* and *Ali Zaheer*, for the Appellant.

Messrs. *Iqbal Ahmad* and *S. N. Roy*, for the Respondent No. 1.

Judgment—The matter in dispute in the five suits out of which these appeals arise is identical.

The plaintiff in all the cases is Raja Pashupat Partab Singh, the *zemindar* of village Dewara Gang-Barar situate on the north bank of the river Gogra in the District of Basti and the defendants are the *zemindars* of five *mahals* of village Ausanpur situated on the opposite side of the river in the District of Fyzabad. The plaintiff brought the suits to obtain possession over a tract of land aggregating an area of 2135 *bighas*, 10 *biswas* and 10 *biswansis* on the allegation that in 1334 *Fasli* owing to a change in the course of the river Gogra, the land in question had passed from the north to the south side

of the river, where the various defendants had taken possession of it as part of their respective *mahals*. He also claimed mesne profits His main plea was that, as this tract of land could be identified as part of village Dewara Gang Barar, he was entitled to retain possession of it, although it had passed over to the opposite side of the river.

The main defence in all the suits was that the deep stream rule, known as *Dhardhura*, applied to the boundary between the two villages and, therefore, the land in suit had become part of village Ausanpur. A number of subsidiary pleas were taken on both sides with which we are not concerned.

The learned Subordinate Judge found that the custom of *Dhardhura* had not been proved. He also found that an area of 1787 *bighas* 2 *biswas* and 8 *biswansis* of the land in suit could be identified as being part of village Dewara Gang Barar and that this land had been cut off from the north bank of the river by a sudden change in the course of the river in 1334 *Fasli*. He accordingly gave the plaintiff decrees for the possession of this area, reserving his decision as to the amount of mesne profits to be decreed until the plaintiff had been put into possession. The defendants have appealed.

Of the above findings the only one that has been challenged before us is that relating to the custom of *Dhardhura* and this is, therefore, the only point that we have to consider.

The defendants base their case on s. 2 of the Bengal Alluvion and Diluvion Regulation (XI of 1825), which is as follows : —

"Wherever any clear and definite usage of *shikast paiwast* respecting the disjunction and junction of land by the encroachment or recess of a river, may have been immemorially established, for determining the rights of the proprietors of two more contiguous estates divided by a river (such as that the main channel of the river dividing the estates shall be the constant boundary between them, whatever changes may take place in the course of the river, by encroachment on one side and accession on the other), the usage so established shall govern the decision of all claims and disputes relative to alluvial land between the parties whose estates may be liable to such usage."

On the other hand the plaintiff maintains that the case is governed by ss. 3 and 4 of the same Regulation of which the relevant portions are to the effect that when there is no local usage of the nature referred to in s. 2, and a river by a sudden change of its course separates a considerable piece of land from one estate, and joins it to another estate, without destroying its identity and preventing its recognition, such land, on being clearly recognised, shall remain the property of the original owner.

Admittedly the burden of proving the custom set up by them was upon the defendants. Under the terms of s. 2 of the Regulation such custom, to be conclusive of the rights of riparian owners, must be clear and definite and immemorially established. The deep stream rule, however convenient it may be for administrative purposes, is apt to be productive of gross inequities as between the proprietors of continuous estates divided by a river. The Courts, therefore, which have had occasion to consider such questions, have in most cases laid emphasis on the point that the proof of the custom must be clear and unequivocal, particularly in cases where a large tract of land has gone over from one bank to the other by a sudden change in the course of the river. Thus in the earliest case on the subject, one of the year 1864, that has been cited before us, *Faroo Singh* v. *Shurfoodeen* (1) it was held that the custom of *Dhardhura* is, when applied to land gained otherwise than by gradual accretion, opposed to equity and it is doubtful how far, in extreme cases, in which it would lead to the transfer of large tracts of land, the Courts would be warranted in applying it. Such a custom must be proved not by vague assertions of witnesses, but by a sufficient enumeration of instances. In *Badruddin* v. *Tej Ram* (2) a Divisional Bench of the Allahabad High Court laid down that there is no charm in the terms "*Dhardhura*" and the mere allegation of the existence of the custom of *Dhardhura* cannot necessarily mean that the custom applies so as to confiscate what was, the day before, the property of another man. All customs that may have, from time immemorial, been governing the rights of the parties, shall continue to do so, in spite of the Regulation XI of 1825. Such an immemorial custom may be one applicable even to a case of a sudden change in the course of the river. Such a custom, which has a very far-reaching consequence, must be established by clear and cogent evidence and all the incidents of the custom must be pleaded and will have to be proved. The Courts have gone further and have considered the question whether, even when

(1) 1 N. W. P. H. C. Rep 244.

(2) 116 Ind. Cas. 300; 27 A. L. J. 380; A. I. R. 1929 All. 233; 13 R. D. 326.

there is a definite custom of *Dhardhura*, such a custom is applicable under all circumstances. In another very early case, of the year 1868, also concerned with the river Gogra, *Ranee Katiyanee* v. *Muhammad Sharf-ud deen* (3), the existence of the custom of *Dhardhura* was admitted, but the case was remanded for determining whether the custom extended to alluvial land capable of identification after severance. A similar question was considered by a Full Bench of the Allahabad High Court, consisting of the Chief Justice and four Judges, in the case of *Kunj Behari Lal* v. *Jai Mal Singh* (4). The learned Judges held that even where the custom of *Dhardhura* has been established, and in one particular year the river made a new channel with the result that a very large area (but considerably smaller than the area involved in the case before us) was taken away from the village of the plaintiff and added to the village of the defendant, the custom of *Dhardhura* did not apply in the absence of any evidence that such an event had ever occurred before.

The river Gogra forms part of the boundary between the Provinces of Agra and Oudh, and as was observed by the late Court of the Judicial Commissioner of Oudh in *Mir Bakar Husain* v. *Gulam Bhewani Pal* (5) which was also a case relating to the river Gogra, it would be extremely inconvenient if the Allahabad and the Oudh Courts were to differ on the principle by which the decision of such claims should be guided. We find ourselves however in complete agreement with the principles laid down in the cases cited above. We consider that for the appeals to succeed the defendants-appellants must satisfy us by clear and definite evidence not only that there is a general custom of *Dhardhura*, but also that such custom contemplates such far-reaching consequences as the transfer of a very large tract of recognisable land from one village to another as a result of a sudden change in the course of the river.

The evidence produced by the defendants in support of the alleged custom falls under the following three heads :—

Firstly, certain official correspondence at the time of the First Regular Settlement of the Fyzabad District in 1866 between the Settlement Officer, Fyzabad, and the Commissioner of the Division relating to certain proceedings for the recording of the custom of *Dhardhura* as between the villages on the two banks of the river Gogra together with certain agreements (*ikrarnamas*) executed by the *zamindars* of both Dewara Gang Barar and Ausanpur in this connection.

Secondly, evidence as to the respective areas of the two villages at various periods from 1860 to 1927 from which the inference is sought to be drawn that, in the absence of evidence of any litigation at the time of any of the accertions to one side at the expense of the other suggested by the figures, the owners of the two villages must be deemed to have acquiesced in the custom of *Dhardhura*.

Third, a suit in the year 1900 between Raja Ram Singh, the predecessor-in-interest of the present plaintiff, and the owner of village Naipura, belonging to the Bhiti Estate, on the Fyzabad side of the river opposite a portion of Dewara Gang Barar, which ended in a compromise under the terms of which the parties recognised the existence of the custom of *Dhardhura* as between these two villages.

We shall proceed to deal with these three heads *seriatim*.

The purport of the correspondence at the time of the First Regular Settlement of the Fyzabad District was that the general custom of *Dhardhura* had been accepted by the Financial Commissioner and the Board of Revenue for the villages lying on the banks of the river Gogra, and it was decided to take agreements from such of the owners of the riparian villages, who were prepared to admit the custom of *Dhardhura* and to call on any of them, who did not admit such custom, but set up a different custom, to prove the same. The object of these proceedings appears to have been to record the custom in the Records of Rights of the villages concerned. Agreements were accordingly taken from the majority of the *zemindars* of the villages on that part of the Gogra which lies between the Fyzabad and Basti Districts including the *zemindars* of Dewara Gang Barar and Ausanpur. In these agreements the *zemindars* of these two villages admitted the *Dhardhura* custom and undertook not to act contrary to it. While, however, the proceedings were still pending, the Board of Revenue cancelled its orders and directed its officers to take no further steps in the matter, having come to the conclusion that the question would be more appropria-

(3) 4 N. W. P. H. C. Rep. 189.
(4) 115 Ind. Cas. 625; 26 A. L. J. 625; A. I. R. 1928 All. 399; 12 R. D. 301; 50 A. 691.
(5) 1 O. D. 57 S. C. 1871-1887, Case No. 27.

tely decided by the Courts when a dispute regarding the title to land transferred from one bank to the other by the action of the river should come before them. Similar agreements, which were also to have been taken from the *zemindars* of the villages on that part of the river Gogra lying between the Fyzabad and Gorakhpur Districts, were accordingly not taken and, from the fact that no *wajib-ul-arz* or *rewaj-i-am* has been produced in the present case on either side we may safely conclude that no entry of any such custom was made in these records.

The evidentiary value of this correspondence and these *ikrarnamas* to prove the custom of *Dhardhura* has been discussed at length in the case of *Baqar Husain* v. *Gulam Bhawani Pal* (5), to which we have already referred. The conclusion reached by the learned Judicial Commissioner in deciding that case was that the record of the inquiries made by the revenue authorities did not establish that a local custom of *Dhardhura* invariably obtained, but only that such custom was found extensively to exist, and that the agreements could not be taken to mean that the riverside proprietors, who agreed to the custom of *Dhardhura*, understood it to include the complete transfer of proprietary rights to be effected by a change of the course of the river Gogra. He accordingly dismissed the appeal of the plaintiff, who had sought to obtain possession of a large tract of land belonging to the defendant that had been transferred from the north to the south side of the river Gogra.

The effect of such agreements was considered in another case by a Bench of the late Court of the Judicial Commissioner of Oudh in 23 Ind. Cas. 224 [*Janki Kunwar* v. *Narendra Bahadur Pal Singh* (6)], to which reference has been made by the Court below. This case also related to a considerable tract of land which had been transferred from one bank to the other by sudden changes in the course of the river Gogra in the years 1308 and 1314 *Fasli*, but the identity of which had not been lost. The weight that could be attached to these *ikrarnamas* as proof of the custom set up was discussed at length by the Judicial Commissioner Mr. Lindsay and Mr. Kanhaiya Lal, A. J. C. It was observed that the *ikrarnama* had not resulted in any entry in the Record of Rights prepared at the time and from the circumstances under which the *ikrarnamas* were taken, they could not be held to be adequat proof of the custom laid down therein.

We see no reason to take a different view from that taken in these two cases with regard to the value of the documents in question as proving the existence of a custom of *Dhardhura* extending to the transfer of a large and identifiable area of land from a village on one bank to the village on the opposite bank by a sudden change in the course of the river.

Coming to the second head of evidence, we do not think that the existence of the custom set up by the defendants can be legitimately inferred from the changes in the areas of the two villages concerned from time to time combined with the fact that there is no evidence of any litigation having taken place at the time of any increase in the area of the one accompanied by a decrease in area of the other. In the first place the figures to which our attention has been drawn are very incomplete. It is difficult to trace out any correspondence between the areas of the two villages. In fact for no single year, except 1927, are the areas of both the villages shown. It is clear, therefore, that there is no material on the record from which to draw any inference at all. What the figures do bring out very clearly is a steady decrease in the area of Dewara Gang Barar from 1914, when it was 625 *bighas*, to 1926, when it was only 3653 *bighas* In the second place, it does not necessarily follow that, even when a large portion of a village is cut off by the river, it can be identified with land newly added to the other side of the river. It is a matter of careful measurement in each case. We have little doubt that in many cases there is no identity between the land cut away from one side and the new land accreted to the other, and also that in many cases land cut away from one bank disappears altogether. In the case of *Shohrat Singh* v. *Ghulam Ezid* (7) where there was evidence from the Settlement maps that, in the course of a number of years, an area of land formerly belonging to one village, had passed over to the village on the opposite side of the river by reason of the river shifting its position, and had been treated as belonging to the village to which it had gone over, a Bench of the Allahabad High Court refused to draw the inference that, because there was no evidence of any objection having been made by the proprietors of the former village, this proved the existence of the

(6) 23 Ind. Cas. 224.

(7) 55 Ind. Cas. 366; 18 A. L. J. 195.

custom of *Dhardhura*. The Court observed that, if this custom was the only possible explanation, the inference might legitimately have been drawn but that it could not be drawn when there was nothing to show what actually happened during the period in question. In the present case, as we have already pointed out, not only are there other possible explanations, besides the existence of the custom of *Dhardhura* of there having been no case between the owners of the two villages at the time of previous changes in their respective areas, but there is also no satisfactory data on which to base any conclusion whatever.

We now come to the third and last part of the defendants' evidence, the litigation in 1900 between Raja Ram Singh, the predecessor-in-interest of the present plaintiff, and the owner of another village Naipura facing a portion of Dewara Gang Barar on the other side of the river. As we have stated above, this litigation ended in a compromise. This compromise contains an admission by the parties that the custom of *Dhardhura* existed for ever as between these two villages. It also contains an undertaking that both parties shall observe this custom and shall make no claim in future to any land thrown up by the river on the side of the other village whether it had thrown up gradually or in a single block. The learned Counsel for the defendants-appellants relies on this compromise, firstly, as an admission by the predecessor-in-interest of the plaintiff as to the existence of a custom of *Dhardhura* of such a nature as to extend to the transfer of even a large tract of land from the one side of the river to the other by a sudden change in its course, and, secondly, as a specific instance of such a custom.

The learned Subordinate Judge was not disposed to accept the compromise as evidence of such a custom of *Dhardhura* being applicable to the present case on the ground that, from the admission of such a custom as between the villages Dewara Gang Barar and Naipura, it would not be safe to assume that the same custom existed as between the villages Dewara Gang Barar and Ausanpur. He had before him the bare compromise. The plaint to which the compromise refers was tendered in evidence by the defendants in the Court below, but as no proof of the signature of the late Raja Ram Singh was forthcoming and the age of the document was short by a few months of the thirty years after which its genuineness could be presumed, that Court had no alternative but to reject it. The defendants have applied for the plaint to be received in evidence in this Court. It is necessary to have it before us for the proper appreciation of the import of the compromise and the learned Counsel for the plaintiff-respondent has agreed that it should be admitted in evidence. We have accordingly acceded to the defendants' request and admitted the plaint in evidence.

The claim put forward by Raja Ram Singh, as disclosed by the plaint was that the land in suit, which was 2850 *bighas* in area, had formerly been part of village Dewara Gang Barar and had gradually been washed away between the years 1878 and 1888. Between the latter year and 1891, it had gradually been redeposited at the same place, and the revenve payable had been settled with the plaintiff. As a dispute had arisen between the plaintiff and the proprietor of the village Naipura on the opposite side of the river with regard to the ownership of this land, proceedings had been instituted against both parties under s. 145 of the Code of Criminal Procedure resulting in the land being attached and the parties referred to the Civil Court for the determination of the question of title. The suit was accordingly instituted by Raja Ram Singh on the allegation that the land was his property, not only by custom of *Dhardhura*, which existed from time immemorial between the two villages and applied as well to other villages situated on the bank of the Gogra, but also as having formerly formed part of his village. He further alleged that it was not the fact that the land had been thrown up all at once, as had been stated by the defendants (presumably in the proceedings under s. 145 Criminal Procedure Code) but it had actually been redeposited gradually. Such then was the case set up by Raja Ram Singh. The frame of the suit suggests that he was not certain in his mind as to the validity of the claim to so large a tract of land based solely on the custom of *Dhardhura*, since he did not confine his case to the custom of *Dhardhura*, but also claimed that the land had actually formed part of village Dewara Gang Barar before it was washed away, and he was at pains to make out that it had not been thrown up by a sudden change in the course of the river although it could hardly be said that the emergence of 2850 *bighas* in the course of the short space of three years was a gradual accession.

The compromise admitted the plaintiff's claim. It is true that of the various grounds taken in the plaint the only one that is emphasised in the compromise is the custom of *Dhardhura*. The admission of the existence of the custom is in the following terms:—

As between Dewara Gang Barar belonging to the plaintiff and the village Naipura to the defendant the same custom of *Dhardhura*, as has been prevalent for ever, shall exist."

The compromise does not further define the existing custom, though it goes on to lay down that in all further disputes it shall be applied to all accretions to the land on either side whether gradual or thrown up *en bloc*

Even, therefore, if we were disposed to hold that the custom applicable to the boundary between Dewara Gang Barar and Ausanpur would in all probability be the same as that applicable between Dewara Gang Barar and Naipura, reading the plaint and the compromise together we are certainly not prepared to regard the latter as an admission of the immemorial existence of a custom of *Dhardhura* extending to cases where a large tract of land identifiable as part of the one village has become attached to the village on the other side by a sudden shifting of the deep stream.

With regard to the portion of the compromise relating to future disputes as the boundary between the two villages, this can hardly be put on any higher footing than an agreement between the parties in that case, and as such, it would not be binding between the present parties in the case before us. In the case of *Bisseesur* v. *Mohessur Bax* (8), their Lordships of the Privy Council had occasion to consider a similar agreement entered into by the *zemindars* of contiguous villages in Bengal divided by the river Ganges. Their Lordships were of opinion that whatever may have been the effect of such agreement as a contract between the two *zemindars* who executed it, it cannot be binding on the defendants in the case before them, who derived their title from a person who was a stranger to it. Their Lordships considered that it was not in the power of the then *zemindar* to impress upon the land a *quasi-servitude*, or to burden it with a covenant which would run with it into the hands of any possessor of it by any title

Turning to the other aspect of the compromise, namely, that it is a specific instance of an absolute custom of *Dhardhura* having been acted upon, we feel doubtful whether, in view of what we have stated above, it would be safe to accept one single instance of such a custom, even if the instance were clear and unambiguous as establishing a custom of *Dhardhura* applicable even to such an extreme case as the present one. The instance, however is far from being unambiguous as we have indicated above. The suit was decided by a compromise and not by a judicial pronouncement on the matters in issue, and it is impossible to say what were the considerations that led the defendant to give up his defence and enter into the compromise.

We are accordingly unable to accept the compromise either as an admission by the predecessor-in-interest of the plaintiff of the existence of a custom of *Dhardhura*, such as would include the transfer of title in a large tract of land which had belonged to one village, but had passed over by a sudden change in the course of the river to the other bank of the river without its identity being lost, or as an instance in which such a custom has been accepted.

In our opinion, therefore, the evidence produced by the defendants-appellants falls very far short of proving a clear and definite usage immemorially established that the main channel of the river dividing the two villages shall be the constant boundary between them, whatever changes may take place in the course of the river so as to bring the case within the purview of s. 2 of Bengal Regulation, XI of 1825. The case has been rightly held to fall under ss. 3 and 4 of the same Regulation.

The result is that all the five appeals fail and are dismissed with costs.

R. L. *Appeals dismissed.*

(8) Ind. App. Sup. Vol. 34; 11 B. L. R. 265.

OUDH CHIEF COURT.

Criminal Revision No. 46 of 1931.

April 27, 1931.

NANAVUTTY, J.

WILAYAT HUSAIN—ACCUSED —APPLICANT

versus

EMPEROR—COMPLAINANT—OPPOSITE PARTY.

U. P. Excise Act (IV of 1910), ss. 60 (a), 60-A—'Permits', significance of—Person liable for use of house for offence under the Act—Large quantity of cocaine found in courtyard—Accused found near by—Inference—Criminal Procedure Code (Act V of 1898),

s. 539-B—Local inspection—Separate record of inspection, necessity of.

The words of s. 60-A of the U. P. Excise Act imply a single person in a controlling position over the premises which is indicated by the use of the word 'permits' later on in the section. [p. 220, col 2.]

It is only the person who has the use of the house in such a way as to be in a position to prevent, if he so likes, the illicit sale of cocaine in that building who is liable for permitting the building under his use and control to be used for the commission of an offence under the Excise Act. [p. 221, col. 1.]

Where a large quantity of cocaine in a number of tin boxes placed in a row is found in a courtyard close to a house and the accused are found to be near the place from where the cocaine is recovered and they do not explain how they came to be there and how the cocaine happened to be found placed in a row, the conclusion is inevitable that either the accused came there to purchase the cocaine or they were there to sell the cocaine which was found in front of them. [p. 222, col. 1.]

A local inspection must be held sparingly and the danger of such an inspection is intensified when one or both of the parties are absent at the time of the local inspection. There is no compliance with the imperative provisions of s. 539-B, Criminal Procedure Code, where there is no separate record made by the Sessions Judge concerning the inspection he made of the locality and the facts that he found which would be helpful to him in appreciating the evidence given at the trial. [p. 221, col. 2.]

Criminal Revision from an order of the Sessions Judge, Lucknow, dated the 14th March 1931.

Dr. *J. N. Misra* and Messrs *R. F. Bahadurji, S. S. Chaudhri* and *Shankar Sahai* for the Applicant.

Mr. *H. K. Ghose*, Government Advocate, for the Opposite Party.

Judgment.—These are three connected applications for revision arising out of an appellate judgment of the learned Sessions Judge of Lucknow upholding the conviction and sentence passed upon the applicant Wilayat Husain for an offence under s. 60-A of the U. P. Excise Act, and the convictions and sentences passed upon the applicants Raza Husain and Abdul Rahman for an offence under s. 60 A of the U. P. Excise Act.

The facts out of which these applications for revision have arisen are briefly as follows:—

A raid was made by the U. I. D. Excise Inspector accompanied by other officers upon the house of Wilayat Husain on the night of the 23rd July, 1930. In a portion of the raided building, which is not a residential house, and which is marked on the sketch of the locality as house No. 1 by the lower Appellate Court, in a Courtyard close to the shrine of Syed Nasiruddin Shah (*Dalan mutasil mazar dari par rakhi hoi ek dibya etc.*) were found a number of small tin boxes or *dibyas* containing cocaine spread out on a carpet or *darri*, and three men, namely Raza Husain and his servant Abdul Rahman and Jan Ali, and a woman were found in this *dalan* or courtyard at the time of the raid. The woman somehow managed to escape arrest but the three men Raza Husain, Abdul Rahman and Jan Ali were caught. Of these three men Raza Husain and Abdul Rahman are two of the applicants before me. A recovery list (Ex. 1) was prepared by the Excise Inspector in the presence of Raza Husain (*bamaujudgi* Raza Husain) and others. It is significant to note that this recovery list (Ex 1) does not state that the cocaine was found in the possession of Raza Husain or of anybody else, but merely that it was found in a place from where it was suspected that it used to be sold. The Excise Inspector after preparing the search list (Ex. 1) and taking possession of the cocaine and cash found in the building submitted a report on the 25th of July, 1930, to the District Magistrate praying for a warrant of arrest against Wilayat Husain who was to be charged under ss. 14 and 15 of Act II of 1930 (The Dangerous Drugs Act of 1930). The Excise Inspector desired that Raza Husain and *Musammat* Tabko should be prosecuted under s. 14 of the same Act and Abdul Rahman and Jan Ali under s. 21 also of the same Act, that is to say, for abetment of offences under ss. 14 and 15 of the Act. The Deputy Magistrate, Mr. Sharafat Ullah Khan on the 10th October 1930 framed charges under s. 60 (*a*), s. 60 (*i*) and s. 60-A of the U. P. Excise Act (Act IV of 1910) against all four accused persons Wilayat Husain, Raza Husain, Abdul Rahman and Jan Ali. He convicted all the accused of an offence under s. 60 (*a*) of Act IV of 1910. He acquitted Raza Husain, Abdul Rahman and Jan Ali of an offence under s. 60(*i*) of Act IV of 1910 but convicted Wilayat Husain of an offence under s. 60 (*i*) of the U. P. Excise Act. He also found all four accused guilty of an offence under s. 60-A of Act IV of 1910 and he further bound them all over to be of good behaviour under s. 60-B of the same Act for a period of three years.

In appeal the learned Sessions Judge set aside the convictions and sentences passed upon Wilayat Husain under ss. 60 (*a*) and 60 (*i*) of the U P. Excise Act, but upheld his conviction and sentence under s. 60-A of the Act. He further set aside the conviction and sentence of Jan Ali on all three charges and acquitted him. He also

set aside the conviction and sentence passed upon Raza Husain and Abdul Rahman for offences under s 60-A of Act IV of 1910 but maintained their conviction and sentence under s. 60(*a*) of the Act.

In revision it has been strenuously argued before me that there is no evidence at all to support the conviction of any of these applicants for the offence of which they have been convicted. I will first take up the case of Wilayat Husain who has been convicted under s. 60-A of the U. P. Excise Act. It has been found as a fact by the lower Appellate Court that Wilayat Husain was not the owner of the building (marked house No. 1 in the sketch) in which the cocaine was found and that it was not strictly speaking in his occupation even. The learned Sessions Judge has, however, surmised that in view of Wilayat Husain's close connection by marriage with the real owners of the house in which the cocaine was found it was quite probable that he had the use of this house also. This however, is not, to my mind, a legitimate mode of reasoning. No evidence has been adduced by the prosecution to prove that this surmise of the learned Sessions Judge is a fact. The alleged use of the house by Wilayat Husain is a concrete fact which is capable of direct proof and it cannot be legitimately deduced from the mere fact that he happens to be a relation of the real owners of the house who are the heirs of one Mariam Bibi. In the second place, the learned Sessions Judge had drawn an inference adverse to the applicant Wilayat Husain from the fact that he had a water connection installed in the courtyard of house No. 1. The mere fact that Wilayat Husain had installed such a water connection in the courtyard of house No. 1 would not prove that he was using house No. 1 as his residential house or *makan maskuna*. It is in evidence that Wilayat Husain lives on the first floor of house No. 2 shown in the plan. House No. 1 consists of only a tomb and a *dalan* or courtyard. The place occupied by the tomb of a saint can hardly be utilised for any secular purpose such as that of a dwelling house. It is established from the evidence on the record that nobody lives in house No. 1, and the prosecution evidence, including that of the City Kotwal, proves that this portion of the house marked No. 1 is a shrine wherein is found the tomb of a Muhammadan saint Syed Nasiruddin Shah who is connected with the well-known saint Syed Salar Mahsud Ghazi of Bahraich. This portion of the building marked as house No. 1 originally belonged to one Hyder Husain and on his death it came to his daughter Mariam Bibi and now it is in the possession of her heirs. The water connection installed in the courtyard of house No. 1 by Wilayat Husain for his own convenience would not prove that house No. 1 was in his occupation or user. In fact the learned Sessions Judge himself in another part of his judgment writes in connection with s. 60-A of Act IV of 1910 that "the words to my mind imply a single person in a controlling position over the premises which is indicated by the use of the words 'permits' later on in the section". I entirely agree with the learned Sessions Judge so far as his interpretation of the words of s. 60-A of the Excise Act goes, but I regret I cannot accept his contention that the mere installation of a water tap or some water connection in the courtyard of house No. 1 would be tantamount *per se* to the use by Wilayat Husain of the building marked No. 1 in which the cocaine was found. The applicant's concern was with the water tap and not with the courtyard in which the water connection was installed and it is moreover in evidence that the *dalan* or courtyard of the building marked No. 1 in the sketch is not for residential purposes but is a mausoleum or shrine of a saint where any member of the public can come at any hour of the day or night to make votive offerings at the tomb or to sing *qavvali* songs, for the door leading to the tomb of the saint is always kept open. Such a place cannot be said to be in the use or occupation of any one. The water connection installed by the applicant Wilayat Husain has not been proved to be in connection with the use of that portion of the building marked No. 1 in which the cocaine was found and in the absence of any proof connecting the installation of the water pipe by Wilayat Husain with the use or occupation of house No. 1 no Court can legitimately draw the inference that the applicant Wilayat Husain was a person having the use of this house for the purpose of illicit sale of cocaine from the mere fact of the installation of the water connection This installation of the water connection in the courtyard of house No. 1 is, therefore, not in my opinion a piece of circumstantial evidence incriminting Wilayat Husain and making him out to be an occupier or a person having the use of house No. 1 so as to be in a position to pre-

vent, if he so liked, the illicit sale of cocaine in that building. It is only such a person who is liable under s. 60-A of Act IV of 1910 for permitting the building under his use and control to be used for the commission of an offence under the Excise Act.

The next piece of circumstantial evidence upon which the learned Sessions Judge relies is that the plan Ex. 9 shows that a portion of the house which corresponds to the house marked No 1 in the sketch is shown in the plan (Ex. 9) as the house of Wilayat Husain, and this plan (Ex. 9) was filed by Wilayat Husain along with his application to the Municipal Board of Lucknow for permission to erect a *pucca* building thereon. This plan (Ex. 9) is not legally proved but assuming that it was filed by Wilayat Husain, I find that it does not advance the case for the Crown in any way, for it is proved on the record and found by the learned Sessions Judge that this house marked No. 1 does not belong to the applicant Wilayat Husain, and a mere mistake in the plan (Ex. 9) wrongly describing this house No. 1 as belonging to Wilayat Husain will not make the latter out to be the owner or occupier of this house or a person having the use of this house. Wilayat Husain was not asked to explain the plan (Ex. 9) and as the plan was not drawn up by him, he cannot be held responsible for any slight inaccuracy there may be in it nor can any inference adverse to him be legitimately drawn from the misdescription of the house in the plan Ex. 9.

The next piece of circumstantial evidence from which an adverse inference has been drawn by the learned Sessions Judge against the applicant Wilayat Husain is that the door of house No. 2 was found closed at the time when the Judge went to make his local inspection and this door which was marked "Y" in the sketch by the Judge apparently always remained closed, and so it was inferred that the passage from house No. 2 into the lane was through house No. 1 and that, therefore, the applicant Wilayat Husain was to be deemed to have the use of the building marked house No. 1 in the sketch. It is a matter for regret that the learned Sessions Judge when he went to make a local inspection of the house of the accused did not see to it that the accused or their Counsel were present at the time when he made the inspection. He also did not comply with the imperative provisions of s. 539-B of the Code of Criminal Procedure. There is no separate record made by the learned Sessions Judge concerning the inspection he made of the locality and the facts that he found which would be helpful to him in appreciating the evidence given at the trial. As was held by the Patna High Court in a case reported as *Ram Sahai Singh* v. *Dwarka Singh* (1) that a local inspection must be held sparingly, and the danger of such local inspection is intensified when one or both of the parties are absent at the time of the local inspection. But apart from these irregularities, it is clear that the learned Sessions Judge has drawn a wrong inference from the mere fact that the door of house No. 2 happened to be closed at the time when he went to make his inspection. The learned Counsel of the applicant Raza Husain has argued before me that Raza Husain and Wilayat Husain had shut the door of house No. 2 because they had to come to Court to hear judgment on the day when the learned Sessions Judge happened to make the local inspection without their knowledge. This explanation seems to me on the face of it satisfactory and in the absence of any evidence to the contrary the conclusion drawn by the learned Sessions Judge from the fact of his finding the door of house No. 2 closed that Wilayat Husain was using the building marked No. 1 is not legitimate.

I have thus shown above that all the circumstantial evidence from which the learned Sessions Judge has drawn the inference that the applicant Wilayat Husain was the person who had the use of the house marked No. 1 in the sketch has really no evidentiary value, and as the learned Sessions Judge has held that there is no direct evidence to prove that Wilayat Husain was the owner or occupier of the house or a person who had the use of the place marked No. 1 in the sketch, I must, therefore, hold that there is no evidence at all to justify the conviction of the applicant Wilayat Husain under s. 60 A of the U. P. Excise Act. I, therefore, am compelled, in the absence of any evidence on the record, to allow this application for revision filed by Wilayat Husain and to set aside his conviction and sentence under s. 60-A of the U. P. Excise Act and to acquit him of that offence.

I turn next to consider the case of the other two applicants Raza Husain and

(1) 61 Ind. Cas. 712; 1 P. L. T. 569; 22 Cr. L. J. 424.

Abdul Rahman. These persons have been convicted of an offence under s. 60 (*a*) of Act IV 1910. The learned Sessions Judge has held that there is no evidence on the record to prove that the cocaine found in the house No. 1 was definitely in the possession of any of these persons found in that building, since it was not in the physical possession of any one of them. He has, however, argued that in such matters it was necessary to look into the circumstances in which the cocaine was found and that in the present case it was found spread out for sale, and Raza Husain and Abdul Rahman and others were found sitting in the verandah close to it, and from this fact a reasonable conclusion might legitimately be drawn that they were all in possession of the cocaine. The learned Government Advocate has argued that under s. 71 of the U. P. Excise Act the presumption should be raised against these applicants Raza Husain and Abdul Rahman, and that it was for them to account in a satisfactory manner how they came to be in possession of the cocaine. The same presumption has also been laid down in s. 32 of the Imperial Act No. 2 of 1930. The evidence on the record fully proves that a large quantity of cocaine in a number of tin boxes placed in a row was found in the courtyard close to the tomb of the saint and these persons were found to be near the place from where the cocaine was recovered. The learned Sessions Judge has held it proved that the cocaine found was exposed for sale in house No. 1. The applicants Raza Husain and Adbul Rahman have not explained how they came to be there and how the cocaine happened to be found placed in a row. The only conclusion that can be drawn from the facts proved is that either these applicants came there to purchase the cocaine or that they were there to sell the cocaine which was found in front of them. From the facts found the conclusion is inevitable that the applicants Raza Husain and Abdul Rahman were either in possession of the cocaine as purchasers of it or that they were found in possession of the cocaine trying to sell it on behalf of themselves or of some other person. Neither applicant has explained how the cocaine came to be found in the house marked No. 1 or how they happened to be found sitting or standing close to the place where tin boxes containing cocaine were spread out in a row. Under these circumstances I hold that the learned Sessions Judge was justified in coming to the conclusion that these applicants were in possession of the illicit cocaine. The other legal pleas in connection with s. 539-B and s. 256 of the Code of Criminal Procedure which have been argued before me do not really affect the question of the guilt of the applicants, and, although the procedure adopted by the trying Magistrate as well as by the learned Sessions Judge is open to objection, yet it has not in my opinion prejudiced any of the applicants in their trial on the merits, nor has it in my opinion occasioned a failure of justice. For the reasons given above I dismiss the applications for revision filed by Raza Husain and Abdul Rahman and uphold their conviction and sentences under s. 60 (*a*) of the U. P. Excise Act.

In the result I allow the application of Wilayat Husain, set aside the conviction and sentence passed upon him under s. 60-A of the U. P. Excise Act and acquit him of that offence. Wilayat Husain is on bail. His bail bond is discharged. The order under s. 60-B of Act No. IV of 1910 is also set aside and the bond executed thereunder by Wilayat Husain is cancelled. I dismiss the applications of Raza Husain and Abdul Rahman and confirm their conviction and sentences for an offence under s. 60 (*a*) of the U. P. Excise Act.

R. L. *Order modified.*

OUDH CHIEF COURT.

Second Civil Appeal No. 237 of 1930.

October 16, 1931.

WAZIR HASAN, C. J. AND BISHESHWAR NATH SRIVASTAVA, J.

SHEO DULARE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

JAGANNATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 55 (4) (b)—Lien of purchaser of immoveable property—Purchase at auction sale—Purchase for value and without notice—Effect on lien.

It is a well established principle of equity that a purchaser of an immoveable property has a lien on the property purchased and the fact that the purchase was made at an auction-sale and not by a private contract does not kill the equitable lien. The lien will however be ineffectual as against a transferee for value and without notice. *Mata Din* v. *Iftikhar Husain* (1), *Mahomed Rahimtulla* v. *Esmail Allarakhia* (2), *Rose* v. *Watson* (3), *Whitebread & Co., Limited* v. *Watt* (4), and *Mir Mahomed Mazuffer Hossein* v. *Kishori Mohun Roy* (5), referred to. [p. 224, col. 2.]

Appeal against the decree of the District Judge, Unao, dated the 5th May, 1930, reversing that of the Additional Subordinate Judge, Unao, dated the 30th August 1929.

Messrs. *M. Wasim*, *Kaliquzzaman* and *Ali Zaheer*, for the Appellants.

Messrs. *A. P. Sen*, *Zahur Ahmad*, *Hyder Hussain* and *Bhagwati Nath*, for the Respondents.

Judgment.—This is the plaintiff's appeal from the decree of the District Judge of Unao dated the 5th May 1930, reversing the decree of the Additional Judge of the same place, dated the 30th of August, 1929.

The facts of this case are somewhat complicated and the points of law raised on behalf of the plaintiffs at the hearing of the appeal were several. We have taken time to consider our judgment and having regard to the opinion which we have formed on one of these questions of law, it is not necessary either to state all the facts or all the questions of law.

The necessary facts bearing on the decisions of this appeal may thus be stated chronologically :—

17th April 1914.—Sheo Dulare, the father of the defendants Kedar, Mahipat, Bishunath and Gauri Shankar executed a deed of mortgage in respect of 1 *biswa 5 biswansis* share out of 16 annas share situate in the village of Makoor, *Pargana* Jhalotar Ajgain in the District of Unao, in favour of Jagannath who is the chief defendant in the suit, out of which this appeal arises.

20th of June 1917.—It appears that one Sri Krishna had obtained a simple money decree against Sheo Dulare and in execution of that decree he had attached and put up to sale the 1 *biswa* 5 *biswansis* share already specified. To this attachment and proposed sale the four sons of Sheo Dulare raised objections on the ground that their 1 *biswa* share was not liable to be sold in execution of a decree obtained against Sheo Dulare alone who was separate from them. The Court rejected the objection and held that the sons' share was also liable for the legitimate debts of the father. The result was that the sale was allowed to proceed and the entire share of 1 *biswa* 5 *biswansis* was purchased at a public auction by one Ram Charan for a sum of Rs 700 on the 20th of June 1917.

18th of July 1917.—Sheo Dulare executed the deed of mortgage in favour of the plaintiffs for a sum of Rs. 850 in respect of the entire share of 1 *biswa* 5 *biswansis* carrying interest at the rate of 12 per cent per annum. In default of payment within ten years the mortgagees were entitled to the relief of foreclosure

25th of July 1917.—Out of the mortgage-money advanced by the plaintiffs under the deed of the 18th of July 1917 a sum of Rs. 700 was paid to Ram Charan and the sale of the 20th of June 1917 was set aside before Ram Charan could enter into the possession of the share purchased by him.

6th of May 1918.—As a result of the claim made by Sheo Dulare's sons the mortgage of the 17th of April 1914 was declared to be inoperative in respect of the sons' share of 1 *biswa*.

19th of March 1919—Jagannath enforced his mortgage of the 17th of April 1914 by means of an action against Sheo Dulare and the plaintiffs and obtained a decree for foreclosure in respect of the 5 *biswansis* share on the 19th of March 1919. This share is now held by Jagannath in indisputable right and is no longer subject to any controversy.

20th of August 1923.—The 1 *biswa* share was again attached and put to sale in execution of a money decree held by Beni Madho and Dwarka against Sheo Dulare and his sons and at Court auction Jagannath the defendant purchased it on the 20th of August 1923. The sale and the purchase were expressly made subject to the mortgage of the 18th of July 1917. It is against this 1 *biswa* share that the plaintiffs of the present suit ask for the relief of foreclosure.

For the purposes of the decision of this appeal we accept the finding of the learned District Judge that previous to the date of the mortgage in suit the family of Sheo Dulare and his sons had ceased to be a joint Hindu family and that a separation in status had taken place.

The mortgage of the 18th of July 1917 was executed by Sheo Dulare for the express purpose of raising money to recover the 1 *biswa* 5 *biswansis* share from the hands of Ram Charan and it is now agreed that out of the mortgage money a sum of Rs. 700 was paid to Ram Charan by the plaintiffs and in consequence thereof, the 1 *biswa* 5 *biswansis* share was again restored to Sheo Dulare and his four sons in equal shares. On these facts the plaintiffs' contention is that they have acquired a charge by operation of law on the 1 *biswa* share and are therefore entitled to

recover the sum of Rs. 700 by sale of that share.

We are of opinion that the contention is well founded. The mortgage of the 18th of July 1917 was a perfectly valid mortgage, though a second mortgage, in respect of Sheo Dulare's share, that is 5 *biswansis*; and it is also clear that Ram Charan had acquired proprietary title to the entire 1 *biswa* 5 *biswansis* share which he had purchased on the 20th of June 1917 at a Court auction. Within this purchase must fall the 5 *biswansis* share in respect of which we have said that the mortgage of the 18th of July 1917 was a valid mortgage. It follows that the act of the plaintiffs in making the payment to Ram Charan and in recovering from his hands the 1 *biswa* 5 *biswansis* share was not an officious act The plaintiffs, for the purpose of protecting the 5 *biswansis* share mortgaged to them, had to pay the entire sale price which Ram Charan had paid to purchase the whole share It follows that by the effect of the rule of subrogation the plaintiffs acquired all the rights which Ram Charan the purchaser had acquired over the 1 *biswa* 5 *biswansis* share by reason of the sale of the 20th of June 1917 in his favour. They lost this right in the 5 *biswansis* share as a result of the decree dated the 19th of March 1919 in favour of Jagannath; but we are of opinion that they still retain it in the rest of 1 *biswa* share. One of us had occasion to consider this question in the case of *Mata Din* v. *Iftikhar Hussain* (1). In the judgment of that case reference is made to several decisions of their Lordships of the Judicial Committee and also to cases decided in England. It seems to us that the present case entirely falls within the principle of the decision of their Lordships of the Judicial Committee in the case of *Mahomed Rahimtulla* v. *Esmail Allarakhia* (2).

What were then the rights of Ram Charan? It is a well established principle of equity that a purchaser of immoveable property has a lien on the property purchased—*Rose* v. *Watson* (3) and *Whitebread & Co., Limited* v. *Watt* (4). This principle is recognised in cl. (*b*) of sub s. (4) s. 55 of the Transfer of Property Act. The lien will, however, be ineffectual as against a transferee for value and without notice. In the present case, as we have already stated, the defendant Jagannath bought the 1 *biswa* share at the auction sale of the 20th of August 1923 with complete notice of the mortgage in suit. The deed of mortgage states all the facts giving rise to the equities to which the plaintiffs now contend they are entitled. We are not unmindful of the fact that Ram Charan had purchased the 1 *biswa* share at an auction-sale and not by means of a private contract. This fact, however, does not appear to us to have the effect of killing the equitable lien which accrued in favour of Ram Charan on the 20th of June 1917 when he purchased the share in question. In the case of *Mir Mahomed Mozuffer Hossein* v. *Kishori Mohan Roy* (5), their Lordships of the Judicial Committee applied a principle of equitable estoppel in favour of one auction-purchaser against another auction-purchaser of the same estate.

We accordingly allow this appeal, set aside the decrees of the Courts below and decree the plaintiffs' suit for sum of Rs. 700 and interest at the rate of 6 per cent. per annum from the 18th of July 1917 till realisation. If the sum hereby decreed is not paid within three months of to-day, the 1 *biswa zamindari* share out of 20 *biswas* of village Makoor, which now under partition amounts to 6 *biswas* out of 20 *biswas* in *mohal* Sitla Din situate in the same village shall be sold for the satisfaction of the decree. As to the costs we order that the plaintiffs shall be entitled to their costs in proportion to their success in all the three Courts. Except Jagannath defendant no other defendant has contested this suit. The costs will therefore be paid by Jagannath alone.

R. L. *Appeal allowed.*

(1) 118 Ind. Cas. 835; 6 O. W. N. 393; Ind. Rul. (1929) Oudh 483; A. I. R. 1930 Oudh 178.

(2) 80 Ind. Cas. 411; 1 O. W. N. 313; 46 M. L. J. 567; A. I. R. 1924 P. C. 133; 26 Bom. L. R. 549; (1924) M. W. N. 422; 34 M. L. T. 99; 10 O. & A. L. R. 753; 48 B. 404; 22 A. L. J. 931; 29 C. W. N. 584; L. R. 7 A. (P. C.) 105; 50 I. A. 236 (P. C.).

(3) (1864) 10 H. L. C. 672; 11 E. R. 1187; 33 L. J. Ch. 385; 10 Jur. (N. S.) 297; 10 L. T. 106; 12 W. R. 585.

(4) (1902) 1 Ch. 835; 71 L. J. Ch. 424; 86 L. T. 395; 50 W. R. 442.

(5) 22 I. A. 129; 22 C. 909, 5 M. L. J. 101; 6 Sar 583 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.
FULL BENCH.

Civil Revision No. 105-B of 1930.
September 16, 1931.

JACKSON, OFFG. J. C., SUBHEDAR AND NIYOGI, A. J. Cs.

KASHIRAO—PLAINTIFF—APPLICANT
versus
ZABU—DEFENDANT—NON-APPLICANT

Limitation Act (IX of 1908), Sch. I, Arts. 97, 116—Suit for damages for breach of covenant of title—Limitation—Starting point—Date of sale or date of dispossession.

Under Art. 116 of Sch. I of the Limitation Act, in the case of a suit for damages for breach of covenant of title contained in a registered deed, where the vendee has been put in possession of the property by the vendor and the sale is void *ab initio* as against the rightful owner, limitation begins to run not from the date of sale but from the time the vendee is dispossessed by the rightful owner. *Pirbhu* v. *Wazirbi* (1), distinguished. *Bahadur Lal* v. *Jadhao* (8), *Subaraya Reddiar* v. *Rajagopala Reddiar* (2), *Ma Hnit* v. *Fatima Bibi* (7), *Narsing Shivbakas* v. *Pachu Rambakas* (9), *Sankara Variar* v. *Thaiparambil Kalathil Ummar* (4), *Premsukhdas* v. *Namdeo* (10), *Dharamchand* v. *Gorelal* (11), *Muhamed Siddiq* v. *Muhammad Nuh* (14), *Mahamed Ali Sheriff* v. *Budharaju Venkatapathi Raju* (12), *Multanmal Joyaram* v. *Budhumal Kavetchand* (5), *Hanwant Rai* v. *Chandi Prasad* (13), *Arunachakla Ayyar* v. *T. Ramasami Aiyar* (3), *Ganapa Putta Hedge* v. *Hammad Saiba* (15), *Harnath Kuarv. Indar Bahadur Singh* (19), referred to. [p. 226, col.1.]

Per *Jackson, J. C.*—The expression "covenant for title" does not, as is too often assumed, mean merely covenant for right to convey but includes covenant for quiet enjoyment. [p. 230, col. 1.]

Revision against an order of the Judge of the Small Cause Court, Akola, in C. S. No. 156 of 1929, dated the 13th March, 1930.

Order of Reference to a Full Bench.

The facts of this case are shortly these. On 22nd February, 1918, Zabu, the defendant non-applicant, acting for himself and for his minor brother Shanker executed a sale-deed in respect of 8 acres of land for Rs. 1,000, in favour of the plaintiffs-applicants and placed them in possession of the property. The vendor had a third brother Amruta who on 31st October, 1925, secured, in Suit No. 185 of 1924, a decree for joint possession to the extent of a moiety in 8 acres conveyed to the palntiffs and in April 1928, he got possession of the 4 acres pertaining to his share. In his first decree Amruta was, however, made to contribute Rs 322-12, as it was held that he had derived benefit from the consideration of the sale on account of the purchase of some other land by the vendors.

On 24th June, 1929, the plaintiff instituted a suit against their original vendor, the defendant, to recover Rs. 700, as damages for failure of consideration in respect of the sale transaction of the year 1918. The cause of action was stated to have accrued in 1928 when the plaintiffs lost possession of the moiety of the land conveyed. The suit was principally resisted on the ground that the claim was barred by time and following *Pirbhu* v. *Wazirbi* (1), the Small Cause Court dismissed the suit. The plaintiffs have, therefore, come up to this Court in revision.

It is conceded that the facts of the present case are almost identical with those of the above ruling; but it is contended that the law laid down there was incorrect and should be reviewed in the light of the following latest rulings on the point. *Subbaraya Reddiar* v. *Rajagopala Reddiar* (2), *Arunachala Aiyar* v. *T. Ramasami Aiyar* (3), *Sankara Variar* v. *Thaiparambil Kalathil Ummar* (4), *Multanmal Joyaram* v. *Budhumal Kavetchand* (5) and *Jai Indra Buhadur Singh* v *Khairati Lal* (6). Reference was also made to *Ma Huit* v. *Fatima Bibi* (7). But this last case and *Sankara Variar* v. *Thaiparambil Kalathil Ummar* (4) were with reference to Art. 97 and not Art. 116 of the Limitation Schedule which admittedly is applicable to the present case. In *Bahadur Lal* v. *Jadhao* (8) it was conceded that limitation in such cases begins to run from the date of dispossession.

Personally I feel very much impressed by the reasonings adopted in the cases cited for the applicants which lay down that under Art. 116 of the Limitation Schedule time would begin to run even where the sale is void *ab initio* and possession of the property is delivered to the vendee not from the execution of the sale deed but from the date of his subsequent disposses-

(1) 31 Ind. Cas. 877; 11 N. L. R. 186.
(2) 23 Ind. Cas. 570; 38 M. 887; (1914) M. W. N. 376; 15 M. L. T. 240.
(3) 25 Ind. Cas. 618; 38 M. 1171; 1 L. W. 849; 27 M. L. J 517; 16 M. L. T. 397.
(4) 70 Ind. Cas. 787; 46 M. 40; (1922) M. W. N 634; 16 L W. 684; 43 M. L. J. 721; A. I. R. 1923 Mad. 46; 32 M. L. T. 3.
(5) 61 Ind. Cas. 70; 45 B. 955; 23 Bom. L. R. 325.
(6) 113 Ind. Cas. 489; A. I. R. 1928 Oudh 465; 5 O. W. N. 836.
(7) 101 Ind. Cas. 414; 5 R. 283; 52 M. L. J. 579; A. I. R. 1927 P. C. 99; 29 Bom. L. R. 863; 4 O. W. N. 517; 31 C. W. N. 830; (1927) M. W. N. 489; 26 L. W. 429 (P. C.).
(8) 2 N. L. R. 174.

sion by the rightful owner. I, therefore, refer the following question for the decision of a Bench of this Court:—

"What is the starting point of limitation under Art. 116 of the Second (sic) Schedule of the Limitation Act in a suit for damages for breach of covenant of title, contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor, and the sale is void *ab initio* as against the rightful owner; whether from the date of the sale or from the date of dispossession of the vendee by the rightful owner ?"

Mr. *S. B. Gokhale*, for the Applicant.

Mr. *G. R. Pradhan*, for the Non-Applicant.

OPINION.

Subhedar, A. J. C.—The question referred to the Full Bench for decision is expressed as under:

"What is the starting point of limitation under Art. 116 of the Second Schedule of the Limitation Act in a suit for damages for breach of covenant of title contained in a registered deed, in a case in which the vendee has been put in possession of the property by the vendor and the sale is void *ab initio* as against the rightful owner whether from the date of the sale or from the date of dispossession of the vendee by the rightful owner ?"

This reference was necessitated by the argument of the learned Advocate for the applicant in a pending application for revision to the effect that the decision of Batten, A. J. C. in *Pirbhu* v. *Wazirbi* (1), was not correct particularly in view of the several cases since decided by their Lordships of the Privy Council and the several High Courts in India. In the aforesaid case it is laid down that a suit for damages for breach of covenant of title contained in a registered deed governed by Art. 116 of the Second Schedule of the Limitation Act and that when the absence of the right contracted for is completed at the time of the execution of the conveyance and there is no question of fraud, the limitation period begins to run from that date and not from the date of dispossession of the vendee if possession is delivered to him in pursuance of the contract of sale. In *Bahadur Lal* v. *Jadhao* (8), it was held that Art. 116 of the Limitation Schedule governed such a case for damages but it was conceded by the parties that limitation commenced to run not from the date of sale but from the time the flaw in the vendor's title was judicially determined.

In *Subbaraya Reddiar* v. *Rajagopala Reddiar* (2), Seshagiri Aiyar, J., classified under the following three heads the several cases cited before him:—

(a) "Where from the inception the vendor had no title to convey and the vendee has not been placed in possession of the property;

(b) Where the sale is voidable on the objection of third parties and possession is taken under the voidable sale; and

(c) Where though the title is known to be imperfect the contract is in part carried out by giving possession of the properties."

The learned Judge held that in the first class of cases the starting point of limitation would be the date of the sale while with regard to those of the other two classes the cause of action to claim damages would rise only when the vendee's possession is disturbed because

"The party is in possession and that is what at the outset under a contract of a sale purchaser is entitled to and so long as his possession is not disturbed he is not damnified".

With regard to cases under either (*b*) or (*c*) class falling under Art. 97 of the Limitation schedule where the claim of vendee plaintiff must necessarily be confined only to the return of the purchase money paid to the vendor defendant it has been uniformly held in a series of cases that the possession or other benefit obtained in pursuance of the transaction is a subsisting consideration whether the transaction itself *is void or voidable* so that in all cases of these kinds the period of limitation will begin to run not from the date of sale but from the time when the possession or other benefit derived from the transaction is lost, which is deemed to be the failure of consideration under this article, *Ma Hnit* v. *Fatima Babi* (7), *Narsing Shivbakas* v. *Pachu Rambakas* (9), *Sankar Variaar* v. *Thaiparambil Kalathil Ummar* (4), *Premsukhdas* v. *Namdeo* (10) and in 47 Ind. Cas. 886 [*Dharamchand* v. *Gorelal* (11).]

In cases of transactions of cl (*b*) *viz.*, those voidable at the option of third parties where the plaintiff vendee upon dispossession or disturbance of title to retain possession sues for damages for breach of convenant for title either express or implied by law, the view entertained is also unanimous that in such cases the starting point of limitation under Art. 116 of the Limitation Schedule is the date of dispossession of the plaintiff or disturbance of his title to retain possession under the transaction and not the date of sale. The latest cases in support of this view are *Subbaraya Reddiar* v. *Rajagopla Reddiar* (2), *Mahamed Ali Sheriff* v. *Budharaju Venkatapathi Raju* (.2) and *Multanmal Joyaram* v. *Budhumal Kevatchand* (5), *Hanwant Rai*

(9) 20 Ind. Cas. 254; 37 B. 538; 15 Bom. L. R. 559.

(10) 3 N. L. J. 221.

(11) 47 Ind. Cas. 886.

(12) 60 Ind. Cas. 235; 39 M. L. J. 449; 11 L. W. 537; 27 M. L. T. 304.

v. *Chandi Prasad* (13), *Muhammad Siddiq* v. *Muhammad Nuh* (14) and *Bhawani Singh* v. *Girdhari*, Second Appeal No 56 of 1930.

In a transaction which is void *ab initio* and in which the defendant-vendor has no title to, nor delivers possession of the property sold if the plaintiff-vendee in his attempt to secure possession is resisted by the true owner and files a suit against his vendor for damages for breach of covenant of title, such a suit falls under Art. 116 of the Limitation Schedule and limitation runs from the date of sale. *Aurnachala Aiyar* v. *T. Ramasami Aiyar* (3) and *Ganapa Putta* v. *Hammod Saiba* (15). The latter decision is also authority for the proposition that the expression 'compensation for the breach of a contract" used in Art. 116 of the Limitation Schedule is not limited to a claim for unliquidated damages but applies also to a claim for payment of a sum certain, *e. g purchase money*, so that even if the claim of a vendee under a registered instrument be confined to the return of the purchase money only the suit would fall under Art. 116 and not under Art. 97 of the Limitation Schedule.

There now remains the consideration of the important question involved in the reference *viz.*, what is the starting point of limitation under Art. 116 of the Limitation Schedule for a claim for damages for breach of covenant of title express or implied in a registered instrument regarding a transaction void *ab initio* but in which possession of the property is delivered and the vendee is subsequently evicted by the rightful owner, whether from the date of the sale or from the time allowed in transactions voidable at the instance of third parties.

Batten, A. J. C., in *Pirbhu* v. *Wazirbi* (1) relying on "a very strong balance of authority" under English Law held that it arose on the date of sale and he quoted Williams on the Law of Vendors and Purchasers and Dart on the Law and Practice relating to Vendors and Purchasers, and especially referred to the cases of *Spoor* v. *Green* (16) and *Turner* v. *Moon* (17). But in *Multanmal Joyaram* v. *Budhumal Keval chand* (5), Macleod, C. J., made the following very weighty observations, by way of caution, against following English Law and decisions in India where Statute Law applies :—

"It was argued by the defendants that where a seller has covenanted that he has a good title then the covenant of title was broken immediately upon the execution of the assurance which contains them"; and "this is so stated in Dart on Vendors and Purchasers, Vol. II, page 788. The authority for that proposition is *Turner* v. *Moon* (17). In that case there was no question of limitation although the case of *Spoor* v. *Green* (16), was referred to by Sir Lawrence Jenkins in *Tulsiram* v. *Murlidhar* (18) But at the end of the judgment the learned Chief Justice said we allude to these facts because we desire to guard ourselves against being taken to decide that where the Transfer of Property Act applies, there may not be remedies to which a different period of limitation would be applicable."

In *Harnathkuar* v. *Indar Bahadur Singh* (19) their Lordships of the Privy Council while dealing with the argument of the appellant that his case was governed by the provisions of s. 65 of the Contract Act also observed that "So framed the plaintiff's claim to compensation rests not on any principle or formula of English Law but on the words of this section and it has to be seen whether the facts of this case came within its scope." This was a case in which the plaintiff vendor in May, 1914, sued the defendant-vendee for possession of certain properties which had been sold to him in January, 1880, but of which possession was not delivered on demand in 1914, and in the alternative for damages for breach of contract. The sale was held to be absolutely void as the vendor had no interest in the property sold but had only rights of expectancy. The suit was, therefore, dismissed by all the Courts in India but on appeal their Lordships accepted the argument that so far as the claim for compensation was concerned the suit was governed by the provisions of s. 65 of the Contract Act and was in time as the cause of action arose when "*demand for possession* was resisted" by the defendant which was in May, 1914.

The following passages from the judgment of their Lordships are very instructive :—

"Before this Board the claim has been based on s 65 of the Contract Act. It is there provided that when an agreement is discoverd to be void or when a contract becomes void, any person who has received

(13) 119 Ind. Cas. 243; 51 A. 651; (1929) A. L. J. 433; A. I. R. 1929 All. 293; Ind Rul. (1929) All. 995.

(14) 124 Ind. Cas 185; 52 A. 604; (1930) A. L. J. 653; Ind. Rul. (1930) All. 489; A. I. R. 1930 All. 771.

(15) 89 Ind. Cas. 59; 49 B. 596; 27 Bom. L. R. 637; A. I. R. 1925 Bom. 440.

(16) (1874) L. R. 9 Cr. 92 at p. 99; 43 L. J. Ch. 57; 30 L. T 393; 22 W. R. 547.

(17) (1901) 2 Ch. 825; 70 L. J. Ch. 822; 85 L. T. 90; 50 W. R. 237.

(18) 26 B. 750 at p. 756.

(19) 71 Ind. Cas. 629; 45 A. 179; A. I. R. 1922 P. C. 403; 9 O. & A. L. R. 270; 9 O. L. J. 652; 44 M. L. J. 489; 37 C L. J. 346; 27 C. W. N. 949; 50 I. A. 69; 18 L. W. 383; 26 C. C. 223; 33 M. L. T. 216, 5 P. L. T. 281; 2 Pat. L. R. 237 (P. C.).

any advantage under such agreement or contract is bound to restore it or make such compensation for it to the person from whom he received it.

The section deals with (*a*) agreements and (*b*) contracts The distinction between them is apparent from s. 2. By cl. (*c*) every promise and every set of promises forming the consideration for each other is an agreement, and by cl. (*h*) an agreement enforceable by law is a contract. Section 65, therefore, deals with [*a*] agreements enforceable by law and [*b*] with agreements not so enforceable. By cl. [*g*] an agreement not enforceable by law is said to be void.

An agreement, therefore, discovered to be void is one discovered to be not enforceable by law and on the language of the section would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void. The agreement here was manifestly void from its "inception and it was void because its subject-matter was incapable of being bound in the manner stipulated."

It would appear that their Lordships of the Privy Council in the case of *Harnath Kuar* v. *Indar Bahadur* (19) held that the cause of action to claim damages for breach of the covenant to place the plaintiff-vendee in possession of the property sold accrued to him not on the date of the void agreement but when demand for possession, agreed to be delivered under it, was resisted by the defendant-vendor. Even in the absence of such an express covenant for delivery of possession the same would be implied in every contract of sale by s. 55 (1) (*f*) of the Transfer of Property Act which casts upon the seller if so required, the duty of placing the vendee in possession of the property sold. *A fortiori* the cause of action to recover damages for breach of covenant of title which necessarily includes that of quiet enjoyment under s. 55 (2) of the Transfer of Property Act would only accrue to a vendee if he was already placed in possession of the property in pursuance of the void agreement on the date when his possession is disturbed by the rightful owner. This was also the view taken of this matter by Sheshagiri Aiyar, J., in *Subbaraya Reddiar* v. *Rajagopala Reddiar* (2), although the transaction before him was of a voidable nature only.

The case of *Premsukhdas* v. *Namdeo* (10), was of a sale void *ab initio* in which the plaintiff-vendee claimed from the defendant-vendor damages, and not merely return of the purchase-money, upon his dispossession by the rightful owner. Prideaux, A. J. C., however, treated the case as falling under Art. 97 of the Limitation Schedule and distinguished it from *Pirbhu* v. *Wazirbi* (1) on the ground that in the case before him there was no express covenant of title in the contract of sale as there was in *Pirbhu's case* (1). But the learned Judge seems to have overlooked that in every contract of sale the statutory indemnity provided by s. 55 (2) of the Transfer of Property Act is implied. It was, however, held that the cause of action to claim damages arose on the date of dispossession of the plaintiff by the rightful owner.

Apart from authorities the matter may be considered from another stand-point. In both voidable and void sales if the vendor places the vendee in possession of the property sold the principal object of the sale, that is possession and enjoyment of property, is secured to the vendee and, therefore, until these are disturbed by the rightful owner it could not logically be said that there is a breach of contract within the meaning of Art. 116 of the Limitation Schedule in a voidable transaction at the time of disturbance of possession by the rightful owner and in the case of a void transaction at the time of the execution of conveyance. In both the cases where possession is delivered to the vendee, the sale, for all practical purposes, remains good until it is avoided by the rightful owner. Cause of action to claim damages for breach of contract cannot arise in either voidable or void sales to a vendee, if he is placed in possession of the property sold, before he is evicted by the rightful owner for the very obvious reason that he in fact suffers no damages till then. It follows then that in a void transaction limitation period should not run against the vendee, who has been placed in possession of the property under the contract of sale to claim damages from the vendor for breach of contract, at any time earlier than it would start running under similar circumstances in the case of a voidable sale.

For these reasons any answer to the question referred to the Full Bench for decision is that the limitation begins to run not from the date of sale but from the time the vendee is dispossessed by the rightful owner.

Niyogi, A. J. C.—I agree with the opinion recorded by Subhedar, A. J. C. I wish to add what follows :—

When a vendee, whose possession is disturbed by the rightful claimant, sues his vendor for compensation, his claim, in substance, is one founded on the breach of the covenant for quiet enjoyment. The covenant for title in a generic sense includes a covenant for quiet possession but in its special sense means only a covenant as to the vendor's right

to convey. Confusion arises from laxity of expression ordinarily used in the pleadings *viz*, to describe a breach of what is really a covenant for quiet enjoyment as one for title.

The usual covenants for title are: for right to convey for quiet enjoyment; for freedom from incumbrances; and for further assurance. Of these, the covenant for right to convey is a covenant for title and the covenant for quiet enjoyment, is a covenant relating to possession. The distinction is material since it affects both the date when the covenant is broken and the measure of damages. A covenant for title is an assurance to the purchaser that the grantor has the very estate in quality and quantity which he purports to convey, whereas the covenant for quiet enjoyment is a future covenant (see Halsbury's Laws of England, Vol. 25, pages 462-466). The law as to limitation of actions in respect of these two cases is succinctly laid down in Halsbury's Laws of England, Vol. 17, page 78 in these terms where on the sale of the property the vendor covenants that he has a good title to transfer, while in fact he has not a good title, the breach of the covenant is at the time of the sale and there is no continuing breach; but if the vendor covenants for quiet enjoyment, there is no breach of that covenant till there is an interference with the enjoyment of the purchaser or those claiming through him." It is obvious that when the vendee obtains corporeal possession of the property purchased by him from a vendor who may or may not have a sound and unfettered right to convey, and his possession is disturbed, the cause of action for damages arises on the date of such disturbance.

Article 116 of the First Schedule to the Limitation Act is specifically enacted respecting claims for compensation for breach of a contract in writing and registered. In *Tricomdas Coorerjee Bhoja* v. *Gopinath Jiv Thakur* (20) their Lordships of the Privy Council affirmed that Art. 116 is a special provision which is intended to apply to all contracts in writing and registered On the authority of this *dictum*, the Courts in India have applied Art. 116 to cases of breaches of covenants, express or implied, for title incorporated in registered instruments; See *Multanmal Joyaram* v. *Budhumal Kavetchand* (5), *Ganappa Putta Hedge* v, *Hammad Saiba* (15) and *Muhammad Siddiq* v. *Muhammad Nuh* (14); See also *Ratanbai Shaligram* v. *Ghasiram Gangabisan* (21)

There may be express covenants for title and quiet possession contained in regularly drawn up instruments of sale. But even if they are absent, such covenants are implied by law. By virtue of s. 55 (2), Transfer of Property Act, 1882, every sale necessarily imports a covenant for title and quiet enjoyment and this covenant is not merely personal but runs with the land. Under that enactment, the seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same. The right to enjoy possession is an incident of ownership and as such an interest in the property. When the vendor, in pursuance of the conveyance, delivers actual physical possession to the vendee the latter acquires the same. The vendor's covenant as to this interest must remain unaffected so long as the vendee is in the quiet enjoyment of possession. This covenant as to quiet enjoyment being a future covenant cannot obviously be broken on the date of the sale, notwithstanding that the vendor, has no right to convey. The breach of that covenant can occur only on the disturbance of the vendee's possession. Since the vendor's covenant is twofold *viz*, for right to convey and for quiet enjoyment, the vendee will have two distinct causes of action in the event of the breach. If the vendor has no title on the date of the conveyance, the breach of the covenant would certainly occur at the time of the sale, and if the remedy is not sought within the statutory period, the cause of action accruing from that breach will alone lapse. It cannot destroy any remedy to which the vendee may be entitled by reason of interference with his possession.

In *Pirbhu* v *Wazirbi* (1), the plantiff did not take his stand on the disturbance of his possession. The case was, therefore, treated as one for breach of a covenant for title only and was determined on the authority of the view expressed by Baron Barmwell in *Spoor* v. *Green* (16), which was followed by Joyce, J., in *Turner* v. *Moon* (17). In the firstmentioned case the plaintiff, founded his action on the breach of a covenant for title as well as that for quiet enjoyment, but his case as to the breach of the covenant for quiet

(20) 39 Ind. Cas. 156; 44 C. 759; 1 P. L. J. 262; 15 A. L. J. 217; 25 C. L. J. 279; 32 M. L. J. 357; 21 M. L. T. 262; 21 C. W. N. 577; (1917) M. W. N. 363; 5 L. W. 654; 19 Bom. L. R. 450; 44 I. A. 65 (P. C.).

(21) 134 Ind. Cas. 1157; 55 B. 565; 33 Bom L. R. 1092; Ind. Rul. (1932) Bom. 37.

enjoyment having failed on technical grounds, it rested solely on the breach of the covenant for title. Baron Bramwell held that the breach of the covenant for title was not a continuing breach since the covenant remains broken indeed but broken once for all. "As the vendor was found to have no title to convey on the date of the conveyance the breach of the covenant for title was held to have occurred on that date. From the observations made by Baron Bramwell in the course of his judgment, *viz.*

"of course, the Statute of Limitation would apply to any breach of covenant for quiet enjoyment which took place twenty years before suit."

it is evident that if the action had been rightly laid as to the breach of the covenant for quiet possession, Baron Bramwell would indeed have treated the claim as being within time. In *Turner* v. *Moon* (17), the claim for damages was founded on the breach of the covenant for title only. It is apparent that these authorities have no direct bearing on a case in which damages are claimed on the basis of the breach of the covenant for quiet enjoyment *viz*, disturbance of possession.

Jackson, Offg. J. C.—I have had the advantage of reading the opinions of Subhedar, A. J. C., and Niyogi, A J. C. and I have not much to add.

As Niyogi, A. J. C., has pointed out, the usual covenants for title are four, and the expression "covenant for title" does not, as is too often assumed, mean merely "covenant for right to convey" but includes "covenant for quiet enjoyment." In *Pirbhu* v. *Wazirbi* (1), the covenant for title considered to have been broken was the covenant for right to convey; and in my opinion it was rightly decided that limitation for a suit on that cause of action began to run from the date of the sale In the present case two covenants for title have been broken, the covenants for right to convey and the covenant for quiet enjoyment, obviously, limitation for a suit based on breach of the second of these covenants can only begin to run from the date on which the vendee's possession was disturbed.

My opinion, therefore, is that, when possession has been given to the vendee, limitation for a suit for damages for breach of covenant for title, that covenant being, in fact, the covenant for quiet enjoyment, begins to run from the date of dispossession.

A. *Reference answered accordingly.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Appeal From Appellate Decree No. 203 of 1928.

March 17, 1931.

STAPLES, A. J. C.

Musammat LAXMIBAI—PLAINTIFF—APPELLANT

versus

SAMBHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Maintenance — Daughter-in-law—Father-in-law's liability—Liability of heirs—Liability of person taking under Will—Rate of maintenance—Right to arrears.

Under Hindu Law, a father in-law who is not possessed of ancestral property is not legally bound to maintain his widowed daughter-in-law. He is, however, under a moral obligation to do so, and this obligation becomes a legal and binding obligation on his heirs. Persons in possession of the self-acquired property of a Hindu father after his death, whether they have taken such property by inheritance, survivorship or under a duly executed Will or deed of gift, are, therefore, under a legal obligation to maintain the widow of a son who predeceased his father. *Meenakshi Ammal* v. *Rama Aiyar* (6), *Adhibai* v. *Qursandas Nathu* (7), *Janki* v. *Nand Ram* (8), *Jamunabai* v. *Manubai* (9), *Rangammal* v. *Echammal* (10), *Jai Nand* v. *Paran Dei* (11), *Gopal Chandra Pal* v. *Kadambini Dasi* (12), *Jeot Ram* v. *Lauji* (13), *Surampalli Bangarammal* v. *Surampalli Brambaze* (14) followed. *Bai Parvati* v. *Tarwadi Dolatram* (15), dissented from. [p. 231, col. 2; p. 232, col. 2.]

A widow is not only entitled to bare maintenance but to maintenance suitable to her condition in life and the status of her family. *Ekradeshwari Bahuasin* v. *Homeshwar Singh* (16), followed. [p 233, col. 1].

A widow who does not live in the house of her deceased husband does not thereby forfeit her claim to maintenance. *Siddessury Dassee* v. *Janardhan Sarkar* (17) *Rattan Singh* v *Beni Bai* (18), followed. [*ibid*]

Appeal against a decree of the District Judge, Wardha, dated the 22nd December, 1927, modifying that of the Subordinate Judge, First Class, Chanda, dated the 3rd February, 1927.

Mr *A. V. Khare*, for the Appellant.

Mr. *D. W. Kathalay*, for the Respondents.

Judgment.—The appellant brought a suit for arrears of maintenance and for a declaration that she was entitled to future maintenance, and in the trial Court she obtained a decree both for arrears and for a declaration that she was entitled to claim future maintenance at the rate of Rs 126 per annum from January, 1926. In appeal the District Judge dismissed the claim for arrears of maintenance and reduced the claim for future maintenance to Rs. 84 a year, which amount was admitted by the defendants, who had preferred the appeal to him. The plaintiff Laximibai has now

preferred this second appeal, claiming both arrears of maintenance at the rate awarded by the trial Court and future maintenance at the minimum rate of Rs. 15 per month.

The appellant is the widow of one Narayan who was the brother of the two respondents Sambha and Sadasheo. The respondents and Narayan were all sons of one Jairam, and admittedly they constituted a joint Hindu family. Narayan died in 1916 when he was only 20, and Jairam, the father, died in 1920. It has been found that Jairam executed a Will, which is filed in the suit as Ex. D-20, on the 25th of February, 1917, and in that Will provision has been made for the maintenance of the appellant Laxmibai out of the income of a *malik-makbuza* field. The trial Court held, however, that the plaintiff Laxmibai was not bound by that condition in the Will and that she could claim maintenance according to her husband's share in the property at the time of his death and in proportion to the income of the family property. The lower Appellate Court, however, has found that the property was not family property but was the self acquired property of Jairam and that, therefore, Laxbmibai could not claim any maintenance out of the property beyond what was allowed to her under Will. These are the two findings which have been made the chief grounds of attack in second appeal.

As regards the first finding that the property was self-acquired, I can see little, if any ground to interfere. This is, in the main, a finding of fact, and it is supported by the evidence on record. The plaintiff's case originally was that Jairam had inherited property from his father, which formed a nucleus of joint family property, but no evidence to prove that plea was adduced. One witness Shanker (P. W. No. 4) was examined, and he has come with a different story, namely that Jairam inherited certain property from his step-mother who lived at Umrer. As pointed out by the lower Appellate Court, the evidence of this witness is uncorroborated and, as his story is different to the plea put forward by the plaintiff in the plaint, it was, I think, rightly rejected. Nor do I think that much importance can be attached to the fact that Jairam in his business kept some accounts in the name of the plaintiff's husband Narayan. There is no sufficient evidence on record, in my opinion, to hold that there was either a nucleus of joint family property or that Jairam and his sons carried on business jointly and acquired property by their joint labour. On the contrary, the evidence seems to show that Jairam acquired the property by his individual exertions. No is there, I think, any sufficient evidence to show that the property, when acquired, was thrown into the joint family fund and treated as joint family property: on the contrary, as pointed out by the lower Appellate Court, Jairam devised all his property by Will without any objection on the part of his sons, and in so doing treated it as his self acquired property. I do not think, then, that any of the cases cited by the learned Counsel for the appellant in this connection, namely, *Kundan Lal* v. *Shankar Lal* (1), *Mohansingh* v. *Punji* (2), *Motilal* v *Harjimal* (3), *Punji* v. *Govind* (4) and *Kahsondass Dharamsey* v. *Gangabai* (5), will apply, and I am of opinion that the finding of the lower Appellate Court, that Jairam's property was his self-acquired property, must be upheld.

The only point then that remains to be determined is whether that self-acquired property of Jairam in the hands of the defendants, who are devisees under the Will, is liable to the plaintiff's claim for maintenance. The question is one not free from difficulty and as regards which there has been some divergence of opinion. The correct view seems to be that a father-in-law, who is not possessed of ancestral property, is not legally bound to maintain his widowed daughter-in law and that such daughter-in-law has no claim against his self-acquired property. On the other hand, it has been laid down in a number of cases, relying on the Hindu text-books, that a father-in-law is under a pious or moral obligation to maintain his widowed daughter-in-law. The lower Appellate Court has relied upon *Meenakshi Ammal* v. *Rama Aiyar* (6), where it has been laid down that, although there is such a pious obligation according to the Hindu text-books, the Courts would not be bound to enforce such obligation, but would only enforce it looking to the circumstances of the case and to the times and according to the rule of justice, equity and good conscience. It may, however, I think, be safely inferred that in the majority of cases, where the widowed daughter-in-

(1) 21 Ind Cas. 13; 35 A. 565; 11 A. L. J. 910.
(2) 103 Ind. Cas. 812; A. I R. 1927 Nag. 327.
(3) 87 Ind Cas 809; A. I. R. 1926 Nag. 146.
(4) 122 Ind Cas. 446; A. I. R. 1930 Nag. 7; Ind. Rul. (1930) Nag. 174.
(5) 32 B. 479; 10 Bom. L. R. 184.
(6) 18 Ind. Cas 34; 37 M. 396; 13 M. L. T. 97; 24 M. L. J. 106; (1913) M. W. N. 40.

law is without means of subsistence and the father-in-law is in possession of self-acquired property, the moral obligation to maintain the daughter-in-law would be enforced by the Courts. Then the next question that arises is, what is the obligation on the sons or heirs of the father-in-law after his death. The view taken by the majority of High Courts is that what is a pious obligation on the part of the father-in-law becomes a legal and binding obligation on his heirs. This was laid down in *Adhibai* v. *Qursandas Nathu* (7), on the ground that what was self-acquired property of the father became the ancestral property of the joint family in the hands of his sons. In *Janki* v. *Nand Ram* (8), a Full Bench of the Allahabad High Court dissented from the view taken by the Bombay High Court, but they also affirmed that what was a pious obligation on the father-in-law became a legal obligation on the son who took the property by inheritance, not because the property would be correctly described as ancestral property, but because the son took the estate not for his own benefit but for the spiritual benefit of his father, the last proprietor. Thus the same result has been arrived at in both cases, although the reason for arriving at that conclusion is different. These cases have been followed in *Yamunabai* v. *Manubai* (9), *Rangammal* v. *Echammal* (10), *Jai Nand* v. *Paran Dei* (11), *Gopal Chandra Pal* v. *Kadambini Dasi* (12), and *Jeot Ram* v. *Lauji* (13); and the principle has again been affirmed in *Surampalli Bangarammal* v. *Surampalli Brambaze* (14).

The lower Appellate Court, however, relied on *Bai Parvati* v. *Tarwadi Dolatram* (15), where it has been held that, when a father-in-law has bequeathed his self-acquired property to a third person, the widowed daughter-in-law has no right of maintenance against that person. The earlier case in *Yamunabai* v. *Manubai* (9), was distinguished on the ground that it applied to persons who took the self acquired property of the father-in law by inheritance, but not to those who took it under a Will. With all due respect, however, I am doubtful whether that distinction is really sound and it has been expressly dissented from in *Gopal Chandra Pal* v. *Kadambini Dasi* (12), and *Jeot Ram* v. *Lauji* (13). It may also be pointed out that in *Rangammal* v. *Echammal* (10), it was held, though *obiter*, that a third person who took the property by a Will would be in no better position to resist a claim for maintenance than the one who took the property by inheritance. In *Jai Nand* v. *Paran Dei* (11), the question of a devisee who took the property by a Will was not considered, and, therefore, *Bai Parvati* v. *Tarwadi Dolatram* (15), was not expressly referred to; but the Judges who decided the case have held that the sons, who are in possession of the self acquired property of their father, are legally bound to maintain the widow of their brother who predeceased their father, whether they took the property of the father by inheritance or by survivorship.

The balance of authority, then, is in favour of the view that not only is there a legal obligation on the sons or heirs of the father in-law to maintain the widowed daughter in-law out of the self-acquired property, which has come to them from their father, but that persons who have taken such self acquired property under a Will executed by the father-in-law are also legally bound to maintain the daughter-in-law. I am of opinion that to hold otherwise would be tantamount to holding that the father-in law could defeat his widowed daughter-in-law's claim by executing a gift or Will, and that would be contrary not only to the principles of Hindu Law but also to the rules of justice, equity and good conscience, when it has been held that the father-in law is under a moral obligation to maintain his widowed daughter-in law. I, therefore, hold that persons in possession of the self acquired property of a Hindu father after his death, whether they have taken such property by inheritance, survivorship or under a duly executed Will or deed of gift, are under a legal obligation to maintain the widow of a son who predeceased his father. Accordingly, I reverse the finding of the lower Appellate Court on this point and hold that the defendant-respondents are legally bound to maintain the appellant.

The questions that remain then to be determined are the amount of maintenance that should be awarded and whether the arrears of maintenance claimed should be

(7) 11 B. 199.
(8) 11 A. 194; A. W. N. (1889) 30; 13 Ind. Jur. 347.
(9) 23 B. 608.
(10) 22 M. 305.
(11) 118 Ind. Cas. 419; 4 Luck 491; 6 O. W. N. 456; A. I. R. 1929 Oudh 251; Ind. Rul. (1929) Oudh 435 (F. B.).
(12) 73 Ind. Cas. 235; A. I. R. 1924 Cal. 364.
(13) 119 Ind. Cas. 253; A. I. R. 1929 All. 751; Ind. Rul. (1929) All. 1006.
(14) 31 M. 338.
(15) 25 B. 263.

granted or refused. On the first point an exhaustive discussion was made by the Judge of the trial Court. The Judge of the lower Appellate Court has been chiefly influenced by the view that the plaintiff could not claim maintenance against the property beyond what was allowed to her in the Will, and has, therefore, granted only the amount of Rs. 84, which was agreed to by the defendants. In para. 6 of his judgment the Judge has made some short discussion about the income of estate, but apparently he has simply accepted the defendants' contention as regards the amount of income without looking into the evidence. On the other hand, as already stated, the Judge of the trial Court has made a full discussion of the evidence, and I can see no reason for differing from the estimate arrived at by him, namely, that the income was not less than Rs. 1,300 a year : this, in fact, as stated by trial Judge, is probably an underestimate. I do not think, then, that the amount allowed by that Judge, namely, Rs. 10-8-0 a month, or Rs. 126 a year, is in any way excessive, and, as pointed out in *Ekradeshwari Bahuasin* v. *Homeshwar Singh* (16), in a case of this kind the widow is not only entitled to bare maintenance but to maintenance suitable to her condition in life and to the status of the family. It cannot, I think, be argued that the amount of Rs. 126 a year is in any way excessive according to this standard: it has been fixed according to this standard. I would, therefore, restore the decree of the trial Court allowing the plaintiff-appellant maintenance at the rate of Rs. 126 per annum.

As regards arrears of maintenance also I am of opinion that the view of the trial Court is correct and that the lower Appellate Court has gone wrong in the matter. It has been laid down in *Siddessury Dassee* v. *Janardhan Sarkar* (17) and *Raja Ratan Singh* v. *Rani Beni Bai* (18), that a widow, who does not live in the house of her deceased husband, does not thereby forfeit her claim to maintenance. It has further been found in the present case that the plaintiff lived with her father after the death of her husband, but that after her father's death about six years prior to the suit she was in difficulties and she applied to the defendants for maintenance, which was refused. Continued demands were made and at last a registered notice was given. It has not been shown that the plaintiff has any other source of income or was able to maintain herself; on the contrary the inference seems to be, as held by the trial Court, that she was in difficulties and probably had to borrow money. The lower Appellate Court has referred to the judgments in *Sakharam* v. *Yashodabai*, S. A. No. 173 of 1924, decided on 27th April 1925 and *Pandurang* v. *Yashodabai*, S. A. No. 196 of 1925, decided on 21st December 1925, but has overlooked the fact that in the present case the father of the plaintiff, who was supporting her, died some six years before the suit and that arrears are only claimed for five years prior to the suit. There seems to me to be no justification for refusing the claim for arrears, and I would point out that the trial Court has only allowed arrears of maintenance at the reduced rate of Rs. 8 a month. I am of opinion that such an amount is in no way excessive and that, if anything, a concession has been made in favour of the defendants. I would therefore restore the decree of the trial Court as regards arrears of maintenance also

The decree of the lower Appellate Court, therefore, is set aside and instead the decree of the trial Court is restored. Two-thirds of the costs of the appeal in this Court will be borne by the respondents, the remaining one-third being borne by the appellant, as she had claimed maintenance at the rate of Rs. 15 per month, or Rs 180 a year, in the appeal. Costs of the appeal in the Court of the District Judge will be borne by the defendant appellants, whilst of the cross objections in that Court will be borne by the plaintiff-respondent. Costs of the suit will be borne as ordered by the trial Court.

A. *Decree set aside.*

(16) 116 Ind. Cas. 409; 8 Pat. 840; 33 C. W. N. 637; 10 P. L. T. 345; A. I. R. 1929 P. C. 128; 49 C. L. J. 579; 31 Bom. L. R. 816; 6 O. W. N. 526; (1929) A. L. J. 695; 30 L. W. 1; 57 M. L. J. 50, (1929) M. W. N. 468 (P. C.).

(17) 29 C. 557.

(18) 1 N. L. R. 33.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Appeal from Appellate Decree No. 114 of 1930.

July 30, 1931.

JACKSON, J. C.

TIKKILAL—DEFENDANT—APPELLANT

versus

GULACHAND—PLAINTIFF—RESPONDENT.

Hindu Law—Partition—Evidence—Unequivocal deed—Separation of one member—Status of others—Pre-

sumption—Intention to continue united—Existence of minor sons, effect of.

If a deed of partition is unequivocal in its language and the intention of the parties is clear from it, it is not necessary to prove acts in support of the deed. *Jai Narain Rai* v. *Baij Nath Rai* (2), followed. [p. 234, col. 2.]

A presumption of complete separation does not arise in all cases when there has been separation of one or more members. No definite agreement to continue to be a joint family on the part of the remaining members is necessary. An agreement may be inferred if the facts justify such inference. *Babanna* v *Parawa* (4), *Palani Ammal* v. *Muthuvenkatachala Moniagar* (5), *Hari Bakhsh* v. *Babu Lal* (6) and *Bala Bux* v. *Rukhmabai* (7), referred to. [p. 235, col. 1.]

Where an adult son separates from the family it is open to the father and the minor sons to remain joint and if the father's intention was that they should not separate that intention would be as effective to continue the joint family as an agreement, express or inferred, between the adults. [p. 235, col. 2.]

Appeal against the decree of the Additional District Judge, Seoni, dated the 8th November, 1929, confirming that of the Subordinate Judge, Second Class, Seoni, dated the 5th July, 1929

Mr. *M. R. Bobde*, for the Appellant.

Mr. *W. B. Pendharkar*, for the Respondent.

Judgment.—In this case the plaintiff-respondent sued for a declaration that he had a half share in the two houses attached by the defendants-appellants in execution of their decree against the plaintiff's two brothers Hirchand and Kallu. The plaintiff's case is that Kallu separated from the rest of the family in 1921, Hirchand and Gulabchand remaining joint with their father Jaikisan; the houses in suit fell to the share of Jaikisan, Hirhand and Gulabchand, and after Jaikisan's death Hirchand and Gulabchand had each a half share. The defendants denied that there was any partition and pleaded in the alternative that there was a partition after Jaikisan's death between the three brothers in which the houses attached fell to the share of Hirchand. The lower Courts have held in favour of the partition as alleged by the plaintiff and had given him the declaration he has asked for.

In appeal it is again contended that there has been no partition. It is argued on the authority of *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (1), that the partition deed, Ex. P 2, executed by Jaikisan and Kallu is not sufficient to prove the partition; and it is pointed out that the lower Appellate Court has remarked that there is no evidence worth the name about actual partition. The decision in question seems to me to have no application. Their Lordships of the Privy Council were considering the value of recitals as to necessity in sale deeds executed by a limited owner, and I am in respectful agreement with *Jai Narain Rai* v. *Baijnath Rai* (2), in which it has been held that if a deed of partition is unequivocal in its language and the intention of the parties is clear from it, it is not necessary to prove acts in support of the deed. I hold that the deed is sufficient in the present case to prove the partition in 1921. This necessarily involves rejection of the defendants' plea of a partition that took place after Jaikisan's death.

It is argued, however, that in any case the plaintiff is not entitled to a half share in the houses but only to four-ninths, because the separation of Kallu raised a presumption that all the brothers of the family separated from each other. The plaintiff would thus get only a one-third share in the property that was not given to Kallu, which would be increased to four-ninths by his getting one-third of his father's one third share on his father's death. In *Ramchandra* v. *Tukaram* (3), it is laid down that, if it is proved that there has been a breach in the state of union amongst the members of a Hindu joint family, the law presumes that there has been a complete partition both as to parties and property. This view, however, has been modified in *Babanna* v. *Parawa* (4), in which it is said that it is not correct to say that, because one brother has separated or has expressed an intention to separate, therefore the intention of the other brothers must be taken to be the same they may without any special agreement amongst themselves, continue to live as members of a joint Hindu family. Fawcett, J., who was a party to the earlier decision, remarked that in it the rule of law was too widely stated and that there is no general legal presumption that can be made applicable to every case. *Babanna* v. *Parawa* (4) follows the decision of the Privy Council in *Palani Ammal* v. *Muthuvenkatachala Moniagar* (5), in which their Lordships,

(1) 36 Ind. Cas. 420; 44 C. 186, 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 8 Bom. L. R. 868; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

(2) 108 Ind. Cas. 449; 50 A. 615; 26 A. L. J. 349; A. I. R. 1928 All. 419.

(3) 61 Ind Cas. 761; 45 B. 914; 23 Bom. L. R. 311.

(4) 100 Ind. Cas. 147; 50 B. 815; 28 Bom. L. R. 1446; A. I. R. 1927 Bom. 68.

(5) 87 Ind. Cas. 333; 48 M. 254; 23 A. L. J. 746; A. I. R. 1925 P. C. 49; 48 M. L. J. 83; 6 P. L. T. 133; 21 L. W. 439; (1925) M. W. N. 330; 3 Pat. L. R. 126; 27 Bom. L. R. 735; 29 C. W. N. 846; L. R. 6 A. (P. C.) 143; 52 I. A. 83 (P. C.).

after remarking that the remaining coparceners may continue to be coparceners without any special agreement amongst themselves, add: "That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous co-parcener had separated from them." In *Hari Baksh* v. *Babu Lal* (6), it has been held that

"the fact of a separation having been effected between brothers constituting a joint Hindu family governed by the Mitakshara Law raises no presumption that there was a separation of the joint family constituted by one of the brothers and his descendants."

It is clear from these decisions that a presumption of complete separation does not arise in all cases when there has been separation of one or more members, and also that no definite agreement to continue to be a joint family on the part of the remaining members is necessary. The Privy Council decision in *Bala Bux* v. *Rukhmabai* (7), is not authority to the contrary on either point. That decision says that there is no presumption when one co parcener separates from the others that the latter remain united, but not that there is always a presumption of complete separation. On the question of agreement it merely holds that an agreement amongst the remaining co-parceners to remain united or to reunite must be proved like any other fact; but that does not mean that an agreement is necessary. When an agreement is relied on it must certainly be proved; but as I have already pointed out, the Privy Council and the Bombay High Court following the Privy Council have held that no special agreement is necessary, it being possible to infer an agreement, if the facts justify such an inference.

Hirchand and Gulabchand were minors when partition took place in 1921, and in *Bala Bux* v. *Rukhmabai* (7), their Lordships of the Privy Council found it difficult to see how an agreement to re-unite could be made by or on behalf of a minor. It would, perhaps, follow, if there can be no actual agreement, that it is impossible to infer one. But I do not think that there is any difficulty in the present case, in which I have to decide whether Jaikisan remained joint with his minor sons and not whether they re-united. In the partition Jaikisan acted on their behalf, and if his intention was that he and they should not be separated, that intention would, I think, be as effective to continue the joint family as an agreement, express or inferred, between adults. To hold otherwise would mean that an adult son could, by separating himself from the family, cause separation between his father and the latter's minor sons against the father's will and probably, against the interests of the minors.

That Jaikisan's intention was to remain joint with Hirchand and Gulabchand is indicated by the partition deed itself which specifies only the share to be given to Kallu. It is true that it does not expressly say that the other members would remain joint; but it seems to me to make it clear that the intention was that they should remain joint. The fact that Hirchand and Gulabchand were minors makes it extremely probable that their father would not wish to separate them from himself, and there is evidence to prove that though Kallu after separation went to live separately, the rest of the family continued to live together.

I am satisfied that Jaikisan, Hirchand and Gulabchand remained joint after Kallu separated and that Gulabchand is entitled to half share in the attached houses. The appeal therefore, fails and is dismissed with costs.

A. *Appeal dismissed.*

(6) 83 Ind. Cas. 418; 5 L. 92, 28 A. L. J. 254; 34 M. T. 70; A. I. R. 1924 P. C. 126; 28 C. W. N. 953; 20 L. W. 406; (1924) M. W. N. 650; 26 Bom. L. R. 1108, 47 M. L. J. 938; 51 I. A. 163; 51 C. 163; 1 L. C. 437; L. R. 5 A. (P. C.) 113; 10 O. & A. L. R. 1471; 1 O. W. N. 536 (P. C.)

(7) 30 C. 725; 30 I. A. 130; 5 Bom. L. R. 469; 8 Sar. 470; 7 C. W. N. 642 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Appeal from Appellate Decree No. 80 of 1930.

April 7, 1931.

MACNAIR, J. C.

SHANKER RAO AND OTHERS—DEFENDANTS—APPELLANTS

versus

DAULAT—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1918), ss. 41, 46—Absolute occupancy holding—Son's right, nature of—Alienation by father—Son's right to challenge on ground of legal necessity—C. P. Tenancy Act (I of 1920), ss 5, 11—Absolute occupancy holding—Son's interest.

Under the old C. P. Tenancy Act sons obtained by birth no vested interest in an absolute occupancy holding for it did not recognise succession by right of survivorship. Therefore, an alienation by a Hindu

occupancy tenant effected before the new Act came into force could not be challenged by his son on the score of want of legal necessity. *Pancham Singh* v. *Nankoo Singh* (2), *Ghanya* v. *Ukund Rao* (3), *Tekchand* v. *Tulai* (4), *Vithu* v. *Mendri* (5), *Bhura* v. *Ramrao* (6) and *Ragho* v. *Sadoo* (7), referred to.

Under the new Act sons of an occupancy tenant take an interest by birth where the law of the parties recognises succession by survivorship.

Appeal against the decree of the District Judge, Nagpur, dated the 23rd October, 1929, modifying that of the Additional First Subordinate Judge, Second Class, Nagpur, dated the 30th April, 1929.

Mr. *A. N. Chorghade*, for the Appellant.

Mr. *W. R. Puranik*, for the Respondent.

Judgment.—On the 18th June, 1910, Sitaram executed a mortgage deed in favour of the plaintiff. The mortgaged property with which I am concerned consisted of an absolute occupancy holding and a house appertaining to this holding. At the date of the mortgage deed Sitaram and his sons formed a joint Hindu family. The plaintiff sued for foreclosure: he has failed to prove that there was legal necessity for the mortgage. The trial Judge held that the sons had a vested interest in the holding and passed a foreclosure decree with respect to the share of Sitaram.

The lower Appellate Court held that the right of an absolute occupancy tenant was not a proprietary but a tenant right and that the sons of an absolute occupancy tenant had no vested interest in the holding during the lifetime of the tenant. The learned Judge remarked that s. 5 of the Tenancy Act (Act I of 1920), merely laid down the manner in which the succession was to be regulated after the death of the tenant and did not cause the sons of the tenant to have a vested interest in the holding during the lifetime of the tenant. A decree for foreclosure with respect to the whole of the holding and the house appurtenant to it was, therefore, passed.

In second appeal it is urged that the sons obtained, by birth, an interest in the holding. Mr. Puranik, Counsel for respondent No. 1, does not support the lower Appellate Court's interpretation of s. 5 of (Act I of 1920). Section 5 is as follows:

"The interest of an absolute occupancy tenant in his holding shall on his death pass by inheritance or survivorship in accordance with his personal law."

It seems to be clearly intended that the sons of a tenant should take an interest by birth: otherwise the interest of a tenant would seldom, if ever, pass by survivorship. This is made clear by s. 11 of the Tenancy Act, which contains a clear proviso:

"No person shall take any interest during the lifetime of any ancestor of such person in the male line of descent from the tenant:".

The absence of such provision in s. 5 shows that, on the death of an absolute occupancy tenant, his descendants together with their progeny take the same interest in the holding as they would in the case of other property. In a recent Bench decision it has been affirmed that, under the new Tenancy Act, sons take an interest in an absolute occupancy holding by birth. Section 5 is so construed by Mohiuddin, A. J. C., and myself in *Laxman* v. *Bhulabai* (1).

But Mr. Puranik points out that the question to be considered is the interest of the sons at the date when the mortgage was executed: if the sons had on that date, no interest, the father had power to transfer the property by executing the deed. He concedes that some ten years later the Act of 1920, created a vested interest in the sons: but that has the same effect as if the sons had been born in 1920.

Section 41 (1) of the old Tenancy Act (Act XI of 1898), is as follows:—

"The right of an absolute occupancy tenant in his holding shall on his death devolve as if it were land,".

Section 46 (1) of the Act states:—

"When an occupancy tenant dies, his right in his holding shall devolve as if it were land."

The sections have been construed by a series of rulings. In *Pancham Singh* v. *Nankoo Singh* (2), Drake Brockman, A. J. C., stated at pages 184 and 185*:—

"Moreover, by virtue of s. 41 (1), Tenancy Act, the right of an absolute occupancy tenant 'devolves as if it were land', and the use of the word 'devolves' appears by necessary implication to exclude, for example, the taking by survivorship which obtain among Hindus in respect of joint ancestral property."

In *Ghanya* v. *Ukund Rao* (3), Stanyon, A. J. C., stated at page 13†:—

"The Tenancy Act does not recognize such things as succession by right or survivorship, the vesting of a son's interest by birth, and so on."

In *Tekchand* v. *Tulai* (4), Skinner, A. J.

(1) 123 Ind. Cas, 449; 26 N. L. R. 1 at pp. 17 & 26; A. I. R. 1930 Nag. 65; Ind. Rul. (1930) Nag. 209.
(2) 3 N.L. R. 182.
(3) 4 N. L. R. 9.
(4) 3 Ind. Cas. 52; 5 N. L. R. 103.

* Pages of 3 N. L. R.—[*Ed.*].
† Page of 4 N. L. R.—[*Ed.*].

C., approved of the view that the right of an absolute occupancy tenant was not subject to the rights of co-parcenary and survivorship, which obtained among Hindus in respect of joint ancestral property. In *Vithu* v. *Mendri* (5), the view was again affirmed :—

"that the Central Provinces Tenancy Act, by providing that the right of a tenant 'shall devolve as if it were land', appears to exclude by necessary implication the taking by survivorship which obtains among Hindus in respect of joint ancestral property."

In *Bhura* v. *Ramrao* (6), Stanyon, A J. C., referred, with approval, to his previous decision that—

"the Tenancy Act does not recognize such things as succession by right of survivorship, the vesting of a son's interest by birth, and so on."

Mr Onorghade on behalf of the appellants relies on the remarks regarding the nature of an absolute occupancy tenancy right in *Ragho* v. *Sadoo* (7). It may well be that this right is different from the rights of tenants proper but this does not affect the validity of rulings which interpreted the provisions of the Tenancy Act. It seems quite clear that if a tenancy devolves as if it were land and this provision excludes taking by survivorship, sons can have no vested interests in the holding : the holding could not pass by inheritance if the sons had vested interest in it.

The rulings I have cited interpreting the expression "devolve as if it were land" have been consistently followed for twenty years.

The principle of *stare decisis* makes it necessary for me to hold that sons obtained by birth no vested interest in an absolute occupancy holding so long as Act XI of 1898, was in force. It is quite clear that the tenant of the holding with which I am concerned was Sitaram alone and not the joint family of which Sitaram was a member The sons had no vested interest in the holding in 1910 : Sitaram could mortgage the holding without legal necessity. The appeal, therefore, fails and is dismissed : with costs on the appellants.

R. L. *Appeal dismissed.*

(5) 4 Ind. Cas. 792; 5 N. L. R. 172.
(6) 17 Ind. Cas. 366; 8 N. L. R. 154 at p. 157.
(7) 5 Ind. Cas. 428; 6 N. L. R. 6.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Appeal from Appellate decree No. 272-B of 1929.

August 10, 1931.

SUBHEDAR, A. J. C.

UTTAMRAO—PLAINTIFF—APPELLANT

versus

GANGARAM—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 53—'Transfer defeating or delaying creditor', meaning of—Transfer in favour of one creditor to prejudice of others, legality of.

In cases where no question of insolvency is involved a debtor may pay one creditor in full and may leave others unpaid. The transfer which defeats or delay creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. [p. 238, col. 1.]

A transfer by a debtor in favour of one of the creditors for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor is not hit by the provisions of s. 53, Transfer of Property Act. [*ibid.*]

Appeal against the decree of the Second Additional District Judge, Akola, dated the 2nd September 1929, reversing that of the Second Class Subordinate Judge, Akot, dated the 16th February 1929.

Mr. *M. Bhasker Rao Niyogi*, for the Appellant.

Messrs. *V. K. Rajwade* and *G. G. Hatwalne*, for the Respondents.

Judgment.—The facts leading to this appeal are shortly these: In execution of a simple money decree the first defendant attached a field belonging to his judgment-debtor the second defendant, got it sold and it was purchased by the third defendant. The plaintiff laid an objection in the executing Court against the attachment on the basis of a sale-deed which he had taken from the second defendant on the 4th January 1926 for a consideration of Rs. 860. That objection was dismissed and the plaintiff therefore filed a regular suit to have it declared that he was the owner of the attached field and that the same was not liable to sale in execution of the first defendant's decree against the second defendant. The suit was contested only by the first and the third defendants on the ground that the sale was without consideration, that the field conveyed never in fact changed hands and that the transaction was void because it was entered into with the intention of shielding the property from the hands of the second defendant's creditors, the plaintiff and the second defendant being relations.

The trial Court, upon a careful consideration of the evidence on record, held that the sale in plaintiff's favour was for consideration, that the field conveyed was duly placed in possession of the purchaser, and that transaction was not in any way fraudulent. It accordingly granted the plaintiff a declaration as prayed for by him.

Against this decision the first defendant filed an appeal which was disposed of by Mr. Karmarkar, Additional District Judge, Akola. He agreed with the finding of the first Court that the sale in question was for consideration and that it was followed by delivery of possession of the property sold. The learned Judge, however, held that the plaintiff did not appear to him to be a *bona fide* transferee and that, therefore, the sale in his favour was fraudulent within the meaning of s. 53 of the Transfer of Property Act. He accordingly allowed the appeal and dismissed the plaintiff's suit. Against this decree the plaintiff has come up in second appeal

It has been contended on behalf of the appellant that on his own findings, that there was good consideration for the sale in the shape of the discharge of antecedent debts owed by the vendor to the plaintiff as well as to another creditor, and that the sale was followed by delivery of possession and in the absence of any finding that any substantial benefit was reserved by this transaction to the debtor, the view of the learned Judge that the transaction came within the purview of s. 53 of the Transfer of Property Act was entirely erroneous in law. This contention appears to me to be well founded.

In a similar case in which, as here, no consideration of the law of bankruptcy applied their Lordships of the Privy Council in *Murahar Sahu* v. *Hakim Lal* (1) made the following weighty observations:—

"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid, *Middleton* v. *Pollock* (2). So soon as it is found that the transfer here impeached was made for adequate consideration in satisfaction of genuine debts, and without reservation of any benefit to the debtor it follows that no ground for impeaching it lies in the fact that the plaintiff who also was a creditor was a loser by payment being made to this preferred creditor—there being in the case no question of bankruptcy."

Their Lordships of the Privy Council recently affirmed the aforesaid proposition of law in *Ma Pwa May* v. *S. R. M. M. A. Chettiyar Firm* (3). In this case it was held that a mortgage executed for adequate consideration, being partly the discharge of a genuine debt, no benefit being retained by the mortgagor, is not invalid under s. 53 of the Transfer of Property Act as being made to defeat or delay creditors, even though the mortgagor, who is heavily indebted, thereby prefers the mortgagee over other creditors, one of whom has instituted a suit, and before registration of the mortgage has obtained an order before decree attaching the mortgagor's property. In *Mardan Singh* v *Karanju* (4) it was also explained by this Court that an assignment is not fraudulent because it may operate to the prejudice of a particular creditor and that a sale of property for good consideration is not fraudulent against the creditors merely because it was made with the intention of defeating a particular execution.

The facts found by the learned Additional District Judge in para. 7 of his judgment are that the plaintiff was aware that his vendor the second defendant was heavily indebted and that another transaction in the shape of a conveyance by the second defendant in favour of his wife was also gone through about the same time when the plaintiff's sale-deed was executed. The wife of the second defendant also objected in the execution proceedings but the objection was disallowed. She did not file any suit like the present one filed by the plaintiff and it may therefore be taken that the sale in her favour was without consideration and fraudulent. These circumstances would not, however, in my opinion, bring the sale in favour of the plaintiff within the purview of s. 53 of the Transfer of Property Act as contended by the Pleaders for the respondents.

The cases relied on by the lower Appellate Court in support of its finding on the question of law have no application to the facts found in the present case and are easily distinguishable. In *Palamalai Mudaliyar* v. *South Indian Export*

(1) 32 Ind. Cas. 343; 43 C. 521 at p. 525; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 23 C. L. J. 406; 18 Bom. L. R. 378; 43 I. A. 104 (P. C.).

(2) (1876) 2 Ch. D. 104 at p. 108; 45 L. J. Ch. 293.

(3) 120 Ind. Cas. 645; 7 R. 624; at p. 629; A. I. R. 1929 P. C. 279; 30 L. W. 481; 34 C. W. N. 6; 6 O. W. N. 869; (1929) M. W. N. 941; Ind. Rul. (1930) P. C. 5; 51 C. L. J. 6; 56 I. A. 379; 32 Bom. L. R. 117; 58 M. L. J. 59; (1930) A. L. J. 533 (P. C.).

(4) 13 C. P. L. R. 160 at p. 165.

Company (5), it was held that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into cash which can easily be concealed and thus to defeat or delay his creditors cannot be treated as a transferee in good faith within the meaning of s. 53 of the Transfer of Property Act The cases of *Narayan* v. *Nathu* (Second Appeal No. 146-B of 1924 decided on 13th December 1926), and *Gopal* v. *Ram Krishna* (6) were cases under the Provincial Insolvency Act the provisions of which are entirely different from those of s. 53 of the Transfer of Property Act. In the case of *Seth Ghunsham Das* v. *Umavershad* (7), there was a clear finding by their Lordships of the Privy Council that

"there can be little doubt that the mortgage was a mere device for reserving the bulk of the available assets of Dhanroopmal for the benefit of his family and indirectly for himself."

For the reasons given above I accept the appeal and setting aside the decree of the lower Appellate Court restore that of the trial Court with all costs.

R. L. *Appeal accepted.*

(5) 5 Ind. Cas. 33; 33 M. 334; 7 M. L. T. 167; 20 M. L. J. 211; (1910) M. W. N. 239.
(6) 62 Ind. Cas. 289; 17 N. L. R. 69.
(7) 50 Ind. Cas. 264; 15 N. L. R. 68; 17 A. L. J. 410; 36 M. L. J. 483; 21 Bom. L. R. 472; 23 C. W. N. 817; (1919) M. W. N. 513; 10 L. W. 511; 1 U. P. L. R. (P. C.) 86 (P. C.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Appeal from Appellate Order No. 310 of 1930.

July 15, 1931.

NIYOGI, A. J. C

KALEKHAN—DEFENDANT—APPELLANT

versus

Musammat HOORA *alias* KUPAR—PLAINTIFF—RESPONDENT.

Muhammadan Law—Dower—Widow's right to retain property until dower debt is satisfied—Husband's creditor's right to proceed against such property.

Under Muhammadan Law a widow's right to retain her husband's property as a creditor for her dower until her debt is satisfied is a personal right and not an interest in the property. Therefore, a creditor who has got a decree against her and other heirs of her husband in respect of his debts is entitled to have the property attached and sold in execution of his decree subject to her right of retention until her dower debt has been satisfied out of the income of the property or otherwise.

Appeal against an order of the Additional District Judge, Damoh, dated the 22nd February, 1930, reversing that of the Subordinate Judge, Second Class, Damoh, dated the 7th December, 1929.

Mr. *K. V. Deoskar*, for the Appellant.
Mr. *Fida Hussain*, for the Respondent.

Judgment.—This appeal arises from execution proceedings. In a Small Cause Court Suit No. 305 of 1928, the appellant Kalekhan obtained a decree against Rulli, Kadar and others including *Musammat* Hura, the respondent, as heirs and legal representatives of Imami, the orignal debtor. The appellant attached a house in execution of his decree. *Musammat* Hura, the respondent, laid an objection against the attachment on the ground that the house was in her possession, pursuant to her claim for dower to the extent of Rs. 500. Her objection was dismissed in the first Court, but was allowed in appeal, with the result that the house was altogether released from attachment.

There seems to be no doubt that the Will dated the 10th December, 1924, was executed by Imami. The dower debt of Rs. 500 is mentioned therein. It cannot be disputed that *Musammat* Hura having come peacefully into the possession of the house in assertion of her claim for dower, is entitled to remain in possession until the satisfaction of the dower debt, either from the income of the property or otherwise.

The question is whether the creditor is precluded from attaching the house and bringing it to sale in execution, for what it is worth. It is argued for the respondent that so long as *Musammat* Hura has the lawful right to continue in possession of the house, it is not capable of attachment and sale. Although it may be conceded on the authority of *Ameer-oon-Nissa* v. *Mooradoon-Nissa* (1), *Umatul Mehdi* v. *Kulsum* (2) and *Hamira Bibi* v. *Zubaida Bibi* (3), that the possession obtained by a Muhammadan widow in assertion of her claim of dower cannot be disturbed, the question still remains whether the property cannot be treated as assets of the deceased husband for purpose of the satisfaction of his debts. The

(1) 6 M. I. A. 211; 1 Sar. P. C. J. 533; 19 E. R. 79.
(2) 35 C. 120; 12 C. W. N. 16; 8 C. L. J. 245.
(3) 36 Ind. Cas. 87; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; (1916) 2 M. W. N. 551; 1 P. L. W. 57; 25 C. L. J. 517; 43 I. A. 284 (P. C.).

answer would depend upon the nature of the right claimed by the widow. In *Bebee Bachun* v. *Hamid Hossein* (4), their Lordships of the Privy Council observed as follows:—

"It is not necessary to say, whether this right of the widow in possession is a lien in the strict sense of the term, although no doubt the right is so stated in a judgment of the High Court in a case of *Ahmed Hoosein* v. *Khodeja* (5). Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she has lawfully, and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account to those entitled to the property, subject to the claim for the profits received."

In *Ali Muhammad Khan* v. *Azizullah Khan* (6), it was held that

"dower stands on no higer footing than any other debt due from her deceased husband; and, except where there is a distinct agreement to that effect, there is no presumption of hypothecation of his estate for her dower to be drawn from the mere circumstance that dower is due."

In *Mahbubibi* v. *Amina* (7), it was held that the right of a Muhammadan widow to the dower is not an interest in immovable property. Similarly in *Muzzaffar Ali Khan* v. *Parbati* (8), it was held that her possession was that of a creditor to hold the property until her debt is satisfied with the liability to account to those entitled to the property. Although for some time the view prevailed that her possession was analogous to that of a mortgagee in possession, see *Azizullah Khan* v. *Ahmad Ali Khan* (9), and *Banoo Begum* v. *Mir Aun Ali* (10), that cannot now be accepted as sound in view of the *dictum* of their Lordships of the Privy Council in *Maina Bibi* v. *Vakil Ahmad* (11). From a review of these cases the deduction follows that the right of a Muhammadan widow in possession of her husband's property for dower debt is a personal right given to her by the Islamic Law and does not by any means amount to an interest in the land.

The creditor of a deceased Muhammadan is entitled to recover his debts out of the assets left by him. The assets no doubt vest in the heirs and are available for distribution amongst them, but as the heirs themselves are liable to the deceased's debts to the extent of the assets, it is obvious that they must go primarily to the discharge of the debts. As the widow in possession has no interest in the assets arising from her claim of dower, there is obviously nothing to prevent the assets being utilized for the satisfaction of the husband's debts, subject, of course, to the personal right of the widow to retain possession. In *Kaniz Fatima Begam* v. *Ram Nandan Dhar Dube* (12), a Muhammadan widow endeavoured to deter attachment precisely on the ground urged in the present case and their Lordships of the Allahabad High Court rejected her claim.

For the foregoing reasons I am of opinion that the house in question is liable to be attached and sold in execution of the decree All that is necessary to state is that under O. XXI, r. 66, Civil Procedure Code, it would be incumbent on the decree-holder to get it mentioned in the proclamation of sale that the house is in possession of *Musammat* Hura by virtue of her claim of dower. All that is sold in execution is the right, title and interest of the judgment-debtors and the auction-purchaser, whether he be a decree-holder or a stranger, would purchase the house burdened with *Musammat* Hura's personal right, which itself is qualified by her liability to account for the income.

For these reasons I allow the appeal and direct that the house be sold subject to the terms above stated. The respondent will pay the costs of the appellant in all Courts. Pleader's fees Rs. 10 only.

R. L. *Appeal allowed.*

(4) 14 M. I. A. 377, at p. 384; 17 W. R. 113; 10 B. L. R. 45; 2 Suth. P. C. J. 531; 3 Sar. P. C. J. 39; 20 E. R. 828.
(5) 10 W. R. 369.
(6) 6 A. 50; A. W. N. 1883, 204.
(7) 10 B. H. C. R. 430.
(8) 4 A. L. J. 521.
(9) 7 A. 353; A. W. N. 1885, 54; 9 Ind. Jur. 395.
(9) 9 Bom. L. R. 188.
(11) 86 Ind. Cas. 579; 47 A. 250; 23 A. L. J. 115; A. I. R. 1925 P. C. 63; 2 O. W. N. 180; L. R. 6 A. (P. C.) 25; 48 M. L. J. 667; 27 Bom. L. R. 796; 52 I. A. 145; 30 C. W. N. 673 (P. C.).
(12) 73 Ind. Cas. 977; 45 A. 384; 21 A. L. J. 269; A. I. R. 1923 All. 331.

OUDH CHIEF COURT.

Second Civil Appeal No. 224 1930.
April 10, 1931.
WAZIR HASAN, C. J., AND KISCH, J.
DILAWAR HUSAIN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
SUBHAN KHAN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 99, O. I, r. 8—Res judicata—*Co-defendants—Representative suit—Defect in frame of suit—Omission to raise objection—Objection in appeal, competency of—Suit relating to* wakf—*Power of Court to pass just and proper orders—Muhammadan Law*—Wakf—Mutawalli—*Appointment by congregation—Validity.*

In a suit for possession by *A* against *B*, *C* and *D* the first Court held that the suit was barred by adverse possession against *B* but decreed the suit against *C* and *D*. On appeal by *C* and *D*, however, the entire suit was thrown out on the ground that *A* had no title. In a subsequent suit between *B* and *C*:

Held, that the adjudication by the first Court in favour of *B* in the earlier suit did not operate as *res judicata* as against *C*. [p. 241, col. 2.]

Where in a representative suit the question whether the plaintiff was entitled to institute the suit because he had not obtained the permission of the Court was not raised and the suit was allowed to proceed:

Held, that the frame of the suit could not be objected to in appeal and that, in any case, the defect was cured by s. 99, Civil Procedure Code. [p. 241, col 2; p. 243, col. 1.]

Where the suit relates to *wakf* property the Court has jurisdiction to pass such order as may be just and proper in all the circumstances of the case and is not bound to the granting of the relief of ejectment asked for by the plaintiff *mutawalli*. [p. 243, col 1.]

Under the Muhammadan Law, in the case of an institution confined to a particular locality such as the grave-yard in a *mohalla* the congregations of that locality can appoint a *mutawalli*. *Piran* v. *Abdool Krim* (2), relied on. [p. 242, col. 2.]

Second Appeal against a decree, of the Additional Sub-Judge, Lucknow, dated the 2nd June, 1930, reversing that of the Munsif, South Lucknow, dated the 11th May, 1929.

Messrs. *Hyder Husein, Manohar Lal* and *Al i-Raza*, for the Appellant.

Mr. *G. Hasan*, for the Respondent.

Kisch, J.—This is the defendants appeal from a decree of the Additional Subordinate Judge of Lucknow, dated the 2nd of June, 1930, reversing the decree of the Munsif, South Lucknow, dated the 11th of May, 1929.

The plaintiff Subhan Khan, alleging himself to be the *mutawalli* of a certain piece of *wakf* property consisting of a *musalman* grave-yard and a mosque in Mohalla Narahi in the City of Lucknow, instituted the suit to recover possession of the portion of the said grave-yard on which the first defendant Dilawar Husain had a smithy shop on the allegation that this defendant had executed a deed of gift of the land on which the shop stood in favour of his son, the second defendant, and that this together with certain other acts of the defendants had caused the plaintiff to apprehend that they intended to assert their title to this land.

A number of pleas were taken in defence before the trial Court and the lower Appellate Court, but only two of them have to be considered in this appeal. The first is that the defendant Dilawar Husain had perfected his title by adverse possession and the second that the suit, being a representative suit, was not maintainable without the permission of the Court

The finding that the land in question is *wakf* has not been contested in this Court, and indeed the decision of this Bench in a very similar case *Noor Mohammad* v. *Ballab Dass* (1) is conclusive on the point.

The contention that the defendant Dilawar Husain has acquired title by adverse possession has been discussed under two aspects, firstly that this is established by the evidence and secondly that it is concluded by a previous decision of a competent Court, and the matter is, therefore, *res judicata*.

With regard to the first argument very little need be said. The lower Appellate Court has found as a fact that Dilawar Husain never asserted a hostile title in him as against the plaintiff or the rest of the Musalman community prior to 1927. This finding is not open to question in second appeal.

With regard to the question of *res judicata* the judgment relied upon was passed in a suit brought in the year 1925 by one Murari Lal against the present plaintiff Subhan Khan, both the present defendants, and a number of other persons to obtain possession of the whole of the grave-yard excluding the ground occupied by the mosque. The present plaintiff and the remaining defendants in that suit, except Dilawar Husain and his son Habibur Rahman put forward the defence that the land being a Musalman grave-yard was *wakf* property. The present defendants pleaded title by adverse possession over their smithy shop. Thereupon the present plaintiff filed a supplementary pleading to the effect that Dilawar Husain and his son occupied the land on which their shop stood with his permission on payment of rent which was devoted to the up-keep of the *wakf* prop-

(1) 134 Ind. Cas. 870; 8 O. W. N 579; A. I. R. 1931 Oudh 293; Ind. Rul. (1931) Oudh 406.

erty. Incidentally this supports the finding of the lower Appellate Court that it was not until this litigation that Dilawar Husain asserted a hostile title as against the rest of the Musalman community. Thus in the suit referred to the present plaintiff Subhan Khan and both the present defendants were co-defendants. No issue was struck as to their rights *inter se*. There was an issue on the question of limitation and in connection with this issue the trial Court held that the defendants Dilawar Husain and his son Habibur Rahman had acquired title by adverse possession of over twelve years as against the plaintiff. The suit was decided on the 18th February, 1927, in favour of the plaintiff except for the plot on which the smithy-shop stands and certain other small plots in respect of which the suit was dismissed. The present plaintiff and certain other defendants in that suit went up in appeal to the District Judge without making Dilawar Husain or his son parties to the appeal with the result that the finding of the Subordinate Judge in favour of the plaintiff Murari Lal was reversed on the ground that his own title was defective and the result was that the whole of his suit was dismissed. The above recital of the circumstances of the litigation on which the defendants rely is sufficient to show that the decision in that case cannot operate as *res judicata* in the present case. In order to give the plaintiff in that case the relief sought by him or to decide the appeal of the appealing defendants in that case, it was not necessary to come to a decision with regard to the rights of Subhan Khan and Dilawar Husain and his son *inter se*. Subhan Khan and the other appellants in that case succeeded in their appeal on the weakness of the plaintiff's title. In the circumstances of that case the defendants Dilawar Husain and Habibur Rahman were not necessary parties to the appeal. It is clear that, on the grounds on which the Appellate Court allowed the appeal, the plaintiff's suit must have been wholly dismissed as it eventually was. Thus having regard to the decision of the Appellate Court the plea of adverse possession raised by Dilawar Husain and Habibur Rahman cannot be treated as a matter directly and substantially at issue in that litigation, the plaintiff having failed on the weakness of his own title.

With regard to the question of the maintainability of the suit, the learned Subordinate Judge has found as a fact that the plaintiff Subhan Khan had been appointed *mutawalli* of the *wakf* property by the Musalman community of Mohalla Narahi with the consent of the out-going *mutawalli*. He recognised that such appointment was not according to the canons of the Muhammadan Law which lays down that a *mutwalli* can be appointed (1) according to the terms of the trust deed, (2) according to custom, if any, (3) by nomination by a *mutawalli* and (4) by appointment by *Qazi* or Judge. He however relied on the ruling of the late Mr. Justice Ameer Ali in *Piran* v. *Abdool Karim* (2) that in the case of an institution confined to a particular locality (as is the grave-yard in Mohalla Narahi) the congregation of that locality can appoint a *mutawalli*. I see no reason to adopt a view different from that taken by such an eminent authority.

On the view that the plaintiff Subhan Khan was in fact the *mutawalli* of the *wakf*, the question of the obtaining of permission of the Court under O I, r. 8 of the Code of Civil Procedure does not arise. But on this point also the conclusion of the learned Subordinate Judge appears to be correct. The question whether Subhan Khan was precluded from instituting the suit, because he had not obtained the permission of the Court, was not a matter specifically in issue. It was raised in appeal before the lower Appellate Court. If the defendants had raised a specific objection on this score the necessary permission could have been obtained and the fact that the suit was allowed to proceed, justifies the presumption that the defendants did not wish to raise such a plea. The reason may possibly be found in the fact that a large number of Musalman residents of the locality, who were interested in the *wakf*, had come forward to give evidence for the plaintiff and, therefore, notice to the persons interested would have been superfluous. The Court had the power to cure this technical defect by allowing amendment of the plaint; but where, as in the present case, the circumstances were such that no amendment of the plaint was really necessary, the Bombay High Court in *Narain* v. *Municipal Corporation of Bombay* (3) refused to set aside the decree of the Court below on the ground that the suit which was brought in a representative capacity had not been properly framed. I would add that in any case the defect would not be fatal to the plaintiff's case in view of the clear terms of s. 99 of the Code of Civil

(2) 10 C. 203.
(3) 83 Ind. Cas. 856; 47 B. 809; 25 Bom. L. R. 689; A. I. R. 1923 Bom. 305.

Procedure that no decree shall be reversed or modified on account of any error, defect or irregularity not affecting the merits of the case or the jurisdiction of the Court.

In my opinion, therefore, there is no substance in either of the contentions raised on behalf of the appellants.

The question remains as to the proper order to be passed in this case. Proceeding on the basis that the land in suit is *wakf* property, this Court has jurisdiction to pass such order as may be just and proper in all the circumstances of the case and is not bound to the granting of the relief of ejectment at once I would propose that a declaration be made that the property in suit is *wakf* property and that the defendants appellants be allowed to continue to occupy that portion of the property on which the smithy stands for a period of five years on payment of rent at Rs. 2 per mensem, in case they so desire. They will intimate their option to continue to hold that piece of land on the terms indicated above within fifteen days from to-day to the Court of first instance. In case they decline to accept these terms, the decree for ejectment will hold good but the defendants will be entitled to remove the materials of the structure within one month from to day. In all events the defendants appellants should pay the costs of the plaintiff-respondent in all Courts.

Hasan, C. J.—I entirely agree with my learned brother that there is no substance in either of the contentions raised on behalf of the appellants and I also agree with him as to the form of the order which should be passed in this case and also as to the costs.

Order modified.

OUDH CHIEF COURT.

Criminal Appeals Nos. 209, 258, 259 and 270 of 1931
Criminal Jury Reference No. 1 of 1931.
October 14, 1931.

RAZA AND SMITH, JJ.

EMPEROR—COMPLAINANT
versus
ZAMIN—ACCUSED

Ciminal Procedure Code (Act V of 1898), ss. 239, 423 (2)—Joint trial for kidnapping and concealing kidnapped woman—Legality—Conviction under s. 368—Essentials of charge to Jury—Penal Code (Act XLV of 1860), ss. 366, 368—Offence under s. 368—Knowledge of accused, importance of—'Knowledge', meaning of.

A verdict of the Jury finding a person guilty under s. 368, Penal Code, must be considered erroneous within the meaning of s. 243 (2), Criminal Procedure Code, where the Judge did not adequately bring out the difference between knowledge and existence of grounds for belief or suspicion in his charge to the Jury or, at any rate, the Jury did not understand the importance of the difference between the two things. [p. 246, col. 1.]

A joint trial for offences under ss. 366 and 368, Penal Code, is not illegal where the whole chain of events beginning with kidnapping or abduction and ending with the discovery of the woman can fairly be regarded as forming one and the same transaction. [p. 244, col. 1.]

For a conviction under s. 368, Penal Code, the accused must be proved to have had knowledge of the fact of kidnapping or abduction. [p. 244, col 2.]

For practical and legal purposes knowledge means the state of mind entertained by a person with regard to existing facts which he has himself observed, or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. [p. 245, col. 1.]

Reference made by the Assistant Sessions Judge, Fyzabad, by his order dated the 20th July, 1931.

Mr. *Ali Mohammad*, Assistant Government Advocate, for the Crown.

Judgment.—The above appeals and reference are connected and can be disposed of together.

The facts, briefly, are as follows. A married girl named Parbhu Dei, a "*murao*" by caste, is said to have been either kidnapped or abducted at Fyzabad on or about the 22nd-23rd January last by three men named Munne, Nazir and Kunnu, and taken on an "*ekka gari*" driven by one Zamin to a Railway Station whence Munne and Kunnu brought her by train to Lucknow. At Lucknow she is said to have been kept for several days at an "*ashram*" or widows' home, run by one Babu Ram with the assistance of one Badri. On the 13th February she was married to one Thakur Dass a resident of Jullundar, in the Punjab, and Thakur Dass, with whom were three companions in the persons of Bholanath, Chunni Lal and Jamna Dass, left with the girl by train on the evening of the 14th February. One Sarabjit Singh, however, had got wind of what was going on and either out of genuinely disinterested motives or to spite Babu Ram himself boarded the same train as Thakur Dass and his party, and gave information to the Police at Shahjahanpur, as a result of which Thakur Dass and those with him were arrested. In the end Nazir, Munne and Zamin were committed for trial on a charge under s. 360, Indian Penal Code, and Babu Ram, Badri, Thakur Dass, Jamna Dass, Chunni Lal and Bholanath on charges under s. 368, Indian Penal Code. Kunnu was said to be absconding

so he was not before the Court. As a result of the trial, which was held with a Jury, Munne and Nazir were convicted under s. 366, Indian Penal Code and Thakur Dass Badri and Babu Ram were convicted under s. 368, Indian Penal Code. Each of them was sentenced to five (5) years' rigorous imprisonment Jamna Dass, Chunni Lal, and Bholanath were acquitted. As regards the above men, the learned Assistant Sessions Judge of Fyzabad, who tried the case, accepted the unanimous verdict of the Jury. As regards Zamin, the Jury were unanimous in finding him also guilty under s 366, Indian Penal Code, despite the fact that the learned Assistant Sessions Judge had directed them to return a verdict of not guilty in his case. The Assitant Sessions Judge was of course entitled to do that, under s. 289 (2), Criminal Procedure Code if he considered there was no evidence that Zamin was guilty of the offence charged against him. The Assistant Sessions Judge has referred the case of Zamin to this Court, as he was unable to accept the Jury's verdict of guilty against him, and we have also before us appeals by the five convicted men. Babu Ram and Badri (Badri Parshad) are the appellants in Appeal No. 209, Thakur Dass (*alias* Thakur Prasad) is the appellant in No. 358, Nazir (Nazir Khan) in No. 259 and Munne in No. 270.

As regards Zamin, we agree with the reasons given by the Assistant Sessions Judge for holding no case made out against him. We can only suppose that the Jury were confused as to him as a result of the very long and elaborate charge addressed to them by the learned Assistant Sessions Judge. Acting under s. 307 (4), Criminal Procedure Code, we acquit Zamin. If he is in custody he must be released forthwith. If he is on bail, any bond executed by him or on his behalf are discharged

As regards the appeals by the convicted men, it was suggested to us that the joint trial was bad in law. We think there is no force in that suggestion. The whole chain of events beginning with the girl's kidnapping or abduction at Fyzabad, and ending with her discovery at Shahjahanpur, can fairly be regarded as forming one and the same transaction. It would be in the highest degree inconvenient in a case of this nature to split the entire chain of events up into several distinct trials involving the repetition of much of the evidence in each of them.

As regards the charge to the Jury, we think that the Assistant Sessions Judge was at pains to lay the case fairly and fully before the Jury and that if he erred it was on the side of over-elaboration, and not on the side of insufficiency of details.

Having said this much by way of preface, we proceed to consider the cases of the various appellants.

The exact age of the girl is not very certain. She may be under 16. According to her mother's evidence she is 14 and according to medical evidence she is about 15. The Jury concluded her to be aged "exactly 16 years," but they found, nevertheless, that she was "kidnapped." If she is not under 16, of course she could not be kidnapped, but we are satisfied that there were materials justifying a finding that she was abducted, since she is said to have been induced to go with the men concerned first by deceitful promises of being taken to the house of a relative of hers, and afterwards by threats of being killed. It was in fact, abduction, and not kidnapping, that was mentioned in the charge sheets. For the purposes of ss 366 and 368, Indian Penal Code, of course, kidnapping and abduction stand on the same footing We are satisfied that the girl was either kidnapped or abducted and that the object of those who kidnapped or abducted her was one or more of the objects specified in s 396, Indian Penal Code. She alleges that she was, in fact, raped on several occasions quite apart from her ultimate marriage against her will to Thakur Dass. Those who kidnapped or abducted her, therefore, were rightly convicted under s. 366, Indian Penal Code. There was sufficient evidence to justify the Jury's finding that Nazir and Munne were two of the men concerned. We see no reason to interfere, as far as they are concerned, either with the convictions or with the sentences. Their appeals are dismissed

We now come to the cases of Babu Ram and Badri. As to them, it is urged in appeal:

(*i*) they had no "knowledge" that *Musammat* Parbhu Dei had been kidnapped or abducted,

(*ii*) they did not "conceal" her, whether they had such knowledge or not.

As to the former point, we are referred to a ruling reported as *Gadadhar Sarkar* v. *Emperor* (1).

It is true that s. 368, Indian Penal Code is confined to "knowledge" only of the fact of kidnapping or abduction. It contains no

(1) 87 Ind. Cas. 845; A. I. R. 1926 Cal. 226; 26 Cr. L. J. 1021.

words, as do certain other sections of the Code (such as ss. 411, 497 and 498), such as 'or having reason to believe'. It has, therefore, to be considered whether Babu Ram and Badri can be said to have known that *Musammat* Parbhu Dei had been kidnapped or abducted.

In that connection we must mention that there is no doubt that the girl did, in fact, spend some time at the "*ashram*" managed by Babu Ram and Badri. It appears that she arrived there on the 30th January and, if that is so, there is a curious lacuna in the evidence as to where she was between the 22nd-23rd January and that date. However, as we have said, she certainly spent several days at the "*ashram*", that is not denied by Babu Ram and Badri. Their version is that she was brought there in the absence of Babu Ram, and was admitted by Badri, to whom she represented that she was a widow anxious to remarry.

It has, therefore, to be considered, as we have said already, whether Babu Ram and Badri can be said to have "known" that she had been kidnapped or abducted.

According to the girl, Munne and Kunnu had some talk with Badri which she did not overhear. She herself, she said, told both Badri and Babu Ram that she was married, and had a husband and various other relatives living. She did not say that she ever gave them to understand that she had been kidnapped or abducted

In these circumstances, it is difficult to see how it can be held that Babu Ram or Badri "knew" her to have been kidnapped or abducted. Without going into a metaphysical discussion of the nature of knowledge, we may say that for practical and legal purposes, knowledge means the state of mind entertained by a a person with regard to existing facts which he has himself observed, or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. Here, it is not suggested that Babu Ram or Badri had any personal knowledge of the girl and her circumstances prior to her arrival at the "*ashram*" at Lucknow, so they can only be held to have had "knowledge" of her and her circumstances if the facts in those connections were communicated to them by the girl herself or by others, which sources of information they had no reason to doubt. If the girl herself, or the men Munne and Kunnu, were alleged to have given to Babu Ram or Badri information that the girl had been kidnapped or abducted, we should have had no difficulty, in the absence of any suggestion that they had any reason to disbelieve what was told them, that Babu Ram and Badri "knew" that the girl had been kidnapped or abducted. As far as the evidence goes, however, we cannot say more than this, that they had reason to believe, or suspected, that she had been kidnapped or abducted We have no hesitation in saying that the arrival at the '*asharm*" of a Hindu girl, who alleged herself to be married, in the company of two Musalmans, (we think the prosecution case to be adequately made out, to that extent) may reasonably be held to have given rise to strong suspicions in the minds of Babu Ram and Badri, but the possibility of her having voluntarily left home remained and we are not prepared to hold that the possibility was negatived by anything communicated to Babu Ram and Badri by the girl or by her companions.....in other words, we are not prepared to hold that Babu Ram or Badri "knew" the girl to have been kidnapped or abducted, so as to render them punishable under s 368, Indian Penal Code.

In these circumstances, we think the conviction of those men under s. 368, Indian Penal Code was not, in law, justified by the evidence. As to whether the girl can be said to have been "concealed" at the "*ashram*" it is not necessary for us definitely to decide, but we may say that despite what is contained in certain rulings, to which we have been referred on that point.—*In re Ihurrup Bhujun Singh* (2); *In re Chubbooa* (3); *In re Phula Singh* (4), we should have had no difficulty having regard to all the circumstances, in holding that Babu Ram and Badri "concealed" the girl. She said that she, and other women in the "*ashram*", used to be kept at times under lock and key, and even if she was not continuously kept concealed or confined (apparently she was not so kept concealed or confined), she was, in our opinion, kept concealed and confined at times. However, having regard to the view we take on the point of the knowledge of Babu Ram and Badri, it is not necessary to discuss that point further. We think that the conviction of Babu Ram and Badri under s. 368, Indian Penal Code was bad in law. It is possible that they might, on the evidence, have been properly convicted under some other section or sections of the Penal Code, but we do not think we need to consider that here. We set aside the convic-

(2) (1873) 5 N. W. P. H. C. R. 133.
(3) (1873) 5 N. W. P. H. C. R. 183.
(4) 10 P. R. 1874 Cr.

tions and sentences of Babu Ram and Badri under s. 368, Indian Penal Code, and direct that they be forthwith released.

It should not be necessary for us to state that we are far from approving of such activities as Babu Ram and Badri appear to have been carrying on at the so-called "*ashram*". We are told that those activities have now ceased, and we are glad to believe that that is so.

There remains the case of Thakur Dass. We need say little in that connection. It is not made out that he knew the girl had been kidnapped or abducted. She did indeed say at first, that she told him, before her "marriage", that she had a husband living, but she afterwards said that she could not remember whether she told him that before her "marriage" to him. After that "marriage," she said, she did not tell Thakur Dass that she had been forced to marry him. Yet again, she said that in the train she told Thakur Dass and his companions that she had not married "with her consent."

Little attention can be paid to what the girl has said at different times on this point. In any case, we are satisfied, that Thakur Dass cannot be said to have known that she had been kidnapped or abducted, so his conviction under s. 368, Indian Penal Code must be held to have been bad in law. We, therefore, set aside his conviction and sentence; he will be released forthwith.

We may mention with regard to the contents of sub-s. (2) of s. 423 of the Code of Criminal Procedure that we consider the verdict of the Jury to have been erroneous as regards Babu Ram, Badri and Thakur Dass owing to the fact that the learned Judge did not adequately bring out in his charge to the Jury the difference between knowledge, and the existence of grounds for belief or suspicion, and that at any rate the Jury failed to understand the importance of the difference between those two things for the purposes of a conviction under s. 368, Indian Penal Code.

Order set aside.

OUDH CHIEF COURT.

Second Civil Appeal No. 188 of 1930.

November 5, 1930.

Oth [illegible] BISHESHWAR NATH, J.

Musammat JASODA—PLAINTIFF—APPELLANT

versus

GOPAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Oaths Act (X of 1873), ss. 8, 9, 10—Party, meaning of—Authorised agent, whether party—Statement by party to be bound—Effect on other parties—Mukhtar's *power to bind.*

The word 'party' in s. 9, Oaths Act, includes a duly authorised agent. *Amir* v. *Mohammad Bakhsh* (1), followed.

Where the terms of a *mukhtarnama* are very wide and give the *mukhtar* authority to make a compromise, confess judgment or make a reference to arbitration, such extensive powers must be deemed sufficiently wide to include authority to take action under ss. 8, 9 and 10 of the Oaths Act.

Statement by a party in pursuance of an agreement made under the Oaths Act, is ordinarily binding only as against the parties who had offered to be so bound, but where the rights and liabilities of certain parties are inseparable and some of them agree to be bound, the agreement is binding on all of them.

Second Appeal against a decree of the Additional Subordinate Judge, Hardoi, dated the 15th February, 1930, affirming that of the Munsif, Bilgram, Hardoi, dated the 10th September, 1929.

Mr. *Hakimuddin*, for the Appellant.

Mr. *Radha Krishna*, for the Respondents.

Judgment.—This second appeal arises out of a suit for demolition of a wall constructed by the defendants.

The persons who are related as brothers were impleaded as defendants. When the case came up for trial, the plaintiff through her *mukhtar* agreed to abide by the statement made by the defendant No. 1 inside a particular temple. Defendants Nos. 1 and 2, who were present at the time when this statement was made, agreed to the case being decided upon the said statement. The Court appointed a Commissioner to record the statement of defendant No. 1 in terms of the agreement above referred to. The statement was to the effect that the plaintiff is not entitled to get the wall demolished and that her suit ought to be dismissed against all the defendants. The Court accordingly dismissed the suit. This order has been upheld by the lower Appellate Court.

The contention urged before me is that the word "party" as used in s. 9 of the Oaths Act (X of 1873) does not include an authorized agent and that even if it did, the agent who made the agreement on behalf of the plaintiff had no authority to do

so. In my opinion those contentions have no substance.

The first contention is fully covered by the decision of a Bench of this Court in *Amir* v. *Mohammad Bakhsh* (1), in which it was held that the word "party" under s. 9 of the Oaths Act includes a duly authorized agent. As regards the second contention the term of the *mukhtarnama* are very wide. They give the *mukhtar* authority to make a compromise, confess judgment or make a reference to arbitration. In my opinion such extensive powers as are given in this *muktarnama* are sufficiently wide to include authority to take action under ss. 8, 9 and 10 of the Oaths Act.

Lastly it was also contended that the defendant No. 3 is not a party to the agreement and therefore the plaintiff is entitled to have her suit decided on merits against the said defendant. Reference has been made to *Ram Ratan* v. *Ram Lal Singh* (2) in support of the argument that the statement made by defendant No. 1 in pursuance of the agreement made under the Oaths Act was binding only as against the parties who had offered to be so bound. The learned Counsel for the appellant in urging this argument admits that the decree passed in pursuance of the statement made by defendant No. 1 will be binding as between the plaintiff and defendants Nos. 1 and 2 but contends that it cannot bind the plaintiffs as against defendant No. 3. The position in the present case is a peculiar one. If the decree holds good as against defendants Nos. 1 and 2 it must hold good against defendant No. 3 also. The result of the decree passed in pursuance of the statement made by defendant No. 1 is that the plaintiff's suit for demolition of the wall must be dismissed. If this dismissal is to hold good against defendants Nos. 1 and 2 it is impossible for the plaintiff to get a decree for demolition against defendant No. 3. The rights and liabilities of the three defendants in the present case are inseparable. I therefore think the decision of the lower Court is correct.

The appeal fails and is dismissed with costs.

R. L. *Appeal dismissed.*

(1) 5 O. W N. 1070.
(2) 27 A. L. J. 1095.

OUDH CHIEF COURT.

Second Civil Appeal No. 280 of 1930.
May 6, 1931.

BISHESHWAR NATH AND NANAVUTIY, JJ.

UMA SHANKAR SINGH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

Musammat SUKHRAJ KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Suit for declaration that certain transfers were fictitious—Partial consideration proved—Transfers not fictitious—Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Concurrent findings that transfers not fictitious—Interference.

Where, in a suit for declaration the relief claimed is that the deeds in question are colourable and fictitious, if any portion of the consideration in respect of them has been paid, the transaction cannot be considered to be fictitious and the plaintiffs cannot get the declaration claimed.

Concurrent findings of fact by the Courts below that certain transfers are not colourable and fictitious are not open to challenge in second appeal.

Second Appeal against a decree of the District Judge, Unao, dated the 27th May, 1930.

Mr. *Ghulam Hasan*, for the Appellants.

Messrs. *Radha Krishna* and *Ali Zaheer*, for the Respondents.

Judgment.—This is an appeal by the plaintiffs against the judgment and decree, dated 27th May, 1930, of the District Judge of Unao upholding the judgment, dated the 9th September, 1929, of the Additional Subordinate Judge of that place. It arises out of a suit for a declaration that certain deeds executed and loans taken by *Musammat* Sukhraj Kuar, defendant No. 1, were fictitious and not binding on the property of her deceased husband Kalka Singh or on the plaintiffs. The plaintiffs' case was that Kalka Singh had on 8th January, 1916, executed a Will giving a life-interest to his wife Sukhraj Kuar and the remainder to the plaintiffs. They further alleged that *Musammat* Sukhraj Kuar had been given a limited power of transfer for certain specified purposes namely for funeral ceremonies, charity, religious purposes and performance of Gaya, etc. They also pleaded that under colour of this power she had executed various deeds purporting to be for objects for which she was authorised to make transfers but that, as a matter of fact, no money was required for any of those objects, and the transactions were only colourable and fictitious. The various deeds impugned by the plaintiffs have culminated in a sale-deed dated the 2nd July, 1927 for a consideration of Rs. 4,300. Both the

lower Courts have found that Sukhraj Kuar borrowed various sums of money for purposes specified in the Will, and that these debts have all been paid up by means of the sale-deed dated 2nd July, 1927. The learned District Judge has also remarked that it is possible that she might have spent on these objects more than what was strictly necessary, but the plaintiffs cannot question the transfers on that ground. Both the lower Courts also recorded a finding, based on an interpretation of the Will of Kalka Singh to the effect that Sukhraj Kuar had an absolute estate in the property bequeathed to her by Kalka Singh.

The learned Counsel for the plaintiffs-appellants have sought to impugn all the findings recorded by the learned District Judge. We think that it is not necessary for us to enter into the question of the interpretation of the Will in the present case. As we have stated before the plaintiffs' claim was confined to a declaration about the transfers specified in para. 4 of the plain being colourable and fictitious. This matter is concluded by the concurrent findings of fact of the two lower Courts. It has been proved from the evidence both oral and documentary on the record that Sukhraj Kuar borrowed various sums of money from time to time under the deeds in question and received the consideration in respect of them. The deeds, therefore, cannot be regarded as fictitious

It was also contended on behalf of the plaintiffs that admittedly Rs. 1,750 out of the consideration of the sale-deed dated 2nd July, 1927, has not yet been paid by the vendee to *Musammat* Sukhraj Kuar and that the plaintiffs should be given a declaration at least to the effect that this portion of the consideration of the sale-deed was fictitious. We find ourselves unable to accede to this contention. The relief claimed was about the deeds in question being colourable and fictitious. If any portion of the consideration in respect of them has been paid the transaction cannot be considered to be fictitious, and the plaintiffs cannot get the declaration claimed.

Lastly the plaintiffs wanted us to determine the extent of the consideration of the sale-deed which was borrowed for the objects for which she has been authorised to borrow under the terms of the Will. This matter also seems to us to be wholly outside the terms of the relief claimed in the plaint. We, therefore, decline to enter into a discussion of it in this appeal.

The appeal must fail on the finding that the transactions in suit are not fictitious. We accordingly dismiss it with costs.

R. L. *Appeal dismissed.*

OUDH CHIEF COURT.

Criminal Revision No. 117 of 1931.

November 5, 1931.

BISHESHWAR NATH, J.

KANDHAI AND OTHERS—ACCUSED —APPLICANTS

versus

EMPEROR—COMPLAINANT—OPPOSITE —PARTY.

Criminal Procedure Code (Act V of 1898), ss. 413, 414, 415—Cattle Trespass Act (I of 1871), s. 24—Penal Code (Act XLV of 1860), s. 447—Conviction for criminal trespass and forcibly rescuing cattle—Combination of sentences—Order of conviction, whether appealable.

Where a person was convicted under s. 447, Penal Code, and s 24, Cattle Trespass Act, and fined Rs. 50 for the former offence and Rs. 20 for the latter, by a Magistrate in the exercise of summary powers:

Held, that there was a combination of two punishments of the nature referred to in s. 414, Criminal Procedure Code, and the order was appealable

The word "therein" in s. 415, Criminal Procedure Code, refers to ss. 413 and 414, and s. 415 is intended to apply to cases in which two or more of the punishments mentioned in s. 413, or s. 414, have been combined.

Criminal Revision from an order of the Sessions Judge, Fyzabad, dated the 26th August, 1931.

Mr. *A. N. Mulla*, for the Applicants.

Mr. *Ali Mohammad*, Assistant Government Advocate, for the Crown.

Judgment—This is an application for revision under ss. 135 439 of the Code of Criminal Procedure, against the order dated the 26th of August, 1931, of the Sessions Judge of Fyzabad upholding the order dated the 12th of August, 1931, of a Magistrate First Class of the Fyzabad District convicting the applicants summarily under s. 447, Indian Penal Code, and s. 24 of the Cattle Trespass Act and sentencing each of them to pay a fine of Rs. 50, in default two months' rigorous imprisonment under s. 447, Indian Penal Code and a fine of Rs. 20, in default one month's rigorous imprisonment under s. 24 of the Cattle Trespass Act. Briefly stated the facts are that there is a military grass farm in Fyzabad. A portion of the land of this farm has been reserved for growing grass for the use of the military. This reserved area has been enclosed with barbed wire fencing. On the night of 21-22 June, 1931, the applicants were found

grazing about sixty head of cattle in this reserved area. When the employees of the grass farm tried to secure the cattle in order to take them to the pound, the applicants resisted and rescued some thirty or thirty-five head of cattle with the result that the grass farm employees could manage to impound only nineteen head.

The learned Magistrate in an elaborate judgment after discussing the evidence at considerable length held that the prosecution case had been fully established and that all the accused persons were guilty of committing criminal trespass and also of forcibly rescuing cattle and that they were therefore liable to conviction under s. 447 Indian Penal Code and s. 24 of the Cattle Trespass Act. He accordingly awarded them the sentences stated above under each of these sections The accused filed an application for revision in the Court of the Sessions Judge of Fyzabad against this order of the Magistrate. The application was dismissed summarily by the learned Sessions Judge.

The first contention urged on behalf of the applicants is that as the Magistrate has awarded two punishments, one a fine of Rs 50 under s. 447 and the other a fine of Rs. 20 under s. 24 of the Cattle Trespass Act, therefore the case is governed by s. 415 of the Code of Criminal Procedure and in spite of the provisions of s 414 of that Code, the sentence was appealable to the Sessions Judge. Section 415 runs as follows:

> An appeal may be brought against any sentence referred to in ss. 413 or 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal, shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

The word 'therein' as used in this section must in my opinion refer to ss. 413 and 414. In other words, the section is intended to apply to cases in which two or more of the punishments mentioned in s. 413 or s. 414 have been combined. The punishments mentioned in s. 413 are a sentence of imprisonment not exceeding one month passed by a Court of Session and a fine not exceeding Rs. 50 imposed by a Court of Session or District Magistrate or other Magistrate of the First Class. It is admitted that this section does not apply to the case. As stated before the conviction by the Magistrate was in the exercise of his summary powers and therefore the relevant section is 414. The punishment referred to in this section is a fine not exceeding Rs. 200 only. In the present case the Magistrate has imposed two such fines, one of Rs. 50 and the other of Rs. 20. Thus the case is one in which two punishments such as are referred to in s. 414 have been combined. If any of these punishments stood by itself, the order by virtue of s. 414 could not be appealable but because the Magistrate imposed two such punishments, therefore by reason of the combination of the two punishments, s. 415 makes the order appealable. I therefore accept the applicants' contention. But the applicants cannot derive any benefit from it. The order of the Magistrate being appealable, the applicants instead of making an application in revision to the Sessions Judge ought to have filed appeals against their conviction and sentence. As they did not do so, the learned Sessions Judge was perfectly right in dismissing the applications for revision summarily. It was argued that the learned Sessions Judge ought to have treated the application for revision as an appeal. But no such request was made to him and he was not bound to do so. Section 439 cl. (5), Criminal Procedure Code, provides that where under this Act an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. The result therefore is that the present application for revision is not maintainable. In this view of the matter it is not necessary for me to enter into the merits of the application.

The application fails and is dismissed.

A. *Application dismissed.*

OUDH CHIEF COURT.

Criminal Revision No, 98 of 1931.

October 17, 1931.

RAZA AND SMITH, JJ.,

GIRDHARIJI SINGH—COMPLAINANT-APPLICANT

versus

JITENDRA MOHAN SINGH AND ANOTHER ACCUSED-OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Acquittal—No appeal by Government—Revision, competency of.

It is open to the High Court to interfere with an order of acquittal in revision at the instance of a private complainant to the extent of setting aside the order of acquittal and directing re-trial. [p 250, col. 2.]

Application for Revision of an order of the Assistant Sessions Judge, Fyzabad, dated the 10th March, 1931.

Dr. *J. N. Misra* and Mr. *Sri Ram Misra*, for the Applicant.

Messrs. *J. Jackson* and *L N. Shukla*, for the Opposite Parties.

Judgment.—This is a criminal revision at the instance of a private complainant against the acquittal of two men, Jitendra Mohan Singh and Mathura Singh, who were tried with the aid of a Jury by the learned Assistant Sessions Judge at Fyzabad. The charges against Jitendra Mohan Singh were under ss. 465 Indian Penal Code, and 477-A, or, in the alternative, under s. 477-A read with s. 114 Indian Penal Code. The charges against Mathura Singh were under ss. 465, 477-A and s. 204 Indian Penal Code.

The facts briefly are that on the 7th of April, 1909, one Raj Bahadur Singh executed a mortgage deed in favour of two men, Indra Bikram Singh and Jai Narain Singh. Jai Narain Singh is still alive. Indra Bikram Singh is dead. The accused Jitendra Mohan Singh is one of Indra Bikram Singh's sons. The mortgagor, Raj Bahadur Singh is also dead, having died n the year 1919. The complainant in the present case is his son, Girdhari Singh. It is said that in the year 1929, Jai Narain Singh and Jitendra Mohan Singh threatened Girdhari Singh with a suit for the recovery of Rs. 62,000 on the basis of the mortgage that has been referred to above. Thereafter, it is said Girdhari Singh having taken legal advice was informed that a claim on the basis of the deed aforesaid was time-barred and he went to Jitendra Mohan Singh accused and told him that he had been so advised. Jitendra Mohan Singh said that he, too, would take legal advice. The suggestion made by the complainant is that certain alterations were made in the account books of the mortgagee and certain pages in certain account books were destroyed in order to create evidence which would bring a suit on the basis of the mortgage-deed within time. Jai Narain Singh and Jitendra Mohan Singh, it should be mentioned, are carrying on a joint banking business, in which Mathura Singh is the manager.

A criminal complaint was lodged by Girdhari Singh against Jitendra Mohan Singh and Mathura Singh on the 11th of March, 1930. As a result of the magisterial inquiry, Jitendra Mohan Singh and Mathura Singh were committed for trial on charges that have already been set forth. The trial began in the middle of December, 1930, and continued till the 13th of March, 1931, on which date the learned Assistant Sessions Judge, accepting the opinion of the majority of the Jurors, found both the accused not guilty of the offences charged against them and acquitted them. It was not until the 14th of August last, that this application in revision was made to this Court against the acquittal of the accused in that trial. We are informed that the complainant had, in the meantime, moved the appropriate authorities to get an appeal instituted by Government against the acquittals, but Government refused to institute such an appeal.

On behalf of the applicant, we have heard Dr. J. N. Misra at very considerable length. He has cited to us numerous rulings both of this Court and of other Courts, as to our competency to entertain this application at the instance of a private complainant despite the fact that Government has declined to institute an appeal. We do not think it necessary to set out any of those rulings in detail, since we are prepared to hold that it is within our competency, should we see fit, to interfere in the matter at the instance of this private complainant to the extent of setting aside the orders of acquittal and directing a retrial.

On the merits, various points have been taken. The first is that the Jury, with the aid of which the Sessions trial was conducted, was not properly constituted. We see no reason to attach any particular importance to the suggestions made on that point especially in view of the fact that the Jurors were not objected to when the trial began. That was the time for the parties to raise any objection.

As to the merits of the matter in other ways, we find ourselves in some difficulty by reason of the fact that on the 12th of March, 1931, that is to say, two days after the decision of the Sessions trial, a civil suit was filed on the basis of this mortgage deed. This suit is still pending and that fact is the one that impresses us most in deciding what action we ought to take with regard to the revision. For us to go into all the details of the accounts would, needless to say, be to consider matters which will come up for decision in the civil suit. If a retrial of the criminal case were ordered, the effect would be that the circumstances would be under consideration both in the Criminal Court and in Civil Court. The object of the applicant in making this application in revision is, it is hardly necessary to point out, to

obtain, if possible, the conviction of the men who were acquitted in the Sessions trial and it is we think in the highest degree undesirable that there should be a determination of the matter in the Criminal Court when it is still *sub judice* in the Civil Court. The case is one of high valuation and will be liable to go up on appeal to the highest Tribunal. In these circumstances, we think it best, now that one criminal trial has already been concluded, that the dispute should, for the future, be conducted in the Civil Court, which is the competent Court to decide the matters which are really at issue between the parties.

We do not think it necessary to say anything more save this that the learned Assistant Sessions Judge made a most elaborate and apparently exhaustive charge to the Jury, and there is no ground for any suggestion that he did not put the matter fully before them. However that may be, for the reasons given we do not think that in this particular case we ought to interfere in revision and order a retrial. We accordingly dismiss this application.

A. *Application dismissed.*

OUDH CHIEF COURT.

Application No. 49 of 1931.
September 29, 1931.
BISHESHWAR NATH SRIVASTAVA, J.
JAGDAMBA PRASAD—PLAINTIFF —APPLICANT
versus
RAM DULARAY AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115, O. XLI, r. 23—Revision—Error of law—Remand—Direction that party should pay costs within certain period after receipt of order by trial Court—Trial Court, whether bound to give notice to party.

Where a case is remanded with a direction for retrial on condition that the plaintiff pays the costs of the previous suit within a certain number of days of the receipt of the order of remand by the trial Court, the trial Court is not bound to serve the plaintiff with notice of the receipt of the record by it. It is the duty of the plaintiff to take necessary steps to find out when the record was received by the trial Court. [p. 251, col. 2; p. 252, col. 1.]

The fact that a decision is incorrect is no ground for revision under s. 115, Civil Procedure Code, where no question of jurisdiction is involved. [p. 252, col. 1.]

Application against an order of the Munsif, Tarabganj, Gonda, dated the 28th February, 1931.

Mr. *L. S. Misra*, for the Appellant.

Messrs. *B. P. Misra* and *H. Husain*, for the Opposite Party.

Judgment.—This is an application for revision of an order dated the 28th of February 1931, of the Munsif of Tarabganj, District Gonda.

It is necessary to state a few facts which have led up to the present application. One Ram Jiawan instituted a suit for partition in 1926. He was granted permission to withdraw the suit with liberty to institute a fresh suit on condition of his paying the costs of that suit to the defendants before he instituted a fresh suit. Subsequently he made a gift of his share in favour of the plaintiff. The plaintiff instituted a second suit for partition in 1930. One of the pleas raised against him was that payment of the costs of the previous suit had been made a condition precedent to the maintainability of a fresh suit, and as the costs had not been paid the suit was not maintainable. This plea was accepted and the suit was dismissed on this preliminary ground. There was an appeal to the Subordinate Judge who, on the 13th of October, 1930, set aside the order of the trial Court and remanded the case to the Court below with directions to determine it on the merits provided the plaintiff paid the costs of the former suit within a fortnight of the receipt of the order by the trial Court. The order was received by the trial Court on the 8th of November, 1930, on which date the learned Munsif recorded an order which is as follows:—

"Seen. Received here on 8th November, 1930. Put up on 24th November, 1930."

As the period fixed by the trial Court expired on the 23rd of November and the costs were not deposited by that date, the learned Munsif dismissed the suit on the 24th of November The plaintiff made an application on the 12th of December, 1930, accompanied with a tender to deposit the amount of costs payable by him but the learned Munsif rejected it the same day. Thereafter the plaintiff moved the learned Subordinate Judge under s. 151 of the Code of Civil Procedure, asking him to add in his order dated the 13th of October, 1930, a provision to the effect that fifteen days are to be calculated from the time of receipt of notice by the plaintiff of the record having been received in the trial Court. The learned Subordinate Judge found it unnecessary to make any such addition in his order and dismissed the application. The plaintiff then made another application on the 28th February, 1931 to the learned Munsif asking for permission to deposit the amount of costs,

This application was also rejected the same day. This last order of the learned Munsif forms the subject matter of this application for revision.

It has been contended in support of this application that the learned Munsif ought to have served the plaintiff with notice of the receipt of the record by him and that he was in error in dismissing the suit without issuing any such notice. The learned Counsel for the applicant has not been able to refer to any provision of law or any rules of practice making it obligatory for the learned Munsif to issue such notice. The order passed by the learned Subordinate Judge on the 13th of October 1930 was pronounced in the presence of the plaintiff. He ought to have taken necessary steps to find out when the file was received by the Munsif. Both the Courts being situate at the same place, he has obviously been negligent in having made no tender and taken no steps to find out when the record was received by the trial Court, before the 12th December 1930. In any case it seems to me that there is no ground for interference under s 115. Code of Civil Procedure. The learned Munsif has rejected the application dated the 28th of February 1931 on the ground that it was not maintainable by reason of the previous order refusing to accept the tender. No question of jurisdiction is involved in this matter. I am not prepared to say that the order of the learned Munsif is incorrect but even if it were that would be no ground for interference under s. 115 of the Code of Civil Procedure, in the absence of any question of jurisdiction

I accordingly reject the application with costs.

A. *Application rejected*

OUDH CHIEF COURT.

Execution of Decree Appeal No. 16 of 1931.

October 27, 1931.

SMITH, J.

RAM SAROOP—PLAINTIFF—APPELLANT

versus

JWALA PRASAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Decree—Construction—Reference to judgment

A Court cannot look at the judgment to interpret the decree, where the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment. *Kasim Ali* v. *Manik Chand* (1), referred to. [p. 253, col 1.]

Appeal against an order of the Subordinate Judge, Malihabad, Lucknow, dated the 24th January 1931, reversing that of the Second Munsif, District Lucknow, dated the 17th May 1930.

Mr. *Manohar Lal*, for the Appellant.

Messrs. *Radha Krishna* and *Ramapat Ram*, for the Respondents

Judgment.—This is a second appeal in connection with the execution of a decree of the Court of an Additional Munsif of the Lucknow District. The suit was for possession of a small piece of land, 1 *biswansi* and 10 *kachwansis* in extent which was said by the plaintiff to have been encroached upon by the defendants. The piece of land lies between the houses of the respective parties. The Munsif came to the conclusion that the defendants had only encroached on a triangular piece of land, the area of which was only 4 *kachwansis*. In giving his finding on the 4th issue framed by him "To what relief is the plaintiff entitled?", the Munsif used the following language:

"The plaintiff is entitled to get the wall of the house of the defendants demolished but only such portion of it as stands on the triangular piece of the base of 9 inches and 4 *kachwansis* in area This is clearly indicated in the *Amin*-Commissioner's report. But this would entail unnecessary difficulties and therefore it would be better if the plaintiff only tries to get money compensation. The plaintiff alleges that 1 *biwansi* and 10 *kachwansis* of his land has been encroached upon. But amount of encroachment as found by the *amin* is 4 *kachwansis* The plaintiff values his suit at Rs. 200. The value thus put to the actual encroachment comes to Rs. 13-5-4. I, therefore, give him a decree for that amount with proportionate costs as against the defendants "

At that point the Munsif wrote his name and the date (17th March 1930). Immediately underneath, however, he wrote as follows:

Order.

"Suit decreed with proportionate costs as against the defendants. The plaintiff can get an amount of Rs. 13-5-4 as the value put on the land encroached. The Commissioner's report is part of the decree O. XX r. 1"

According to the actual wording of the decree, however, it was ordered:

"That the suit be and is hereby decreed to the extent of 4 *Kachwansis* land encroached, with proportionate costs as against the defendants The plaintiff can get an amount of Rs 13-5-4 as the value put on the land encroached. The Commissioner's report and map is made part of the decree O. XX, r. 1."

There was no appeal from this decision and the plaintiff proceeded to apply for execution. The plaintiff asked for the demolition of that part of the defendants' premises which stands on that part of the

land found to have been encroached upon by them. The defendants then objected that the plaintiff had not been given a decree for demolition, but only for compensation. They relied upon the words used in the Munsif's judgment

"I, therefore, give him a decree for that amount with proprtionate costs as against the defendants."

The learned Munsif, however, interpreted his own meaning to have been that monetary compensation was only awarded to the plaintiff as an alternative relief, and that he had been decreed, in the alternative, possession of the piece of land in dispute to the extent set forth in the judgment. The objection of the defendants was consequently rejected, and the plaintiff was found entitled to get the defendants' structures demolished.

Against that decision the defendants went in appeal. The Subordinate Judge allowed the appeal, and held that the plaintiff was not entitled to any demolition of the defendants' premises but only to money compensation amounting to Rs. 13-5 4. That is the decision which is the subject of this second appeal.

It is unfortunate that the Munsif did not express himself clearly in his judgment, portions of which certainly lend colour to the view that was taken by the Subordinate Judge. The decree, however, undoubtedly was to the effect that the plaintiff's suit was decreed to the extent of 4 *kachwansis* of land encroached upon, though it contains a provision also that the plaintiff can get an amount of Rs. 13 5-4 as the value put on the land encroached. The words in the decree, "to the extent of 4 *kachwansis* land encroached," are written above the line,—when precisely this was done does not appear, but they are undoubtedly there, and must be regarded as an integral part of the decree.

It has been contended for the defendants that the decree itself is not free from ambiguity, but I do not think that contention has any force. The decree can, in my opinion, only be regarded as awarding the plaintiff 4 *kachwansis* of the land in suit, or, if he preferred to accept monetary compensation, a sum of Rs. 13-5-4. According to a ruling reported in *Kasim Ali* v. *Manik Chand* (1) a Court cannot look at its judgment to interpret its decree, where the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment.

(1) 5 O. C. 35.

In the present case, as I have said, I do not regard the decree as being ambiguous, and, in any case, the Munsif, who decided the original suit, considered his judgment and said that the decree as drawn up properly embodied his intentions.

It seems to me to be a somewhat hard case for the defendants. I am given to understand that the defendants, thinking that only monetary compensation had been awarded to the plaintiff, did not appeal from the original decision of the Munsif, and that if they have to vacate even the small area of 4 *kachwansis* they will be put to a lot of expense and inconvenience. It seems to me, however, that the plaintiff is entitled under the decree to require, if he so chooses, that the defendants should vacate that area, and I think the appeal must be allowed. I accordingly allow it, and setting aside the decision of the learned Subordinate Judge restore that of the Munsif. The defendants must pay the plaintiff's costs in respect of the objection in all the three Courts.

A. *Appeal allowed.*

OUDH CHIEF COURT.

Application No. 38 of 1931.
September 11, 1931.
RAZA, J.

SECRETARY, CHHOTI BAZAR BANK—DEFENDANT—APPLICANT.
versus
BAQRIDI AND OTHERS—PLAINTIFFS AND DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 151, 152, O. XX, r. 3—Judgment—Absence of clerical error or omission—Alteration without review—Legality—Inherent powers.

When there is no clerical or arithmetical mistake or any error arising from any accidental slip or omission, a judgment cannot be altered or added to, except by way of review. Section 151, Civil Procedure Code, cannot override the distinct provision of O. XX, r. 3. [p. 254, col. 1.]

Appeal against an order of the Munsif, Dalmau at Rae Bareli, dated the 14th March 1931.

Mr. *P. N. Chaudhri* for the Applicant.

Mr. *Siraj Husain*, for the Opposite Party.

Judgment.—The Secretary of Chhoti Bazar Bank, Rae Bareli, attached some moveable property (grain, cattle, etc) in execution of his decree against Bafati Gaddi of Rae Bareli. Baqridi brother of Bafati filed an objection which was disallowed by the execution Court in August 1930. His brother Baqridi and his sister *Musammat* Lallia and *Musammat* Dulia then filed a

declaratory suit which was disposed of on the 8th of January 1931. The learned Munsif passed a decree in the following terms:—

"I hereby order that the property to the extent of two-thirds shall not be sold. But as the nature of the property is such that it is indivisible, then all of it shall be sold and out of the sale proceeds, the plaintiffs shall get two-thirds of the amount realised and one-third shall be taken by defendant No. 1 Secretary after deducting the expenses of the sale. The plaintiffs shall get half of the costs incurred by them in the prosecution of the suit from defendant No. 1".

This decree has admittedly become final. Baqridi and his sisters named above (plaintiffs in the declaratory suit) filed an application on the 4th February 1931, asking the Court to amend the decree under ss. 151, 152 and 153 of the Code of Civil Procedure. The learned Munsif then passed the following order on their application on the 14th of March 1931:—

"Read application. It is opposed by S. Mohammad Ismail. There is no clerical mistake or ambiguity in the judgment and therefore no alteration is necessary. But I have to add this much to my previous order that only the interest of Bafati to the extent of one-third shall be sold and the property shall not be delivered to the purchaser but shall be entrusted to a *supurddar* and the purchaser, if any, shall have to get it partitioned before he can take delivery. A copy of this order shall be placed before the learned Munsif, Rae Bareli, at the time of the sale".

The Secretary of the Chhoti Bazar Bank has applied to this Court in revision under s. 115 Code of Civil Procedure.

I think this revision should be allowed. Under O. XX, r. 3, Code of Civil Procedure,

"The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by s. 152 or on review."

The learned Munsif has "altered and added to" his judgment by making the order in question. He was clearly wrong in doing so. There was no clerical or arithmetical mistake in the judgment or decree. There was no error arising from any accidental slip or omission. Section 151 of the Code of Civil Procedure was never meant to enable the Court to contravene a distinct provision of law—see *Bhagwan Singh* v. *Sheo Nath Singh* (1). The application of Baqridi and others (plaintiffs in the declaratory suit) ought to have been rejected.

Hence I allow this application for revision, set aside the order of the learned Munsif dated the 14th March 1931 and dismiss the plaintiffs' application dated the 4th February 1931 with costs.

A. *Application allowed.*

(1) 64 Ind. Cas. 217; 24 O. C. 215.

OUDH CHIEF COURT.

Second Civil Appeal No. 137 of 1931.

November 2, 1931.

HASAN, C. J. AND KISCH, J.

SITLA PRASAD SINGH—PLAINTIFF—APPELLANT

versus

SARJU SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mutation—Compromise by mother on behalf of minor without leave of Court—Legality of compromise—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, application of, to proceedings under Land Revenue Act.

The provisions of the Code of Civil Procedure do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act. Therefore, where a minor is represented in mutation proceedings by his mother who *bona fide* enters into a compromise with the other party without the leave of the Court as required by O. XXXII, r. 7 of the Code the compromise is not bad merely for want of such leave. [p. 256, col. 1.]

Appeal against an order of the Subordinate Judge, Sultanpur, dated the 5th February 1931, upholding that of the Munsif, Musafirkhana at Sultanpur, dated the 8th September 1930.

Mr. *G. Imam*, for the Appellant.

Mr. *H. D. Chandra*, for the Respondents.

Judgment.—This is an appeal from the decree of the Subordinate Judge of Sultanpur, dated the 5th February 1931, affirming the decree of the Munsif, Musafirkhana, Sultanpur, dated the 8th September 1930 dismissing the plaintiff's suit for possession of a share in village Gaura, Pargana Baraunsa, District Sultanpur.

The facts of the case are not in dispute. One Saheb Bakhsh Singh was the owner of shares in two villages Baraulia and Gaura. He had no son by a lawful wife, but he had several sons, of whom the first born appears to have been Sitla Prasad Singh, the present plaintiff-appellant, by his kept mistress. On the 31st of May 1918, Saheb Bakhsh Singh executed a deed of gift in respect of his entire property in favour of the plaintiff-appellant who was then a minor. No mutation of names was, however, effected in respect of the deed of gift and subsequent to the deed Saheb Bakhsh Singh mortgaged on two occasions small portions of the property in question in order to pay off his debts. After the death of Saheb Bakhsh Singh, five years after the execution of the deed of gift, and while the plaintiff-appellant was still a minor, his mother acting as next friend of her minor sons applied for mutation of names in their favour over the whole of Saheb Bakhsh Singh's property. The application was opposed by the defend-

ants-respondents who alleged themselves to be the reversioners of Saheb Bakhsh Singh. Thereupon the plaintiff-appellant's mother applied for amendment of the mutation application and for mutation to be made in favour of Sitla Prasad Singh alone on the basis of the deed of gift. The defendants-respondents contested the amended application, and in the course of the proceedings, the plaintiff-appellant's mother and the defendants-respondents entered into a compromise under the terms of which the plaintiff-appellant was to get the Baraulia property, which in area is about three-fourths of the property of Saheb Bakhsh Singh, and the defendants-respondents were to get the Gaura property. The terms of this compromise were communicated to the mutation Court and mutation was effected accordingly by the order of the Court. The suit out of which the present appeal arises was instituted by Sitla Prasad Singh some three years after he attained majority to recover possession of the Gaura property on the ground that he is not bound by the compromise made by his mother in the mutation proceedings during his minority.

Both the Courts below came to the conclusion that the compromise arrived at in the mutation proceedings was in the nature of a family settlement and was not open to question by the plaintiff on attaining majority. The lower Appellate Court further found as a fact that the compromise was for the benefit of the minor as he obtained the larger part of the property without incurring the heavy expenses of litigation with uncertain result in view of the peculiar circumstances of the case as set out above, which might have put difficulties in the way of the plaintiff establishing his title.

Before us the case for appellant has been argued on a somewhat different basis, namely, that the compromise in the mutation proceedings having been entered into by the mother of the minor without the leave of the Court contrary to the provisions of O. XXXII, r. 7, of the Code of Civil Procedure, it is not binding on the plaintiff-appellant. It may be observed that this is a new point that has been raised for the first time in this Court in second appeal. We have, however, considered the point on the merits, and we find ourselves unable to accept contention of the learned Counsel for the appellant. If the compromise had been entered in a suit under the Civil Procedure Code there would have been no doubt as to the soundness of the contention that the compromise entered into by the next friend of the minor without the leave of the Court was voidable—*Ganesha Row* v. *Tuljaram Row* (1). Even the fact that the compromise was for the benefit of the minor would not have altered the legal position *Bhiwa* v. *Devchand Bechar* (2). It has, however, been contended by the learned Counsel for the defendants-respondents that the provisions of O. XXXII, r. 7 do not apply to mutation proceedings in a Revenue Court. We have given our careful consideration to this question, and we are not prepared to hold that the contention of the learned Counsel for the respondents is incorrect. In section 135 of the Oudh Rent Act, 1886, it is clearly laid down that the provisions of the Code of Civil Procedure, 1908, shall so far as they are not inconsistent with the provisions of the Act, apply, to all suits and other proceedings under the Act. No such provision, however, finds a place in the North-Western Provinces and Oudh Land Revenue Act, 1901; but where the procedure under that Act is to be governed by the provisions of the Code of Civil Procedure, it is expressly stated as, for example, in s. 204 of the Act. Under s. 234 of the Land Revenue Act the Local Government is empowered to make rules in respect of matters dealt with under the various clauses of the Act and in s. 10 of Circular No. 6 of the Board of Revenue, Department II (dealing with the rules affecting the procedure of the Revenue Courts) it is laid down that previous to appointing a guardian *ad litem* under the provisions of O. XXXII, Act V of 1908, the Court shall ascertain whether the person whom it is proposed to appoint is willing to act. The provisions of O. XXXII of the Code of Civil Procedure have not been expressly made applicable to proceedings under the Land Revenue Act either by that Act or by the Code of Civil Procedure itself, and the Circular as it stands does not appear to go further that to lay down that in the case of a minor litigant a guardian shall be appointed. We have been unable to discover any sufficient jurisdiction for holding that the whole of O. XXXII, does in fact govern procedure under the Land

(1) 19 Ind Cas. 515; 40 I. A. 132; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; (1913) M. W. N. 575; 14 M. L. T. 1; 25 M. L. J. 150; 36 M. 295 (P. C.).

(2) 10 Ind. Cas. 909; 35 B 322; 13 Bom. L. R. 280.

Revenue Act. In *Shakur un-nisa Bibi* v. *Abdul Majid Khan* (3), the Board of Revenue took the view that the Code of Civil Procedure does not of its own force govern the procedure in proceedings under the Land Revenue Act. In a case which is on all fours with the present case it was held by the late Court of the Judicial Commissioner of Oudh, *Harpal Singh* v. *Sukhrani* (4), that the provisions of the Code of Civil Procedure do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act, and that where a minor was represented in mutation proceedings by his elder brother who *bona fide* entered into a compromise with the other party without the leave of the Court as required by O. XXXII, r. 7 of the Code of Civil Procedure, the compromise was not bad merely for want of such leave. We are not called upon to find a reason for the omission to apply the provisions of O. XXXII, of the Code of Civil Procedure to the proceedings under the Land Revenue Act, but it may be observed that the remedy allowed by the general law is always open to a party dissatisfied with a compromise entered into during his minority in proceedings before a Revenue Court, namely, to have it set aside, if he can show that it was not beneficial to him. In the present case, however, as we have already observed it has been found as a fact that the compromise in question was for the benefit of the minor.

We accordingly see no reason to interfere with the decree of the Court below and dismiss the appeal with Costs.

B. L. *Appeal dismissed.*

(3) 1 R. D 355; S. D. 4 of 1899.
(4) 48 Ind. Cas. 119; 21 O. C. 220.

OUDH CHIEF COURT.

Oudh Courts Act Appeals Nos. 4 and 5 of 1931.

October 28, 1931.

RAZA AND BISHESHWAR NATH SRIVASTAVA, JJ.

Musammat ZAHIDA BEGAM AND ANOTHER —DEFENDANTS—APPELLANT

versus

MUMTAZ ALI KHAN—PLAINTIFF AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 142, 144, application of—Suit for possession by partition by transferee from daughter of her share in her father's estate—Dispossession not alleged—Limitation.

Article 142, Limitation Act, is restricted to suits which are in terms and substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. A suit for possession by partition by a transferee from a daughter entitled to her share in her father's property where it is not alleged that she was ever dispossessed is not within the ambit of Art. 142 but is governed by Art. 144, Limitation Act.

Appeal against an order of Mr. Justice Kisch, Judge of the Chief Court, Oudh, Lucknow, dated the 19th May, 1931.

Messrs. *Bishambhar Nath* and *Rauf Ahmad*, for the Appellants.

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the Respondents.

Judgment.—These are appeals (Nos. 4 and 5 of 1931) under s. 12 (2) of the Oudh Courts Act (No. 4 of 1925).

The facts of the case are fully set out in the judgment of our learned brother Mr. Justice Kisch, dated the 19th May, 1931, and they need not be repeated in this judgment.

The dispute in this case relates to certain groves in respect of which the plaintiff's claim has been decreed in second appeals Nos. 105 and 107 of 1931. The only point for determination in the appeals before us is whether the suit is governed by Art. 144 or by Art. 142 of the Indian Limitation Act.

It has been held in second appeals that the suit is governed by Art. 144 and not by Art. 142 of the Indian Limitation Act. This finding has been challenged in the appeals before us. We have examined the pleadings in this case. We are of opinion that our learned brother, Mr. Justice Kisch, was perfectly right in holding that the suit is governed by Art. 144 and not by Art. 142 of the Limitation Act. Article 142 is restricted to suits which are in terms and substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession. The present suit is a suit for possession by partition. The basis of the present suit is the title of Akhtar Jahan to her share in the property left by her deceased father Ahmad Hasan. The plaintiff is the vendee from Akhtar Jahan. He does not allege that Akhtar Jahan had been dispossessed from the property in suit at any time. It has been found that Akhtar Jahan, as the rightful heir and successor of her father Ahmad Hasan, is entitled to the property to the extent of the share claimed. It has also been found that Abdulghani is a mere dummy without any shadow of claim of his own either by title or possession. This being the case the suit was properly held to be governed by Art. 144 of the Indian Limitation Act. In our opinion the case was rightly and properly decided in second appeal. We can find no ground for interference and dismiss both the appeals with costs.

B. L. *Appeal dismissed.*

LAHORE HIGH COURT.

First Civil Appeal No. 2518 of 1928.
January 13, 1931.

BROADWAY AND JOHNSTONE, JJ.

SHIROMANI GURDWARA PARBANDHAK COMMITTEE AND OTHERS —APPELLANTS

versus

Mahant GULAB DAS AND OTHERS— RESPONDENTS.

Punjab Sikh Gurdwaras Act (VIII of 1925), s. 16 (2), (3)—Nature of institution—Burden of proof—Udasi *institution—Worship of* samadh— *Inference from circumstances*—Udasis, *whether 'Sikhs'.*

An institution was founded in the time of Moguls by one Guria, and ever since its foundation all the *mahants* were *Udasis*, succession going from *guru* to *chela*, subject to confirmation by *Udasi Bhek*. The principal object of worship was the *samadh* of Guria, which existed on the date of dispute:

Held (1) that the onus of proving that Guria was a Sikh and that the institution had been established for use by Sikhs for the purpose of public worship and that it had been used for such worship by Sikhs, and fell within s. 16 (2) (3), Punjab Sikh Gurdwaras Act, was on those claiming it to be a Sikh Gurdwara; [p. 258, cols. 1 & 2.]

(2), that the institution must be regarded as having been founded by *Udasis* and must be treated as an *Udasi* Gurdwara; and.

(3) the mere fact that *Adi Grantha* was also kept in the institution and on occasions opened with due ceremony and passages from it read was not sufficient proof of the purely Sikh nature of the worship carried on at the Gurdwara or Dera. [p. 258, col. 1.]

The *Udasis* are not Sikhs within the meaning of the term 'Sikh' as used in the Sikh Gurdwaras Act. *Ram Prasad* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar* (1), followed. [p. 258, col. 2.]

Fisrt Appeal against a decree of the Sikh Gurdwaras Tribunal, Lahore, dated the 18th June, 1928.

Messrs. *Sheo Narain* and *Bhagat Singh*, for the Appellants.

Messrs. *Mehr Chand* and *Badri Nath*, for the Respondents.

Broadway, J.—On 20th April, 1926, the Local Government published a petition duly made to it on 20th February, 1926, under s. 7, Sikh Gurdwaras Act, 1925, relating to a Gurdwara at Machhike in the District of Sheikhupura.

On 21st July, 1926, a petition was duly made under s. 8 of the said Act by *Mahant* Gulab Das and other persons.

On 23rd July, 1926, *Mahant* Gulab Das filed a separate petition under s. 10 of the said Act claiming that the property attached to the institution in question was his personal property.

These petitions were sent to the Gurdwara Tribunal for disposal and the petition under s. 8 was disposed of by a majority of the members of the Tribunal in favour of the petitioners. This decision has given rise to this appeal which has been filed by the Shiromani Gurdwara Parbandhak Committee, etc., and in support of it we have heard Mr. Sheo Narain, while Diwan Mehr Chand has supported the case of the respondents.

It is common ground that this institution was founded a very long time ago by one Guria. The appellants asserted that Guria was a Sikh, whereas the respondents Gulab Das, etc., claimed that he was an *Udasi Sadh* and not a Sikh. The majority of the members of the Tribunal held that the onus of proving that Guria was a Sikh and that this institution had been established for use by Sikhs for the purpose of public worship and that it had been used for such worship by Sikhs, was on the appellants who had failed to discharge it.

Mr. Sheo Narain did not think it necessary to take us through the statements of all the witnesses led by his clients. He contented himself with drawing our attention to the statements of six witnesses who were regarded by him as the most reliable as well as most knowledgeable (?). These witnesses are Bhagwan Singh (R. W. No. 2), Ralla Ram (R. W. No 5), Kesar Singh (R. W. No. 9), Sawan Singh (R. W. No. 12), Kala Singh (R. W. No. 18) and Fauja Singh (R. W. No. 24).

I have very carefully studied the statements of these witnesses and have come to the concluson that they do not prove the appellants' case. I have also perused the other evidence on the record and find that they do not carry the case any further for the appellants. It appears that this institution is the only one of its kind in village Machhike. The inhabitants of this village, as well as of the surrounding villages, are mainly Sikhs. It has been amply established (and indeed Mr. Sheo Narain did not challenge the fact), that since its foundation the *mahants* have all been *Udasis* and that succession has gone from *Guru* to *chela*. The buildings fell into disrepair at one time and one Kharak Singh, contractor, financed the reconstruction of the said buildings and it appears either made himself or was made *mahant* by the villagers. This led to a case which was instituted on 18th July, 1885, by Bawa Gopal Das who described himself as an *Udasi Sadh* and claimed to be the duly appointed *mahant* of the Machhike Gurdwara which is also known as Bawa Guria's *dera*. He prayed for the removal of Kharak Singh, alleging that

Kharak Singh had been improperly made a *mahant*. His claim was decreed and Gopal Das apparently managed the affairs of this institution since that time up to his death when he was succeeded by the present incumbent, Gulab Das When the Akali movement began Gulab Das was forcibly turned out of this institution and it seems that the Akalis or their representatives have been in actual possession of the institution since.

It seems to me that there can be no doubt that the appellants have failed to prove that this institution was one falling within the purview of s. 16 (2) (*iii*), Sikh Gurdwaras Act. In 1919, the revenue records of this village were destroyed by fire during the disturbances which took place in Gujranwala. There is thus no documentary evidence to show how this institution came into existence. It is significant that some fourteen *zemindars* who definitely claimed to be Sikhs, appeared in the witness-box and stated that this institution was not a Sikh Gurdwara. The witnesses relied upon by Mr. Sheo Narain, to whom I have already referred, are clearly interested in the Akali movement.

As has been held by the majority of the members of the Tribunal, one of the principal objects of worship in this institution is the *Smadh* of Bawa Guria. It is true that the *Adi Granth* is also kept in this institution and on occasions opened with due ceremony and passages from it read. This circumstance by itself cannot, in my opinion, be held as proof of the purely Sikh nature of the worship carried on at this *Gurdwara* or *dera*. Some of the appellants' witnesses have themselves (3) (4) admitted that on Diwali days women used to come and whitewash the *Smadh* of Bawa Guria. Whether or not there were other small *Smadhs* or *Marhis* is open to doubt. Mr. Mehr Chand contended that, while the Akalis were in possession, they demolished these *Smadhs* and indeed endeavoured to obliterate the traces of Bawa Guria's *Smadh* as well. In the opening stage of the case the witnesses for the appellants stated that they had seen no *Smadhs* in the building at all. Later on, after the buildings had been inspected by the Tribunal and the existence of Bawa Guria's *Smadh* had been clearly demonstrated, the other witnesses for the appellants admitted the existence of this particular *Smadh* but denied that there had been any other *Smadhs* or *marhis* on the premises.

As I have already said the evidence on the record shows that ever since the foundation of this institution which was said to have taken place in the time of the Moghuls, all the *mahants* have been *Udasis* Succession has been from *guru* to *chela* with confirmation by the *Udasi Bhek*. It has, I think, been established that the *Smadh* of Bawa Guria still exists and is the principal object of worship. In these circumstances, I consider that the conclusion arrived at by the majority of the members of the Tribunal is correct and that this institution must be regarded as having been founded by *Udasis* and must be treated as an *Udasi Gurdwara*.

There remains the question as to whether *Udasis* are Sikhs within the meaning of the term "Sikh" as used in the Sikh Gurdwaras Act. This question has been discussed at length in *Ram Prasad* v. *Shiromani Gurdwara Parbandhak Committee, Amritsar* (1) and has been decided by us against the present appellants. In these circumstances the appeal fails and is dismissed with costs.

Johnstone, J.—I agree.

A. *Appeal dismissed.*

(1) 135 Ind. Cas. 657; A. I. R. 1931 Lah. 161; 12 Lah. 497; 32 P. L. R. 910; Ind. Rul. (1931) Lah. 113.

LAHORE HIGH COURT.

Miscellaneous First Civil Appeal No. 447 of 1931.

December 8, 1931.

DALIP SINGH, J.

GANGA RAM—OBJECTOR—APPELLANT

versus

OFFICIAL RECEIVER, DELHI—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 75 (1), (3)—Order refusing to restore appeal dismissed for default, whether appealable—Power to grant leave after expiry of limitation—Civil Procedure Code (Act V of 1908), O. V, r. 17—Substituted service—Duty to allow sufficient time to appear.

An appeal lies under the proviso to s. 75 (1), Provincial Insolvency Act, from an order of the District Court refusing to restore an appeal dismissed for default. At any rate, even if such an order be regarded as one passed otherwise than on appeal the appellant can appeal with the leave of the High Court or of the District Court, under s. 75 (3). [p. 259, col. 1.]

Leave to appeal may be granted even after the expiry of limitation and even if there is no prayer for it in the memorandum of appeal. [p. 259, col. 2.]

Even in the case of substituted service duly effected under O. V, r. 17, Civil Procedure Code, sufficient time must be allowed from the date of the affixation of the process on the door of the

defendant's house and the date of the hearing of the case. One day is obviously inadequate in the absence of special circumstances. [p. 260, col 2.]

Miscellaneous First Appeal from an order of the District Judge, Delhi, dated the 1st August, 1930, dismissing the application for restoration of the appeal from an order of the Insolvency Judge, dated the 19th July, 1928, dismissed by him in default on the 22nd January, 1930.

Mr. *J. G. Sethi*, for the Appellant.

Messrs. *Kishan Dayal* and *Bhagwat Dayal*, for the Respondent.

Judgment.—The facts of this case are given in the order of remand passed by a learned Judge of this Court dated the 8th November, 1929. It is not necessary to recapitulate them here.

On remand the learned District Judge dismissed the appeal in default. The appellant then applied for restoration under O. XLI, r. 19, Civil Procedure Code. The learned Judge took the evidence and found that the applicant had failed to establish that he was not in Delhi at the time when the process was first endeavoured to be served on him, and that the report of the process server established that the appellant was evading service. Substituted service was, therefore, correctly ordered and was sufficient, and therefore, rejected the application to rehear the appeal. The appellant has now come in appeal from the order refusing to restore.

The first objection taken is that no appeal lies. The learned Counsel for the respondent relies upon the terms of s. 75 (1) of the Insolvency Act. His contention is that, though the case originally fell within the purview of s. 4 of the Insolvency Act and on appeal lay to the District Judge, and, on a point of law, to the High Court, yet the appeal was terminated by the order dismissing the appeal in default. The order refusing to restore does not come within the meaning of the proviso to s 75 (1) and, therefore, as the Insolvency Act is a special Act no appeal lies. The learned Counsel for the appellant contends, firstly, that the appeal lies under the proviso to s. 75 (1) for the order refusing to restore is also one passed on appeal by the District Court. He next contends that, in any case, if this is an order passed otherwise than in appeal the appellant can appeal to the High Court by leave of the District Court or of the High Court under the provisions of s. 75 (3).

The learned Counsel for the respondent contends that s. 75 (3) only applies to orders passed in original jurisdiction and not to this kind of order. In my opinion, though the point is not free from difficulty, the case is covered by the proviso to s. 75 (1) and, in any event, if it is held to be governed by the provisions of s. 75 (3) then, as the point is not free from difficulty and no direct ruling of any High Court has been cited on the point, I would in the circumstances, give leave to the appellant to appeal.

The learned Counsel for the respondent contends that leave to appeal cannot be granted unless it is prayed for in the memorandum of appeal nor after the expiry of limitation. But with this contention—though it again raises a point of some difficulty—I am not prepared to agree as at present advised.

Coming now to the merits of the case it appears that the process server went on the 14th of January to the place where the appellant is alleged to reside. He reported that, on knocking at the door, a man used to come out, go back into the rooms, return and state that the appellant was not to be found. He, therefore, inferred that the appellant was evading service deliberately and craved permission to take action under the terms of O. V, r. 17. On the 20th the Court ordered him to take action under the terms of O. V, r. 17, and affix the summons to the door of the appellant's alleged residence. This was done on the 21st and on the 22nd the appeal was heard and dismissed in default.

Counsel for the appellant contends, firstly that O. V, r. 17, Civil Procedure Code, could not be invoked as the appellant had filed the appeal through Counsel and, therefore, there was a person available on whom service could be effected.

The learned Counsel for the respondent contends that the engagement of Counsel had terminated with the original hearing of the appeal, but, under the terms of O. III, r. 4 (2), the appointment was not terminated until leave of the Court had been obtained on a writing signed by the client or Pleader or until all proceedings in the suit were ended. Order III, r. 4 (3) shows that the mere hearing of the appeal does not conclude the authority of the Pleader. Secondly, it is contended that if service was duly effected under O. V, r. 17, Civil Procedure Code, yet no sufficient time was allowed to elapse from the date of the affixation of the process on the door of the appellant and the date of the hearing of the appeal.

In my opinion it is unnecessary to decide

the first point as the appellant must succeed on the second. The law does not provide that on proof that a person is evading service of summons he should be treated as served. On the contrary it provides another way of service of summons. This clearly implies that sufficient time must elapse between the service ordered and the time of the hearing of the appeal in order to furnish the person room for repentence. Therefore, it follows that an adequate time must be allowed from the date of the service and the hearing of the appeal. The learned Counsel for the respondent contends that it was never argued before the learned District Judge, that one day was not sufficient in the circumstances of this case. This is so no doubt, but it seems to me that one day must obviously be held to be inadequate until special circumstances are shown that it was adequate.

I, therefore, accept the appeal and restore the appeal and direct the learned District Judge to dispose of it according to law. In the circumstances I make no order as to the costs of this appeal which will be borne by the parties.

A. *Appeal allowed.*

LAHORE HIGH COURT.

Second Civil Appeal No. 1954 of 1926.

October 30, 1930.

ADDISON AND BHIDE, JJ.

DIWAN CHAND PARMA NAND—DEFENDANTS—APPELLANTS

versus

RAM DAS UTTAM CHAND—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 251—Partnership—Adjustment of firm debt towards private debt of partner, whether binding on firm—Absence of prejudice—Court holding adjustment illegal—Interference in second appeal—Civil Procedure Code (Act V of 1908), s. 100.

Where a partner in the plaintiff-firm owes a certain sum to the defendant-firm and gets his liability cancelled by cancelling the debt due by the defendant-firm to his firm, such adjustment does not necessarily amount to a fraud and in the absence of proof of fraud or prejudice it is binding on the plaintiff-firm. *Sheikh Ibrahim* v. *Rama Iyer* (2), *Mannava Anapurnamma* v. *U. Akayya* (3), *Palaniappa Chettiar* v. *Veerappa Chettiar* (4), *Annamalai Chetty* v. *Annamal Chetty* (5), *Hodi* v. *Nidha* (6) and *Veerasawmi Naicker* v. *Ibrahimsa Romther* (7), relied on. *Baikunta Nath* v. *Hara Lal* (1), explained. [p. 261, col. 2.]

In such a case the Court errs in law if it holds that such a mere act of adjustment, in the absence of proof of fraud or prejudice to the plaintiff-firm, is prejudicial to the plaintiff-firm and it is open to the High Court to interfere in second appeal, [*ibid.*]

Second Appeal from a decree of the District Judge, Shahpur, dated the 1st May, 1926.

Lala *Badri Das*, R. B, for the Appellants.

Mr *Nanak Chand*, for the Respondents.

Judgment.—The plaintiff-firm consisting of three partners, Ram Das, Uttam Chand and Bashi Ram, sued the defendant-firm for Rs. 2,000 balance due on certain transactions between them. The trial Court decreed the sum of Rs. 68-10-9 with proportionate costs in favour of the plaintiff-firm and dismissed the rest of the claim with costs to the defendant-firm. There was an appeal by the plaintiff firm to the District Judge who granted a decree for Rs. 1,559-7-3 with proportionate costs of both Courts. Against this decision the defendant-firm has appealed.

The lower Appellate Court allowed in addition to what was allowed by the trial Court an item of Rs. 1,278-12 6 plus interest on that item, and the appeal is confined to the dispute about this item and its interest. Bashi Ram was an active partner and, in fact, manager of the plaintiff-firm. He owed Rs. 1,278-12-6 to the defendant firm while the defendant-firm owed the plaintiff-firm that amount. At the request of Bashi Ram his liability to the defendant-firm was cancelled by his cancelling the liability of the defendant-firm to the plaintiff-firm. This was held to be a good transaction by the trial Court. It further found that Bashi Ram had been giving other discharges like that disputed in the present case. It also found that there was no evidence that this act was done *mala fide* or to the prejudice of the plaintiff-firm or in fraud thereof. On appeal the learned District Judge also held that Bashi Ram had been setting off items in this way in other cases but considered that that did not affect the merits of the present case. He purported to follow 9 Ind. Cas. 116 [*Baikunta Nath* v. *Hara Lal* (1),] and, though there was no evidence of prejudice to the plaintiff-firm, he held that the fact that the other co-partners had been prejudiced by the amount due to the firm having been credited to the private account of one of the partners was obvious enough and required no proof. He has thus assumed that such an act would be always prejudicial to the partnership.

There are numerous authorities which show that payment to a partner is a valid payment to a firm, while a release by a partner is also valid; the other partners are

(1) 9 Ind. Cas. 116; 13 C. L. J. 234

bound by such acts unless there has been fraud or collusion. In *Sheikh Ibrahim* v. *Rama Iyer* (2), it was held that payment to one of several joint creditors would not operate as a payment to all the creditors if the payment was fraudulently made to one and not for the benefit of all. In this ruling the general principle was assumed that such payments are valid but it was held that they would not be valid if there was fraud or if the payment was obviously for the benefit of one. In *Mannava Anapurnamma* v. *U. Akayya* (3), the general principle is enunciated that one of several payees of a negotiable instrument can give a valid discharge of the entire debt without the concurrence of the other payees. In *Palaniappa Chettiar* v. *Veerappa Chettiar* (4), it was held that a partner can release a partnership claim and that the surviving partners have a right to do so after the death of a partner. It was further held that, if such a release by a partner is fraudulent, the other partners can avoid it and seek to recover their share of the released debt, but that the legal representatives of the deceased partner cannot do so, as such a right is personal to the partners. It is clear from these authorities that a partner has authority to release debts and to give receipts for the debts of a partnership. In 52 Ind. Cas. 456 [*Annamalai Chetty* v. *Annamalai Chetty* (5)[1], it was held that a partner was competent to give a valid discharge of a debt due to the partnership even after its dissolution. In 54 Ind. Cas. 272 [*Hodi* v. *Nidha* (6)] it was held that where payment had been made to one partner the firm could not sue for the debt.

In 1 Ind. Cas. 200 [*Veeraswami Naicker* v. *Ibrahimsa Rowther* (7)], it was held that the general rule was that a partner could give a valid discharge of a debt due to the partnership, but that rule did not apply if the discharge so given was in fraud of the aggrieved partner or was the result of collusion between the partner giving the discharge and the debtor.

Reliance however was placed, by the other side, on 9 Ind. Cas. 116 [*Baikunta Nath* v. *Hara Lal* (1)]. It was held there that one partner could not discharge a separate debt of his own by setting it off against a debt due to his firm, to the prejudice of his co-partners. If this authority be accepted it still does not help the respondent's firm. It must be proved that the act of setting-off was fraudulent, or collusive, or done to the prejudice of the plaintiff-firm. Such an adjustment may be in many cases a matter of convenience. In itself it does not necessarily amount to a fraud and does not necessarily prejudice the plaintiff-firm. There is no evidence that there was any fraud or that there has been any prejudice to the plaintiff-firm by the fact that Bashi Ram, one of its members, set off his debt against the sum in question. Further, seeing that a partner can give a valid discharge of a debt due to a partnership and can even release it, provided there is no fraud, there seems to be nothing against such an adjustment as has taken place in the present case provided again that there has been no fraud or prejudice to the plaintiff-firm. It would have been easy for Bashi Ram to have collected the debt due to the plaintiff-firm from the defendant-firm and then to have paid the money back to it in adjustment of his own debt. On the authorities such a transaction would be valid, always assuming the absence of fraud and prejudice to the partnership. It seems unnecessary to demand the double transaction and to hold that the single transaction is illegal.

Clearly it is open for us on second appeal to interfere as it is obvious from the judgment of the District Judge that there was no proof of any fraud or prejudice to the plaintiff-firm. He erred in law in holding that the mere fact of the adjustment in question having taken place was prejudicial to the plaintiff-firm.

For the reasons given we accept the appeal, set aside the order of the District Judge and restore the order of the trial Judge, decreeing a sum of Rs. 68-10-9 with proportionate costs on that sum and dismissing the rest of the claim with costs to the defendant-firm. The appellant-firm will also have its costs in this Court and in the lower Appellate Court.

A. *Appeal allowed.*

(2) 10 Ind. Cas. 874; 35 M. 685; 21 M. L. J. 508; (1911) 1 M. W. N. 442.

(3) 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; 24 M. L. J. 333 (F. B.)

(4) 44 Ind. Cas. 466; 41 M. 446; 34 M. L. J. 41.

(5) 52 Ind. Cas. 456; 10 L. W. 67.

(6) 54 Ind. Cas. 273; 10 P. W. R. 1920; 29 P. L. R. 1920.

(7) 1 Ind. Cas. 200; 5 M. L. T. 209; 19 M. L. J. 221.

LAHORE HIGH COURT.

Matrimonial Petition No. 12 of 1929.

July 14, 1930.

CURRIE, J.

MRS. GLADYS SEINAPATTI—PETITIONER

versus

SEINAPATTI—RESPONDENT AND *Musammat* RANI—CO-RESPONDENT.

Divorce Act (IV of 1869), s. 10—Hindu marrying English wife in England—Subsequent marriage of Hindu wife in India—Petition by English wife for divorce—'Bigamy with adultery'—'Marriage with another woman with adultery'—Petition for divorce—Wife's right to costs.

The respondent, a Hindu, married the petitioner, a Christian lady, by license at Manchester. After living with the respondent for some time in India the petitioner returned to England and the respondent married a Hindu lady in India by a Hindu form of marriage and had a son by her. The petitioner sued for dissolution of marriage:

Held, (1) that the petitioner's marriage with the respondent having been celebrated in England was a valid Christian marriage, despite the Indian domicile of the husband. *Chetty* v. *Chetty* (1), *R* v. *Hammersmith Registrar of Marriages Mir Anwar-ud-Din, Ex-parte* (2), *Brinckley* v. *Attorney-General* (3) and *Thapita Peter* v. *Thapita Lakshmi* (4), referred to. [p. 262, col. 2.]

(2) that the respondent, however, being a Hindu was not precluded from marrying a second wife in India during the life-time of the first and the petitioner was not entitled to divorce on the ground that the respondent had committed 'bigamy with adultery'. [p. 263, col 2.]

(3) that the petitioner was, however, entitled to a decree for dissolution of marriage on the ground of the respondent's 'marriage with another woman with adultery'. [*ibid.*]

Where the wife is the petitioner and is successful in her suit, her husband will, as a matter of course, be ordered to pay her costs. [p. 264, col. 1.]

Petition under s. 10, Indian Divorce Act, (XVII of 1869), for dissolution of marriage.

Mr. *M. C. Mahajan*, for Mr. *D. C. Ralli*, for the Appellants.

Mr. *Kahan Singh*, for the Respondents.

Judgment.—This is a petition by the wife Mrs. Gladys Seinapatti for dissolution of her marriage. The petitioner then Gladys Wainwright married the husband Seinapatti son of Kahan Singh by license at the Church of St. Luke's Cheetham, Manchester, on the 13th of May, 1922. They cohabited in Manchester and finally in Amritsar until the 6th of January, 1924, when Mrs. Seinapatti returned to England, in consequence, as she alleges, of her husband's cruelty and harshness. Since that time the parties have not lived together. She claims divorce on the ground that in 1925, her husband Sainapatti went through a form of a marriage with the co-respondent *Musammat* Rani and was thereby guilty of bigamy and further that the respondent and the co-respondent had since that date of the second marriage lived and cohabited together, as husband and wife and committed adultery with each other in consequence whereof a male child had been born in Amritsar. She denied any collusion or connivance.

The facts are admitted by Seinapatti, who is now residing at Behrampur. He, however, urged that he had been agreeable to the petitioner going to England and had given her about Rs. 3,000 for the purpose and had gone to Karachi to see her off. Subsequently he went to Manchester to bring her back to India and had been supplying her with funds there. She, however, refused even to see him or to return to him at Manchester. He accordingly returned to India and married *Musammat* Rani early in 1925, by a Hindu form of marriage and has since been living with her as husband, first at Amritsar and then at Behrampur. He has had by her a son, now aged four years.

This Court clearly has jurisdiction, as the wife takes the domicile of her husband and the last place where the parties resided together was Amritsar.

The question is whether there is good ground for granting a decree. As will be seen from the petition, the petitioner based her claim on the ground that the respondent had committed bigamy with adultery with the co-respondent *Musammat* Rani. It was also urged that if the respondent's marriage with *Musammat* Rani was not held to be bigamous, the petitioner could claim divorce under s. 10 of Act (IV of 1869), on the next ground, *viz.*, marriage with another woman with adultery. Now, there is no doubt that the petitioner's marriage with the respondent having been celebrated in England was a valid Christian marriage, despite the Indian domicile of the husband. The validity of the marriage, is clear, in view of the authorities that have been cited, *viz.*, *Chetty* v. *Chetty* (1) and *R* v. *Hammersmith Registrar of Marriages Mir Anwar-ud-Din, Ex parte* (2). In *Brinckley* v. *Attorney General* (3), a case in which the marriage of a British subject with an Irish domicile of origin, contracted with a Japanese woman in Japan, was recognised as valid, the question of what constituted a "Christian marriage or marriag in Christendom" was

(1) (1909) P. D. 67; 78 L. J. P. 23; 99 L. T. 885; 25 T. L. R. 146.

(2) (1917) 1 K. B. 634; 86 L. J. K. B. 210; 115 L. T. 882; 81 J. P. 49; 15 L. G. R. 83; 61 S. J. 130; 33 T. L. R. 78.

(3) (1890) 15 P. D. 76; 59 L. J. P. 52; 62 L. T. 911

discussed, and it was held that the idea which has to be expressed was this—that the only marriage recognised in Christian countries or in Christendom is the marriage of the exclusive kind. As was remarked in *Thapita Peter* v. *Thapita Lakshmi* (4), "the idea of the union of one man and one woman to the exclusion of others is present in it."

Thus it is clear that in England the law would hold that the respondent by going through a Hindu form of marriage with the co-respondent had committed bigamy and having cohabited with her and having had issue had committed adultery. The Indian Divorce Act of 1869, does not define either bigamy or adultery. "Bigamy with adultery" is defined in s. 3 (7), as meaning "adultery with the same woman with whom the bigamy was committed" According to Rayden on Divorce, page 86, Second Edition,

"Bigamy was defined as the marriage of any person during the life of the former husband or wife, whether the second marriage shall have taken place within his Majesty's Dominions or elsewhere."

This presupposes that the first marriage must be subsisting. The question, however, remains whether in India the second marriage contracted by the respondent can be held to be bigamous. No authority has been cited before me on this point In discussing the expression "marriage with another woman", Rattigan in his Law of Divorce in India at page 24 writes as follows :—

"Under the Indian Penal Code (s 494) a person who contracts a marriage during the life of a former husband or wife 'does not commit the offence of bigamy' if such husband or wife, at the time of the subsequent marriage shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time, provided that the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of the facts so far as the same are within his or her knowledge".

Under such circumstances a man who, during the life of his wife, marries another woman does not commit bigamy. But if, after such second marriage, he cohabits with such woman, or (apparently) commits adultery with any other woman, the wife is entitled, under s. 10 of the Act, to apply for a dissolution of marriage just as she would have been entitled to apply had the husband been guilty of 'bigamy with adultery'.

From this apparently it would follow that to constitute bigamy the second marriage must be such as would render the person contracting it liable for punishment under the Indian Penal Code. In the present case the respondent being a Hindu would not in this country be precluded from marrying a second wife during the life-time of the first, and I am, therefore, of opinion that it is doubtful whether his marriage with *Musammat* Rani could be held to bring him within the scope of s. 494, Indian Penal Code, as the marriage would not be void by reason of its taking place during the life of his first wife. I am, therefore, of opinion that the petitioner cannot claim divorce on the ground that the respondent has committed bigamy with adultery

As regards the divorce on the ground of the respondent's marriage with another woman with adultery, it appears to me that the petitioner has a valid ground for claiming dissolution of marriage. Though as already noted, "bigamy with adultery" is specifically defined as meaning adultery with the same woman with whom the bigamy was committed, "marriage with another woman with adultery" is not defined. The definition contained in s. 3 (8) merely deals with "marriage with another woman" which is defined as meaning,

"marriage of any person being married to any other person during the life of the former wife, whether the second marriage shall have taken place within the Dominions of his Majesty or elsewhere"

Rattigan in his commentary in the passage already cited remarks that if a man after such second marriage cohabits with such woman, the wife is entitled to apply for dissolution of marriage just as she would have been entitled to apply if the husband would have been guilty of "bigamy with adultery". No authority is cited by him but it seems reasonable to suppose that that was the meaning and intention of the Legislature when differentiating between "bigamy with adultery" and "marriage with another woman with adultery".

In the present case there appears to me not the least ground for thinking that there is either collusion or connivance on the part of either the petitioner or the respondent. I, therefore, hold that the petitioner has established that she is entitled to a decree for dissolution of her marriage with the respondent on the ground of his marriage with the co-respondent with adultery. I accordingly grant her a decree *nisi*.

As regards the question of costs, it is urged that in the circumstances of the case the respondent should not be ordered to pay the costs. But as Rattigan pointed out at page 369,

(4) 17 M. 235 at p. 241.

"Where the wife is the petitioner and is successful in her suit, her husband will, as a matter of course, be ordered to pay her costs."

I, therefore, direct that the respondent pay the petitioner's costs.

A. *Order accordingly.*

LAHORE HIGH COURT.

Second Civil Appeal No. 1114 of 1930.
May 19, 1931.

BROADWAY AND JOHNSTONE, JJ.

GANDA RAM—PLAINTIFF—APPELLANT

versus

MUNSHI RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 144, 148—Co-owners—Redemption by one co-owner—Suit by others—Article applicable—Adverse possession—Starting point of limitation.

A co-owner who redeems a mortgage becomes a charge-holder and not a mortgagee and a suit by the other co-owners against him for possession is governed by Art. 144 and not by Art. 148 of the Limitation Act. The possession of the redeeming co-owner does not become adverse to the other co-owners from the date of redemption but becomes adverse only when he does any unequivocal overt act showing his intention to hold adversely to the other co-owners. [p. 265, col. 2.]

Second Appeal from a decree of the District Judge, Gurdaspur, dated the 18th March, 1930.

Mr. *Fakir Chand*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

Broadway, J.—On the 26th April, 1923, one Munshi Ram obtained a decree against Vaishno Das for Rs. 2,000. In execution of this decree he got attached, and brought to sale, one-fifth of three houses Nos. 826, 806 and 507 and a site bearing number 837. Gandu Ram and Hira Lal raised objections to the sale of these properties on the ground that the properties were ancestral and not liable to be sold. Their objections having been dismissed, on the 2nd November, 1927, they instituted a suit for a declaration to the effect that the houses attached and sold were ancestral *qua* them and, therefore, not liable for the decree passed against Vaishno Das.

The trial Court dismissed the suit, holding that the plaintiffs had failed to prove their allegations. On appeal, the learned District Judge came to the conclusion that house No. 806 was ancestral as also was the site bearing No. 837. House No. 826 found to be the property of Rallia Ram, father of Vaishno Das, to which the plaintiffs had no right whatever, with regard to house No. 507 it was held that the plaintiffs had failed to prove that their common ancestor Maghi Ram had ever possessed the same, and that it had as a matter of fact been proved that the house had at one time belonged to one Dhaunkalya Mal who had gifted, half of it to one Kahna *Jhiwar* and the remaining half by Will to Rallia Ram and Nathu, uncle of the plaintiff Ganda Ram and father of Hira Lal (now deceased). That portion of the house, which had been demised to Rallia Ram and Nathu, was under mortgage to Imam Din who was in possession thereof. Inasmuch as the mortgagee was in possession, the legatees were unable to obtain possession so long as the mortgage subsisted. Rallia Ram brought a suit for possession by pre-emption of that half of the house which had been gifted to Kahna *Jhiwar* and obtained a decree in due course. Half of this house No. 507 clearly belonged to Rallia Ram alone. *Qua* the half of which Rallia Ram was one of the two legatees, it appears that the said Rallia Ram paid Imam Din, the mortgagee the sum of Rs. 60 due under the mortgage and obtained exclusive possession of the same. He was thus in exclusive possession of the entire house (No. 507) of which he was the sole owner of half and a co-owner with Nathu of the redeemed half. Having come to this finding the learned District Judge held that, inasmuch as Rallia Ram had redeemed the mortgage, he was a charge-holder *qua* that portion of the house which he had redeemed, and that Nathu was not entitled to possession until such time as he paid up his share of the mortgage money. He proceeded to find that Rallia Ram's possession having been exclusive from that date of the redemption and Rallia Ram having done various overt acts advertising his exclusive ownership of this property, Nathu's descendants were barred from advancing any claim to the share that otherwise would have devolved on their ancestor Nathu. He accordingly dismissed the claim advanced by the plaintiffs *qua* this house (No. 507). He also noted at the end of his judgment that house No. 807, which was in the possession of the plaintiffs, was ancestral.

Against this decision Ganda Ram alone (Hira Lal having died) has preferred a second appeal to this Court, and it has been urged by Mr. Fakir Chand on his behalf that the view taken by the learned District Judge is wrong. He has also object-

ed to the declaration noted at the end of the learned District Judge's judgment *qua* house No. 807. This note does not appear in the decree, and I do not think it necessary to refer to it further.

So far as house No. 826 is concerned, the findings are findings of fact which cannot be re-opened in second appeal and the same applies with regard to house No. 806 and the site bearing number 837.

There remains the question of house No. 507. Mr. Fakir Chand's argument has been that, when Rallia Ram paid off Imam Din he stepped into Imam Din's shoes, and must, therefore, be regarded as a mortgagee and that, therefore, Art. 145 applied and the appellant's claim to be a co-owner of the redeemed portion of this house was within limitation. Mr. Shamair Chand has contended that, when Rallia Ram redeemed the mortgage, he did not become mortgagee but was a charge-holder and that, therefore, Art. 148 did not apply, the relevant Article being Art. 144. Mr. Fakir Chand's contention is based on certain authorities of the Allahabad High Court. These authorities have been considered by practically all the other High Courts in India which have taken a different view—a view that has been accepted by a Division Bench of this Court in *Jhandu* v. *Nur Muhammad* (1) decided on the 18th February, 1931. In these circumstances I must hold that the view taken by the learned District Judge that Rallia Ram was a charge-holder and not a mortgagee was correct.

The question, however, for determination is the date from which time should begin to run. On this point there was a certain amount of conflict in the authorities of this Court. The former view taken in three cases by three Judges sitting alone was that time began to run from the date of the redemption—a view that did not find favour with the Division Bench in *Jhandu* v. *Nur Muhammad* (1) where it has been held that the co-owner out of possession is still a co-owner and that the possession of his co-owner cannot be regarded as adverse unless and until the said co-owner in possession can prove some clear and unequivocal overt act showing his intention to hold adversely to the other co-owner. This, in my opinion, is the correct view.

The learned District Judge in his judgment has considered that Rallia Ram did certain overt acts which evinced his intention to assert his sole ownership. These overt acts, however, were not enumerated in the judgment; and, on being asked what they were, Mr. Shamair Chand found it impossible to refer to any with the exception of an entry in the *khana shumari* papers of 1917 in which Rallia Ram is shown as the sole owner. He also referred to certain leases which Rallia Ram had been executing since 1905 in which he had described himself as the sole owner. Not one of these leases appears to have been registered, and it is perfectly clear that knowledge of the contents of these leases cannot be attributed to Nathu or his descendants, so that any allegations made in these leases cannot, in my judgment, be regarded as overt assertions of a denial of a co sharer's rights.

The next point made was that the plaintiffs themselves in this suit claimed that this particular house was ancestral and had devolved on them from Maghi Ram. It has been urged that had Nathu or any of his descendants been aware of their rights in this house they could not possibly have alleged that this house had ever belonged to their common ancestor Maghi Ram. The want of knowledge on the part of Nathu and his descendants cannot, in my opinion, be regarded as an overt act on the part of Rallia Ram which would entail the starting of limitation against them. In these circumstances it seems to me that the view taken by the learned District Judge with regard to this particular house No. 507 is incorrect, and that the appellant must be held to be the owner of half of that portion of the house (No. 507) which had been redeemed by Rallia Ram from Imam Din and their share, therefore, is not liable to be attached and sold under the decrees against Vaishno Das. In the circumstances of the case I would leave the parties to bear their own costs in this appeal.

Johnstone, J.—I agree.

A. *Appeal accepted.*

(1) 135 Ind. Cas. 506; 32 P. L. R. 622; A. I. R. 1931 Lah. 744; 12 Lah. 671; Ind. Rul. (1932) Lah. 106.

LAHORE HIGH COURT.

Second Civil Appeal No. 1222 of 1927.

December 4, 1931.

SHADI LAL, C. J., AND HILTON, J.

NATHA—PLAINTIFF—APPELLANT

versus

GANESH SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Customary Law (Punjab)—Attachment, whether gives

cause of action to reversioners for declaratory suit—Suit before sale—Findings, whether res judicata—*Alienation of ancestral property for trade, validity of.*

Mere attachment does not amount to an infringement of the rights of the reversioners, and cannot furnish the latter with a cause of action for a suit for a declaration that the attachment shall not affect their reversionary rights. Therefore, the sons of the judgment-debtor cannot, before the sale bring a suit objecting to the attachment of the property and any finding in such a suit that there was no necessity would not operate as *res judicata*. *Chet Ram* v. *Spedding & Co., Ltd.* (1) and *Shib Deo Singh* v. *Uttam Singh* (2), relied on. [p. 266, col. 2.]

It cannot be laid down as a hard and fast rule that ancestral property can never be alienated by an agriculturist for the purpose of providing funds for trade or business. The decision in each case must depend upon in its own facts. *Santa Singh* v. *Waryam Singh* (3), explained, *Mohamad Hassan-ud-din* v. *Saif Ali Shah* (4), and *Taj Din* v. *Dule* (5), relied on. [p. 267, col. 1.]

Second Appeal from a decree of the Additional District Judge, Jullundur at Ludhiana, dated the 12th February, 1927, reversing that of the Subordinate Judge, Third Class, Jullundur, dated the 11th October, 1926.

Messrs. *Achhru Ram* and *N. C. Mehra*, for the Appellants.

Lala *Durga Das*, R. B., for the Respondents.

Shadi Lal, C. J.—On the 21st February, 1921, one Ganesha Singh a *Jat*, obtained a decree for a certain sum of money against Atma Ram another *Jat*, and in execution of that decree he attached a house and an open site belonging to the latter. The judgment-debtor's sons, Ujagar Singh and Natha, unsuccessfully objected to the attachment, and then brought an action for a declaration that they were the owners of the property attached by the decree-holder, and that the attachment was, therefore, invalid. They also added an alternative prayer that the property being ancestral was not liable to be sold in execution of a decree, because the money, for which the decree was obtained, was not raised for any legal or valid necessity. That suit was dismissed on the ground that the plaintiffs had failed to prove that the property belonged to them and not to the judgment-debtor, and the judgment of the trial Court was confirmed on appeal.

After the dismissal of the suit, the property was sold on the 21st August, 1925 and this sale was attacked by Natha, one of the sons of the judgment-debtor, on the ground that there was no necessity to justify the alienation. The suit brought by him to protect his reversionary rights has been dismissed on two grounds (1) that it is barred by the rule of *res judicata*, and (2) that the alienation was for necessity, and consequently binding upon the reversioners.

The decision of the learned District Judge on the first point cannot be sustained. In the first place, it is clear that mere attachment does not give the reversioner a right to bring a suit for a declaration that it shall not affect his reversionary rights. As laid down in 74 Ind. Cas. 479 [*Chet Ram* v. *Spedding & Co., Ltd.* (1)], a mere attachment infringes the rights of only the judgment-debtor and has the effect of placing the property attached *in custodia legis*. It does not amount to an infringement of the rights of his reversioners and cannot furnish the latter with a cause of action for a suit for a declaration that the attachment shall not affect their reversionary rights. This view has been endorsed by a Division Bench in 78 Ind. Cas. 926 [*Shib Deo Singh* v. *Uttam Singh* (2)] It is, therefore, clear that the sons of the judgment-debtor could not before the sale in dispute, bring a suit objecting to the attachment of the property, and any finding on that point would have been wholly unnecessary for the decision of the former suit. Moreover, neither the Court of first instance nor the District Judge decided that case on the ground that the attachment infringed the reversionary rights of the then plaintiffs. The rule of *res judicata* does not, therefore, operate as a bar to the present action.

Coming now to the question of necessity, we find that the judgment debtor, Atma Ram, had gone to Vancouver and engaged in trade there. He borrowed the money from Ganesha Singh, who too was in Vancouver at that time, and used it for the purposes of trade. The learned District Judge finds that Atma Ram had not followed the profession of agriculture for many years and had been "living out of India and carrying on trade and sending money to his sons" in India. It must be remembered that it was only a house with the land attached to it which was sold in execution of the decree obtained against him, and his agricultural land was neither attached nor sold. In these circumstances the learned District Judge was justified in holding that the money borrowed for carrying on business constituted a valid necessity. Our attention has been invited

(1) 74 Ind. Cas. 479; 5 Lah. L. J. 234; A. I. R. 1924 Lah. 52.

(2) 78 Ind. Cas. 926; 1 Lah. Cas. 90; A. I. R. 1925 Lah. 84.

to the judgment in *Santa Singh* v. *Waryam Singh* (3), in which it was decided that an alienation of an ancestral land in lieu of money borrowed for the purposes of carrying on a trade is not an alienation for a necessary purpose; and it was observed that the "village custom would not look with favour upon the conversion of a *Jat* agriculturist into a shop-keeping trader". But as pointed out in *Mohamad Hassan-ud Din* v. *Saif Ali Shah* (4) the judgment in *Santa Singh* v. *Waryam Singh* (3) was not intended to lay down that under no circumstances could a member of an agricultural tribe alienate ancestral property for the purposes of engaging in trade. The same view was taken in 95 Ind. Cas. 433 [*Taj Din* v. *Dula* (5).]

It would be unreasonable to suggest that an agriculturist should not improve his financial position by starting an industry or engaging in trade, and that he should in no case, be allowed to alienate his ancestral property in order to finance his business. No hard and fast rule can be laid down that ancestral property can never be alienated for the purpose of providing funds for trade or business. The decision in each case must depend upon its own peculiar facts, and having regard to the circumstances mentioned above and to the fact that the son, who has brought the present suit, has himself benefited from the earnings of the trade carried on by his father, I consider that the money borrowed by the latter constituted a valid necessity for the sale of the house.

I would accordingly affirm the decree of the learned District Judge and dismiss the appeal with costs.

Hilton, J.—I agree.

A. *Appeal dismissed.*

(3) 24 Ind. Cas. 361; 19 P. R. 1915; 207 P. L. R. 1914; 147 P. W. R. 1914.

(4) 74 Ind. Cas. 451; 4 L. 122; 5 Lah. L. J. 246; A. I. R. 1924 Lah. 41.

(5) 95 Ind. Cas. 433; A. I R. 1926 Lah. 515.

LAHORE HIGH COURT.

Miscellaneous Second Appeal No. 159 of 1931.

January 12, 1932.

BROADWAY, J.

SHAKAR KHAN—INSOLVENT—APPELLANT

versus

SANMUKH SINGH AND OTHERS CREDITORS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 68—Civil Procedure Code (Act V of 1908), O. XXI—Sale by Official Receiver—O. XXI, applicability of—Objection by insolvent—Limitation.

The rules laid down in the Civil Procedure Code, regulating sales under that Code are not applicable to sales by Official Receivers in insolvency proceedings. Sale by the Official Receiver is not, therefore, irregular merely because it was held at his office and not at the spot. [p 268, col 1]

Though an insolvent who is aggrieved by an act of the Receiver is entitled to move the Court under s. 68, Provincial Insolvency Act, he must take action within the period prescribed by the proviso to that section. [*ibid.*]

Miscellaneous Second Appeal from an order of the District Judge, Jhelum, dated the 12th November, 1930, reversing that of the Senior Subordinate Judge, Jhelum, dated the 6th December, 1929.

Mr. *Ghulam Mohy ud-Din*, for the Appellant.

Mr. *B. A. Cooper*, for the Respondents.

Judgment.—One Shakar Khan was adjudicated an insolvent in September 1928. His property, therefore, vested in the Official Receiver who took possession of it and apparently, on the 3rd April 1929, sold certain land and a house at his office in Jhelum, the purchaser being one Feroz Khan. On the 30th August 1929, the insolvent Shakar Khan filed an application in the Court of the Insolvency Judge objecting to the sale on the ground that it had been held at the office of the Official Receiver instead of on the spot. Presumably this application was made under s 68 of the Insolvency Act. The Insolvency Court being under the impression that O. XXI of the Civil Procedure Code applied to sales by Official Receivers cancelled the sale holding that it was "irregular" to sell the land at the Official Receiver's office instead of on the spot.

Against this order one of the creditors preferred an appeal to the District Judge. The appeal was heard *ex parte* and the learned District Judge on the 1st April, 1930 accepted the said appeal holding that the Insolvency Court had wrongly held that the sale had been held in an irregular manner. Shakar Khan then filed an application to have that *ex parte* order set aside. It is not quite clear what *locus standi* he had in this matter but the order was set aside and the matter was re-heard. But the original order of the learned District Judge was maintained, the sale being held valid. This was on the 18th November 1930

Against this order Shakar Khan has preferred this second appeal to this Court under s 75 of the Insolvency Act. It has

been urged that he has no *locus standi* and further that in any case no question of law exists which can be considered in second appeal. There can be no doubt that the Insolvency Court was under the mistaken impression that the rules laid down in the Civil Procedure Code regulating sales under that Code were applicable to sales by Official Receivers in insolvency proceedings and it was for that reason, and that reason alone, that the sale was cancelled by that Court. The learned District Judge was, therefore, correct in holding that no irregularity had been committed and his order is, therefore, not open to attack in second appeal. Mr. Ghulam Mohy-ud-Din, however, has urged that the acts of the Official Receiver are under the general control of the Insolvency Court and he referred to s. 59 of the Insolvency Act. Section 59 by itself does not afford Mr. Ghulam Mohy-ud-Din, any assistance. It is clear that the Official Receiver has full power to deal with the property that is vested in him in his official capacity. It is, however, perfectly true that his acts are subject to the control of the Insolvency Court for the Receiver is an officer of the Court. Section 68 empowers the insolvent, when aggrieved by any act of the Receiver, to move the Court, and on being so moved, the Court will examine the proceedings and decide whether the act of the Official Receiver should be upheld or not. The insolvent, however, must take action within the period prescribed by the proviso to s. 68 which lays down that no application under this section should be entertained after the expiration of 21 days from the date of the act or decision complained of. As I have already said, the sale appears to have been effected on the 3rd April, 1929. Shakar Khan did not move the Insolvency Court till the 30th August 1930, or long after the period provided by the proviso to s. 68 of the Insolvency Act. The Insolvency Court, therefore, should not have entertained the application.

After a consideration of all the circumstances of this case I am unable to say that the learned District Judge's order refusing to cancel the sale is wrong and I, therefore, dismiss this appeal. No order as to costs.

A. *Appeal dismissed.*

LAHORE HIGH COURT.

Second Civil Appeal No. 824 of 1931.

January 12, 1932.

ABDUL QADIR, J.

KUNDAN LAL—PLAINTIFF—APPELLANT

versus

SOHAN LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 145, O. XXXVIII, r. 7—Attachment before judgment—Properties delivered to sapurdar—*Suit by defendant against* sapurdar *for rent of premises—Maintainability.*

Where certain moveable properties belonging to the defendant were attached before judgment and they were handed over to a *sapurdar* and as the *sapurdar* did not remove the goods from the defendant's premises the latter brought a suit against the *sapurdar* to recover a certain sum of money by way of rent of the premises and damages and for a permanent injunction against the *sapurdar* restraining him from using the premises:

Held, that inasmuch as the cost, if any, incurred in storing the property attached would be a legitimate charge on the properties or the proceeds of their sale when they were delivered eventually to the party who succeeded in the suit, the question was one between the parties to the suit and the suit was not maintainable under s. 47, Civil Procedure Code. *Doda Shah* v. *Bishan Das* (1), referred to. [p. 269, col. 2.]

Second Civil Appeal from the decree of the District Judge, Gujranwala, dated the 7th February, 1931, affirming that of the Subordinate Judge, Fourth Class, Gujranwala, dated the 11th August, 1930.

Diwan *Mehr Chand*, for the Appellant.

Pandit *Bishen Narain*, for the Respondent.

Judgment.—In a suit for a large sum of money which was owed by Kundan Lal, proprietor of the American Trading Company, Gujranwala, to the Peoples Bank of Northern India, the latter got the property of Kundan Lal, approximately worth about Rs. 13,000 attached before judgment. It consisted of machinery and tools including three plaining machines, shearing and punching machine, stamping press and electric motor etc. Mr. Sohan Lal, the manager of the Gujranwala branch of the Peoples Bank of Northern India, was made a *sapurdar* of this property, when it was attached. He did not, however, remove the things from the premises of the American Trading Company and the property remained there for more than two months. I understand that the suit in which the attachment before judgment was obtained is still pending. In the meanwhile Kundan Lal brought a suit against Sohan Lal for recovery of Rs. 300 by way of rent of his premises and damages and also prayed for a permanent injunction against him not to use his premises any longer for storing the goods attached. The plaintiff states that he

had asked the *sapurdar* to remove the attached property from his premises and had told him that if he did not do so, rent at the rate of Rs. 5 per day would be charged. He also gave him a notice on 1st October, 1929, stating that rent at the rate of Rs. 10 per day would be charged if the goods were not removed within three days. The defendant raised many objections to this suit relating, *inter alia*, to its valuation for purposes of Court-fees, the *locus standi* of the plaintiff to bring the suit and the non-joinder of the Peoples Bank of Northern India as a party. The trial Court dismissed the plaintiff's suit after giving findings in favour of the defendant on all the issues raised by him, except one, which concerned the possession of the premises in dispute by the plaintiff. On appeal the decision of the Court of first instance was maintained by the learned District Judge. He held that the valuation for Court-fees was correct but he agreed with the Court below that the plaintiff had no *locus standi* to bring a separate suit against Sohan Lal and that his proper remedy was by an application to the attaching Court on the analogy of s. 17 of the Civil Procedure Code. He also held that the Peoples Bank of Northern India was a necessary party.

The plaintiff has preferred a second appeal to this Court and *Diwan* Mehr Chand, on his behalf, challenges the correctness of the finding as to the *locus standi* of the plaintiff, on the ground that s. 47, Civil Procedure Code, has no application to this case. Mr. Bishen Narain for the respondent lays stress on the fact that a *sapurdar* is a surety, and the question of his liability or otherwise for any rent of the premises on which the property attached was left, is a question which can be gone into in execution proceedings under s. 47, Civil Procedure Code, and can be decided only by the Court that passed the orders attaching the property and that a suit against the *sapurdar* is not competent. Counsel refers to a Division Bench decision of this Court in *Doda Shah* v. *Bishen Das* (1) where it was laid down that a *sapurdar* being a person to whom goods attached in execution of a decree are entrusted is a surety and his liability can be enforced in execution proceedings in virtue of s. 145 read with s. 47 of the Civil Procedure Code. He also refers to O. XXXVIII, r. 7 Civil Procedure Code, according to which attachment before judgment is to be made in the manner provided for the attachment of property in execution of the decree. He contends that the provisions relating to the execution of decrees are applicable to an attachment before judgment *Diwan* Mehr Chand replies that even if the *sapurdar* is considered to be a surety in the light of the authority referred to above, he may be a surety for the purposes of keeping the property in safe custody and producing it when required by the Court, but the question of payment of rent for the premises occupied by the goods which came under his control is a distinct and separate matter between him and the defendant in the original suit and cannot be regarded as a question arising between the parties to the suit according to the terms of s. 47, Civil Procedure Code. It is contended on behalf of the respondent that the cost, if any, incurred in storing the property attached would be a legitimate charge on the said property or the proceeds of its sale, when it is delivered eventually to either of the litigants, who succeeds in the suit, and that this is therefore clearly a question between the parties. I think there is force in the contention of the respondent. With regard to the custody of the property, a *sapurdar* cannot incur any expenses personally. The expenses incurred by him must come either out of the pocket of the decree-holder or the judgment-debtor. Without pronouncing in any way on the merits of the claim of the present plaintiff Kundan Lal, I must say he seems to have rushed prematurely into Court. If he loses the main case, any costs of the custody of the property in question incurred by the *sapurdar* will have to be borne by himself. If he wins, he could claim a deduction of the rent due for the use of his premises against the decree-holder when the latter takes possession of the property or its proceeds in satisfaction of his decree. I am of opinion that the Courts below have rightly held that in view of the provisions of s. 47, Civil Procedure Code, the present suit of the plaintiff against the *sapurdar* is not competent.

The opinion expressed by me on the above question justifies the dismissal of the appeal and it is not necessary to go into any other question raised between the parties in this case. I dismiss this appeal but under the circumstances of the case leave the parties to bear their own costs.

A. *Appeal dismissed.*

(1) 111 Ind. Cas. 592; A. I. R. 1928 Lah. 181.

LAHORE HIGH COURT.

Second Civil Appeal No. 1054 of 1927.
December 2, 1931.
SHADI LAL, C. J. AND HILTON, J.
HARI RAM—DEFENDANT—APPELLANT
versus
KUNDAN LAL—PLAINTIFF—RESPONDENT.

Benami *transactions—Property standing in wife's name — Presumption — Onus of proof of* benami *nature.*

There is no presumption that when a document stands in the name of a woman, the property conveyed by it must be deemed to belong to her husband. The onus is clearly upon the person alleging the transaction to be *benami* to show that the apparent state of things is not the real state of things. *Sura Lakshmiah Chetty* v. *Kothandarama Pillai* (1), distinguished. [p. 270, col. 2.]

Second Appeal from a decree of the Additional District Judge, Amritsar, dated the 2nd January, 1927, affirming that of the Subordinate Judge Second Class, Amritsar, dated the 13th November 1926.

Mr. *M. C. Mahajan*, for the Appellant.

Mr. *Shaukat Rai*, for the Respondent.

Shadi Lal, C. J.—On the 15th July, 1903, a deed was executed in favour of *Musammat* Ananti, the wife of one Radhu Ram, evidencing the sale of the house in dispute in her favour for Rs. 1,250. The deed was registered on the 18th July, and before the Sub-Registrar she was represented by her husband who on her behalf paid the price to the vendor. Radhu Ram died in 1920, and *Musammat* Ananti, on the 2nd October, 1925 made a Will devising the house to her brother's son Kundan Lal.

Radhu Ram's brother Hari Ram has, after the death of *Musammat* Ananti, taken possession of the house and disputes the title of Kundan Lal. He raised various objections regarding the Will made by *Musammat* Ananti, but these objections have been over-ruled by the Courts below.

The only question, which has been debated by Mr. Mehr Chand *Mahajan*, in this second appeal, is that the sale in favour of *Musammat* Ananti was a *benami* transaction and that her husband, Radhu Ram was the beneficial owner of the house. The learned Counsel places his reliance upon the judgment of their Lordships of the Privy Counsel in *Sura Lakshmiah Chetty* v. *Kothandarama Pillai*(1), and contends that a purchase by a husband in favour of his wife must be presumed to be a *benami* transaction. A perusal of the judgment, however, shows that the money, with which the purchase was made in that case, belonged to the husband; and it is an incontestable doctrine that the criterion in cases of this kind is to determine the source of the purchase money. There is absolutely no evidence in the present case that money, which was paid by the husband before the Sub-Registrar on behalf of his wife, belonged to him, and not to the wife. It is significant that Hari Ram, who relied upon the *benami* character of the transaction, has not gone into the witness-box in order to give evidence in support of his allegation that the money belonged to his brother or to the joint family consisting of the two brothers. It is also significant that though *Musammat* Ananti dealt with the property as her own, Hari Ram did not during her lifetime, dispute her title.

There is no presumption that, when a document stands in the name of a woman, the property conveyed by it must be deemed to belong to her husband. The onus is clearly upon the person alleging the transaction to be *benami* to show that the apparent state of things is not the real state of things; in other words, that the person, who appears as the owner on the face of the deed, is not the real owner.

For the aforesaid reasons I would affirm the decree of the learned Additional District Judge and dismiss the appeal with costs.

Hilton, J.—I agree.

A. *Appeal dismissed.*

(1) 88 Ind. Cas. 327; 48 M. 605; 23 A. L. J. 662; 49 M. L. J. 109; 42 C. L. J. 8; A. I. R. 1925 P. C. 181; 27 Bom. L. R. 1076; 29 C. W. N. 1013; 3 Pat. L. R. 290; 23 L. W. 138; (1925) M. W. N. 717; 52 I. A. 286 (P. C.).

LAHORE HIGH COURT.

Civil Appeal No. 3118 of 1925.
October 15, 1931.
ADDISON AND HILTON, JJ.
JAI DAYAL—PLAINTIFF—APPELLANT
versus
NARAIN DAS—DEFENDANT—RESPONDENT.

Hindu Law—Joint family—Gains of science—Member of joint family educated up to Entrance, earnings of—Self-acquired property — Partition—Previous possession to be respected—Court Fees Act (VII of 1870), Sch. I, Art. 1—Partition suit, appeal from—Appeal attacking money relief—Court-fee payable—Giving up part of claim to avoid further payment of Court-fee.

Gains made personally and without the aid of joint funds by a member of a joint family, who was maintained at the expense of the joint family and received no more than an ordinary education suitable to his position as a member of the family, are the self-acquired property of such member and not joint family property. Education up to the Entrance pass is a very ordinary education and a clerk who started his life on Rs. 15 a month cannot be said to be a member of a profession or occupation requiring special training. Any saving therefore, from his pay cannot be described as gains of science.

It is a general rule of law that partition should be made with due regard to the possession of the parties. *Fateh Chand* v. *Bilas Rai*(1), followed.

Where in an appeal from a partition suit all that the appellant claims is that he should not have been held liable to pay certain sum to the respondent by the trial Court, he is bound to pay *ad valorem* Court-fee on such sum.

A party may give up a part of his claim so that the Court-fee already paid may suffice.

First Appeal from the preliminary decree of the Subordinate Judge, First Class, Lahore, dated the 23rd March, 1925.

Messrs. *Muhammad Hussain* and *Manohar Lal Sachdev*, for the Appellant.

Messrs. *Tirath Ram* and *Darbari Lal*, for the Respondent.

Addison, J.—This is a partition suit brought by the plaintiff against his brother, the defendant. A preliminary decree was passed for partition of the immovable property. It was further held that the plaintiff had to give the defendant half of Umar Din's debt, half of Rs. 4,580 on account of Maula Bakhsh's debt and half of Rs. 150 on account of certain repairs done by defendant. It was also ordered that the Lahore house in which the defendant resided should be allotted to the defendant at the final partition and the residential house of the family in Niaz Beg should be allotted to the plaintiff as he had always lived there with the deceased father of the parties. The plaintiff claimed that certain other sums should be paid by the defendant to him. This claim was disallowed as well as the claim of the plaintiff for a share of the earning of the defendant.

Against this decision the plaintiff appealed on several grounds. One ground was that the decision of the trial Court was wrong that the earnings of the defendant did not constitute joint family property. Another was that the decree of the trial Court was contrary to law and facts on the record and under this head it was claimed that the trial Court should not have given the Lahore residential house to the defendant and the Niaz Beg residential house to the plaintiff. These two grounds were certainly covered by a Court-fee of Rs. 21-4-0 There were, however, other grounds of appeal, namely, that the plaintiff should not have been held liable to pay to the defendant half of Rs. 4,580 due from Maula Bakhsh and that the trial Court was wrong in disallowing to the plaintiff certain sums amounting to about Rs. 1,000 which he claimed from the defendant. In these grounds it was claimed that the liability of the plaintiff to the defendant should be reduced by definite sums and obviously Court-fees were necessary on these claims *ad valorem*. As these had not been paid, plaintiff's Counsel limited his appeal to the grounds mentioned above as being covered by the Court-fee paid. We allowed him to do so.

The father of the parties lived in Niaz Beg where he kept a shop and lent money. The plaintiff used to live with him. The defendant, however, stayed in Lahore. He passed the Entrance Examination in 1892 and thereafter got a post in the Punjab Civil Secretariat at Rs. 15 a month. He has very slowly worked his way up and is now drawing Rs. 260 a month. The plaintiff's claim is that he has accumulated savings out of his pay in the Punjab Civil Secretariat and that as he was educated at the family expense these accumulations are joint family property.

In the first place, it has not been proved that there are any savings of the defendant out of his pay. Further it is clear that if there were any, they could not be described as "gains of science". As stated in Mulla's Hindu Law, 6th Edition, para. 231, at page 245.

"Gains made personally and without the aid of joint funds by a member of a joint family, who was maintained at the expense of the joint family and received no more than an ordinary education suitable to his position as a member of the family, are the self-acquired property of such member, and not joint family property."

Education up to the Entrance pass is a very ordinary education and a clerk who started life on Rs. 15 a month, even though now he is drawing Rs. 260 a month, cannot be said to be a member of a profession or occupation requiring special training. Any saving, therefore from his pay cannot be described as "gains of science", and this part of the appeal must fail.

The only other point argued was that the defendant should not have been allotted the residential house in *kucha* Sethan, Lahore, as by this order the plaintiff's interests were prejudiced. I am unable to agree with this contention. The plaintiff in para. 12 of his plaint asked that partition should be done with due regard to possession of the parties, and this is the general rule as laid down in *Fateh Chand* v. *Bilas Rai* (1). The plaintiff as a witness stated that both brothers were in possession of the Lahore house in dispute up to the death of their father, defendant having a lock on the upper storey while plaintiff had his on the lower storey. After their father's death in 1919, however, the defendant broke his lock and took possession of the whole house. In this he is supported by Sant Ram, who

(1) 31 Ind. Cas. 497; 96 P. R. 1915; 61 P. L. R. 1916 169 P. W. R. 1915.

was married to the sister of the parties who is now dead. It is clear from Sant Ram's evidence, however, that he is a partisan of the plaintiff. On the other hand, the defendant has stated in the witness-box that he himself built this house in 1900-1901 and lived in it since that date. In this respect he is supported by Barkat Ali D. W. No. 9, who supplied the bricks for the building. Further, it is clear that the defendant has all along been living in Lahore while plaintiff and his deceased father resided in Niaz Beg. In these circumstances I must hold that defendant has all long been in possession of the house in *kucha* Sethan just as plaintiff has been in possession of the Niaz Beg residential house where he lived with his father. The order of the trial Judge, therefore, that the possession of the parties should be maintained with respect to these two houses was correct.

For the reasons given I would dismiss the appeal with costs.

Hilton, J.—I agree

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

Criminal Revision No. 1199 of 1931.

November 6, 1931.

TEK CHAND, J.

EMPEROR—PETITIONER

versus

NATHU AND OTHERS—ACCUSED—RESPONDENTS.

Criminal trial—Cross cases under ss. 326 and 302, Penal Code, close connection between—Commitment to Sessions Court of case under s. 326, propriety of—Procedure.

It is no ground for committing to Sessions Court a case under s. 326, Penal Code, that it is closely connected with a counter case under s. 302, Penal Code, for the offence under s. 326 is triable and can be adequately punished by a Magistrate of the First Class or at any rate by one exercising enhanced powers under s. 30, Criminal Procedure Code. The object of avoiding a possible conflict of decisions can be achieved by awaiting the result of the Sessions trial under s. 302.

Case reported by the Additional Sessions Judge, Lahore, with his No. 73 of 1931.

Report.—Bakhu, Jhanda, Karam Ilahi and Chanan, weavers of Kot Fatteh Din, in the town of Kasur, have been committed for trial under s. 302 read with s. 34, Indian Penal Code, for the murder of Karam Din. Along with this case, Nathu, Karmun and Shahabu, weavers of Dhur Kot, in the town of Kasur, have been committed for trial under s. 326 read with s. 34. Indian Penal Code, for having caused hurt with dangerous weapons—an offence not triable exclusively by a Court of Session. The reasons given by the learned Magistrate in his committal order for committing the latter case are that this case is a cross case to one under s. 302, Indian Penal Code, and it "presents a quite different story which cannot be separated from the murder case without discussing at any great length the merits of that case." It also appears that the question of the exercise of right of private defence also arises in the case.

The apparent connection of the case under s. 326, Indian Penal Code, with the case under s. 302, Indian Penal Code, is in my opinion no ground whatsoever for committing it to this Court when the offence involved is triable and can be adequately punished by a First Class Magistrate or one exercising enhanced powers under s. 30 of the Code of Criminal Procedure. The circumstances are entirely on all fours with the reference made by the Sessions Judge, Lahore, with his No. 483 of 16th March, 1931, *Crown* v. *Santa Singh and others* (see High Court Revision No. 400 of 1931). In this connection I would also refer to 3 Cr. L. J. 94 *Emperor* v. *Dharam Singh* (1), *Emperor* v. *Asha Bhatti* (2) and 31 Cr. L. J. 178 *Emperor* v. *Karm Singh* (3). The accused in the case under s. 326, Indian Penal Code, are not in the least likely to be prejudiced by the trial of the case under s. 302, Indian Penal Code, in this Court. As submitted in the report in 31 Cr. L. J. 178 *Emperor* v. *Karm Singh* (3) if the object of the Magistrate is to avoid a possible conflict of decisions, this can be achieved by awaiting the result of the Sessions trial in the case under s. 302, Indian Penal Code.

For the above reasons I submit the case to the High Court and recommend that the commitment of the case under s. 326, Indian Penal Code, be quashed and would request that orders may be passed as early as possible so that there may be no delay in the Sessions trial.

ORDER.—For reasons recorded by the learned Sessions Judge I quash the order of commitment and direct that the case be tried in accordance with law by the Magistrate who has been dealing with this case, or any other Magistrate, as the District Magistrate thinks proper. The record will be returned at once.

R. L. *Case remanded.*

(1) 3 Cr. L. J. 94; 3 A. L. J. 14; A. W. N. (1906) 28; 1 M. L. T. 61.

(2) 21 Ind. Cas. 897; 14 Cr. L. J. 657; 15 Bom. L. R 998.

(3) 120 Ind. Cas. 677; 31 Cr. L. J. 178; Ind. Rul (1930) Lah. 133; A. I. R. 1930 Lah. 312.

ALLAHABAD HIGH COURT.

First Civil Appeal No. 107 of 1930.
March 17, 1931.
SULAIMAN, AGIG., C. J. AND BAJPAI, J.
Rai Bahadur Munshi BISHEN SARUP—APPLICANT
versus
M. ABDUL SAMAD--OPPOSITE PARTY.

Transfer of Property Act (IV of 1882), ss. 106, 108 (b), *116—Lease for term—Subsequent lease to enure after expiry of term—Suit by subsequent lessee for ejectment of prior lessee—Maintainability—Necessity of notice.*

Section 106, Transfer of Property Act, is not applicable to the case of a lessee for a fixed term when the term has expired. [p. 273, col. 2.]

Sections 106 and 116, Transfer of Property Act, regulate the rights of the lessor and the lessee *inter se* and do not apply to a suit brought by a subsequent lessee against the lessor and the prior lessee. [*ibid*]

A subsequent lessee is entitled to enforce his right to obtain possession by instituting a suit against the lessor and the prior lessee in possession whose term has expired. It is not necessary that an ejectment suit should be brought by the lessor himself against the prior lessee. *Ibad Ullah Khan* v. *Ram Charan Sah* (1), distinguished. [p. 274, col. 1.]

First Appeal from decree of the District Judge, Agra, dated the 17th April, 1930.

Messrs. *N. P. Asthana* and *B. N. Sahai*, for the Appellant.

Dr. *N. C. Vaish* and Messrs. *P. L Banerji*, and *Shabbir Hasan*, for the Respondent.

Judgment.—This is a defendant's appeal arising out of a suit for recovery of possession on the strength of a lease. Defendant No. 2 is the owner of the property which consists of a quarry to be worked. He had granted a lease in favour of defendant No, 1 which was to expire at the end of May, 1928. Another lease was executed by Pahlad Narain, professing to be the general attorney of the owner, on the 10th of April, 1926, in favour of the plaintiff for a period of 10 years to come into effect from June, 1928, on the expiry of the lease in favour of defendant No. 1.

The plaintiff alleged that he had not obtained possession and accordingly sued to recover possession. He impleaded both the owner and the former lessee as defendants. On behalf of the defendants it was denied that any valid lease was executed by Pahlad Narain. On behalf of the owner it was urged that the alleged agent had no authority to grant any such lease. There was also a plea of want of notice under s. 106. A few other pleas also were taken.

The learned Subordinate Judge framed no less than seven issues, but disposed of the case on his findings of fact on Issues Nos. 1 and 2 only. The learned District Judge has come to a contrary conclusion on those points and has remanded the whole case.

The first point to be considered is whether a private copy of the power-of-attorney under which Pahlad Narain, the agent professed to act was admissible in evidence. The Courts below have differed.

A copy of the general power-of-attorney cannot be obtained by any person who is no party to the deed. The original could be produced either by defendant No. 2 or his agent Pahlad Narain, and we think that a copy could be obtained by these persons alone. The learned Subordinate Judge had first ordered defendant No. 2 to produce either the original power-of-attorney or a certified copy within 10 days. This he failed to do. Later on he was allowed to appoint a special attorney for the purpose of obtaining such copy from Patna where the deed had been executed. The only copy which was obtained from Patna was of an abstract of the power of-attorney and not a copy of the whole document, although an application for a copy of the whole document had been made.

The abstract shows that the document was executed before and authenticated by the Sub-Registrar under s. 33 (*i*) (*a*) of the Indian Registration Act. It was obviously not registered and that is why a complete copy of the original has not been retained by the Sub-Registrar. Section 74, sub s. (2) of the Indian Evidence Act cannot apply to this case because the Sub-Registrar was not called upon to keep a public record of this private document. We are, therefore, satisfied that the learned District Judge was right in holding that when the original was not forthcoming it was open to the plaintiff to prove a private copy of it in the way allowed by law.

The other question that is raised on behalf of the defendants is that notice under s. 106 should have been given before the suit was instituted. As pointed out by the learned District Judge this is not a suit for possession brought by the plaintiff lessee against his own lessor-defendant No. 1 who is retaining actual possession. Section 106 does not apply to the case of a lessee for a fixed term when the term has expired.

It is contended on behalf of the appellant that by virtue of the provisions contained in s. 116, notice became necessary if the lessor subsequently assented to his continuing in possession on the expired lease or accepted rent. But these sections regulate

the rights of the lessor and the lessee *inter se* when a suit for ejectment is brought.

The next question urged is whether a suit by the plaintiff as lessee against defendant No. 1 who is continuing in possession is maintainable without a proper ejectment suit having been brought by the lessor himself. Reliance is placed on the case of 53 Ind. Cas. 140 [*Ibad Ullah Khan* v. *Ram Charan Sah* (1)] for the proposition that no such suit by a lessee is maintainable. An examination of the facts of that case however shows that there the lessee could have been ejected only by the Revenue Court, and he not having been so ejected, the Civil Court had no power to dispossess him. It was in these circumstances that the learned Judge of the Oudh Court held that a suit by the lessee in a Civil Court was not maintainable.

Under s. 108, sub-s. (*b*) the lessor is bound on the lessee's request to put him in possession of the leased property. Thus there is a liability on the lessor to put the lessee in possession even though the actual transfer of interest in the immoveable property may not have taken place. There is no reason why the lessee should not be able to enforce his own rights and the liability of the lessor to put him in possession. If the lessee can sue the lessor for possession in order to enforce the same, there seems to be no good ground why he should be debarred from doing so, merely because the lessor chooses to allow another person to continue in possession of the leased property. In this case both the lessor and the person in actual possession have been impleaded and we cannot see that there is any defect in the frame of the suit which is fatal to the claim.

As the learned Subordinate Judge had disposed of the question of ownership only and left practically all the other issues undecided, the learned District Judge thought that the case had been disposed of on a preliminary point and he accordingly remanded the whole case for disposal. He also directed that the parties should have an opportunity to produce evidence on the question of the authority of Pahlad Narain to grant the lease. He has also left undecided the other matters which are covered by Issues Nos. 3, 4, 6 and 7. The plea covered by Issue No. 5 had been given up at the trial.

We think that the order of the learned District Judge is right and we accordingly dismiss the appeal, and direct that the costs should abide the event.

A. *Appeal dismissed.*

(1) 53 Ind. Cas. 140; 6 P. L. J. 378.

ALLAHABAD HIGH COURT.
FULL BENCH.

Second Civil Appeal No. 1314 of 1929.
July 14, 1931.

SULAIMAN, ACTG., C. J., MUKERJI AND BOYS, JJ.

DURGA THATHERA—PLAINTIFF—APPELLANT

versus

NARAIN THATHERA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XLI, rr. 11, 31—Appeal—Summary dismissal—Judgment, contents of—Compliance with r. 31, necessity of—Interpretation of Statutes—Headings of chapters.

In a judgment delivered on hearing an appeal under O. XLI, r. 11 of the Civil Procedure Code by a Court subordinate to the High Court, compliance with the provision of r. 31, O. XLI, is necessary. *Samin Hasan* v. *Piran* (1), overruled [p. 276, col. 1]

The question whether in a particular case there has been a substantial compliance with the provisions of r. 31 is a different one depending on the nature of the judgment delivered in each case. A non-compliance with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second Appellate Court is in a position to ascertain the findings of the lower Appellate Court. [p. 276, col. 2.]

Headings in the body of an Act are of some help in clearing up obscurities when there is an ambiguity, but they cannot control the provisions of the sections when they are unequivocal and clear. [p. 276, col. 1.]

Second Appeal from a decision of the Second Additional District Judge, Gorakhpur, dated the 18th July, 1931.

On 1st July, 1931, Mr. Justice Mukerji and Mr. Justice Allen made the following

Order of reference to a Full Bench.—This appeal the valuation of which is rather small, being only Rs. 49 and, therefore, cognisable by a single Judge, came for admission before Niamatullah, J. and he ordered that it should be put up before a Bench of two Judges for hearing. We are of opinion that it should be heard by a larger Bench so that the question raised may be definitely decided so far as this Court is concerned.

This appeal arises out of a suit for redemption. The suit was dismissed by the learned Munsif, after he had written a judgment, covering 12 pages of the manuscript copy, which has been filed by the appellant. The learned Additional Dis-

trict Judge before whom the plaintiff's appeal came for hearing dismissed the appeal under O. XLI, r. 11 by writing a judgment which covers seven typed lines. The judgment is simply to the effect that the learned Judge is satisfied, on reading the judgment and hearing the Counsel for the appellant, that the case has been properly decided, that the mortgage alleged by the plaintiff has not been satisfactorily proved and that it was not established that the "site of the house in dispute was formerly covered by his father's house."

Sitting in second appeal we are not in a position to know from the judgment of the lower Appellate Court what were the points for determination, and how the learned Judge came to the conclusions at which he arrived.

As already stated, this was a suit relating to property and was complicated. The alleged mortgage is said to have been made about 32 years prior to the institution of the suit.

The point taken by the plaintiff-appellant is that as the judgment is not in accordance with law, the Court below should be called upon to give a proper judgment.

Findings of fact are binding on second appeal provided the findings are arrived at without any contravention of any rule of law, for example, the rule as to burden of proof, admission of evidence, and so on and so forth. In order to enable the High Court to see that a finding of fact has been properly arrived at, there should be a properly written judgment before it. This advantage is denied to us by the judgment complained of.

It has been held by a Bench of this High Court in *Samin Hasan* v. *Piran* (1) that the rules laid down in s. 574 of the old Civil Procedure Code did not apply to an appeal which was heard under s. 551 of the old Code. Order XLI, r. 31 has now taken the place of the old s 574, and O. XLI, r. 11 has taken the place of the old s. 551. The change in the law is not material, and the question is whether the decision in *Samin Hasan* v. *Piran* (1) is good law.

With all respect, we doubt the correctness of this decision, and find it desirable that the case should go before a larger Bench so that the point of law involved may be settled once and for all so far as this Court is concerned.

There is a conflict of decision among several High Courts on this point, and some of these cases have been noted by Chari, J., in *Ma Saw* v. *Ma Bwin Byu* (2). The learned Judge agreed with some decisions and dissented from others and held that a judgment pronounced after hearing under O. XLI, r. 11 must comply with the requirements of O. XLI, r. 31.

The argument in favour of the proposition that a decision given after a hearing under O. XLI, r. 11 may be a summary one, and it is not necessary to comply with the requirements of O. XLI, r. 31, is very often based on the headings to be found in O. XLI, Sch. 1 of the Civil Procedure Code, for example, over the r. 16 we find the heading "Procedure on hearing". Over the r. 9, similarly we find the heading "Procedure on admission of appeal". Again over the r. 30 we find the heading "Judgment in appeal". It has been sometimes argued on the basis of these headings that r. 31 applies only when there is a contested appeal in which both the parties are represented.

These headings are no part of the enactment. They are on the same lines as the marginal notes to the sections or rules. They are never put to the vote in the Legislature, and they are meant merely as guides for the person trying to find out a particular rule of law in a particular Code. That these headings are very faulty and have been prepared without much consideration will be apparent from the fact that the heading "Procedure on hearing" comes between rr. 15 and 16. The heading would imply that previous to the stage to which r. 16 is applicable, there is no hearing at all of the appeal. But if we look at r. 11, we see that it distinctly requires that the Appellate Court shall 'hear' the appellant or his Pleader. Surely, then, there was a hearing at the stage for which r. 16 is meant.

It is not necessary to discuss the point at length, because we are of opinion that the question is of such importance as requires the decision of a larger Bench. We direct that the record be laid before the Hon'ble the Chief Justice for the formation of a Full Bench for the decision of the following point, namely,

"whether in a judgment delivered on hearing an appeal under O. XLI, r. 11 of the Civil Procedure Code by a Court subordinate to the High Court, compliance with the provisions of r. 31, O. XLI is necessary."

Mr. *Shiva Prasad Sinha*, for the Appellant.

Mr. *Sankar Saran*, for the Respondents.

(1) 30 A. 319; A. W. N. (1908) 115; 5 A. L. J. 300.

(2) 95 Ind. Cas. 881; 4 R. 66; 5 Bur. L. J 60; A. I. R. 1926 Rang. 129.

Opinion.—The question referred to the Full Bench is

"Whether in a judgment delivered on hearing an appeal under O. XLI, r. 11 of the Civil Procedure Code by a Court subordinate to the High Court, compliance with the provisions of r. 31, O. XLI is necessary."

The question which we have to answer is whether r. 31, O. XLI requiring that the judgment of the Appellate Court shall be in writing and shall state the points for determination, the decision thereon, the reasons for the decision and, where the decree appealed from is reversed or varied, the relief to which the appellant is entitled and shall at the time that it is pronounced, be signed and dated, applies to a dismissal of an appeal under O. XLI, r. 11.

The answer will depend on the question whether, when an appeal is dismissed summarily under O. XLI, r. 11, there is a judgment delivered and r. 31 applies to such a judgment.

There can be no question that in dismissing an appeal under O. XLI, r. 11 the Appellate Court delivers a judgment, in accordance with which the decree is prepared. Such a judgment is treated as a judgment from which a Letters Patent Appeal could be entertained, and a certified copy of it is required under the law when a second appeal is to be filed. It is unthinkable that there could be a decree passed dismissing the appeal, without there having previously been a judgment. If a judgment has to be delivered by the Appellate Court, there seems to be no reason why r. 31, which applies to judgments of Appellate Courts, should not be applicable. Our attention has been drawn to the case of *Sami Hasan* v. *Piran* (1) and some cases of other High Courts where the view has been taken that s. 574 of the old Code corresponding to this rule was not applicable in its entirety. On the other hand, there are a large number of cases which have held the other view.

The learned Judges, who have taken a view in conformity with the view taken in *Samin Hasan's case* (1) have relied mainly on the effect of the headings which precede the groupings of the rules in this order. No doubt headings in the body of an Act are of some help in clearing up obscurities when there is an ambiguity, but they cannot control the provisions of the sections when they are unequivocal and clear. The headings are like preambles which supply a key to the mind of the Legislature, but do not control the substantive sections of the enactment. As has been pointed out by the learned Judges referring this case, the groupings of the sections under various headings in this order are not at all happy and cannot be relied upon in order to control the effect of the provisions.

If r. 31 were not to apply to judgments delivered under O. XLI, r. 11, the necessary result would be that there would be no provision of law which would require such judgments to be in writing or to be signed and dated by the Judge. A judgment under O. XLI, r. 11 could then be pronounced orally. This could not possibly have been intended by the Legislature.

Furthermore, a second appeal is allowed from such decrees under O. XLII, Civil Procedure Code and before the Appellate Court in second appeal can make up its mind as to whether there are grounds for interference under s. 100 Civil Procedure Code, it must know the points which were for determination and the decision of the lower Appellate Court on each of those points in order to decide whether the decree can be affirmed or not. If the Appellate Court were simply to dismiss the appeal summarily without pointing out what its decisions are, the result would be that it would be impossible to know what findings of fact are binding upon the second Appellate Court and what questions of law have been decided and how.

The question whether in a particular case there has been a substantial compliance with the provisions of r 31 is a different one depending on the nature of the judgment delivered in each case. A non-compliance with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second Appellate Court is in a position to ascertain the findings of the lower Appellate Court. Our attention has not been drawn to any reported case of this Court after the passing of the new Code, in which the case of *Samin Hasan* v. *Piran* (1) has been followed. Our answer to the question referred to us is in the affirmative.

A. *Answered in the affirmative.*

ALLAHABAD HIGH COURT.

Criminal Reference No. 271 of 1930.
September 9, 1930.
KING AND BENNET, JJ.
EMPEROR—APPLICANT
versus
JOHRI—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s 211—'Institution of criminal proceeding', what amounts to—Making false charge of cognizable offence, effect of—Criminal Procedure Code (Act V of 1898), ss. 4 (l) (m)—'Criminal proceeding', meaning of.

The making of a false charge to the Police of a cognizable offence is the institution of criminal proceedings within the meaning of s 211, Penal Code. Where the accused made a report of an alleged offence under s. 304, Penal Code, and thereby caused the Police to make an investigation:

Held, that the accused must be deemed to have instituted a criminal proceeding within the meaning of s. 211, Penal Code. [p. 278, col. 1.]

The expression 'criminal proceeding' includes investigation by a Police Officer of an alleged cognizable offence. *Karim Bakhsh* v. *Queen-Empress* (4), *Parameshwar Lal* v. *Emperor* (10), *Queen-Empress* v. *Nanjunda Rau* (8) and *Sessions Judge of Tinnevelly Division* v. *Sivan Chetti* (9), followed. *Empress of India* v. *Pitam Rai* (1), *Empress* v. *Parahu* (2), *Queen-Empress* v. *Bisheshar* (3), *Emperor* v. *Jagmohan* (5) and *Barkatullah* v. *Sadho Kalwar* (6), dissented from. [p. 279, col. 1]

Order on Reference submitted by the Sessions Judge, Agra as per his Letter No. 138 I, dated the 17th April, 1930.

The Assistant Government-Advocate, for the Crown.

Bennet, J.—This is a Reference by the learned Sessions Judge of Agra recommending that the commitment of Johri to the Court of Sessions for trial under the second part of s. 211, Indian Penal Code, should be quashed. Johri made a report under s. 304, Indian Penal Code, against certain persons, and the case for the prosecution is that that report was false. If the case comes under the second part of s 211, Indian Penal Code the case would be triable only by the Court of Session. The Police made an investigation into the report and found it to be false, and the persons named in it were not prosecuted. Hence the Sessions Judge considers that no criminal proceedings were instituted and, therefore, the charge of making the false report comes under the first part of s. 211, Indian Penal Code, and is punishable with two years' imprisonment of either description or with fine or with both and as the Committing Magistrate can pass such sentences he should dispose of the case himself.

The view of the Sessions Judge is in accordance with rulings of this Court. But as three other High Courts have taken a different view, the learned single Judge of this Court before whom the case came referred it to a Bench of two Judges.

Section 211 states as follows:

"Whoever, with intent to cause injury to any person, institutes or causes to be instituted any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person, shall be punished with imprisonment of either description for a term which may extent to two years, or with fine, or with both;

and, if such criminal proceeding be instituted on a false charge on an offence punishable with death, transportation for life, or imprisonment for seven years or upwards, shall be punishable with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

The words in this section which have given rise to difference of opinion are the words "if such criminal proceeding be instituted." The Allahabad view of these words has been that they mean that a criminal prosecution should have taken place The High Courts of Calcutta, Madras and Patna hold that these words cover a report in the Police Station even though the Police do not prosecute on it.

The Allahabad cases are in historical order as follows. *Empress of India* v. *Pitam Rai* (1). Pitam made a false report to a Police Officer but the Police did not prosecute the person he accused. A single Judge, Mahmood, J., held that there was no institution of criminal proceedings and therefore, no offence under the second part of s. 211, Indian Penal Code. In the next year, 1883, this ruling was followed by another single Judge in *Empress* v. *Parahu* (2). In 1893 the matter came before a Bench of two Judges of this Court, in *Queen-Empress* v. *Bisheshar* (3), on a reference by a Sessions Judge who considered that the Full Bench ruling of the Calcutta High Court in *Karim Bakhsh* v. *Queen-Empress* (4) should be followed. Unfortunately the Acting Public Prosecutor did not place this view before the Court and in a ruling of eight lines the Bench stated that they preferred the previous Allahabad rulings. There is no discussion of the merits of either view in this ruling, so it can hardly be taken as an authoritative decision between the two conflicting views.

This case was followed in 1909 by *Emperor* v. *Jagmohan* (5), and in 1912 by

(1) 5 A. 215; A. W. N. (1882) 225.
(2) 5 A. 598; A. W. N. (1883) 149.
(3) 16 A. 124; A. W. N. (1894) 10.
(4) 17 C. 574 (F. B.).
(5) 4 Ind. Cas. 812; 6 A. L. J. 989; 11 Cr. L. J. 54.

Barkatullah v. *Sadho Kalwar* (6). These were single Judge rulings.

In none of these rulings is there any discussion of these difficulties; there is merely the assumption that the phrase "institution of criminal proceedings" can only refer to the institution of a criminal case in Court.

The Calcutta High Court followed the Allahabad view in a Bench ruling *Queen-Empress* v. *Karim Bakhsh* (7) but the matter was fully considered by a Bench of five Judges in 1888 in *Karim Bakhsh* v. *Queen-Empress* (4) where it was laid down that :

"a man who sets the criminal law in motion by making a false charge to the Police of a cognizable offence institutes criminal proceedings within the meaning of s. 211 of the Penal Code, and if the offence fall within the description in the latter part of the section, he is liable to the punishment there provided."

The reasoning on which this conclusion is reached is as follows :

"there are two modes in which a person aggrieved may seek to put the criminal law in motion. He may make a charge.....to the Police. If the information discloses a cognizable offence, the proper officer of Police may proceed to make an investigation; and if the result of that investigation is adverse to the accused, he is, in due course, brought by the Police before a Magistrate. If the information does not disclose a cognizable offence, the Police cannot take any step of their own authority. Secondly, a person aggrieved may lay a charge, or, as the Court calls it, a complaint (s. 191) before a Magistrate. Whichever of these methods is adopted, the thing done by the accuser is the same, that which is called in the one case giving information, in the other making a complaint. In each case the steps that follow are governed by the Criminal Procedure Code. In each the first step taken by the accuser is ordinarily also the last, for from that time the control of the investigation or the enquiry passes out of his hands into those of the constituted authorities."

The ruling then points out that the expressions "instituting proceedings" and "making a charge" are not mutually exclusive, because there is no mode by which a private accuser can institute criminal proceedings except by making a charge, and because the second part of the section speaks of proceedings instituted on a false charge." But the expressions are not co-extensive, because a charge to the Police of a non cognizable offence or a charge to a Civil Court or a public officer asking for sanction to prosecute, cannot be considered the institution of criminal proceedings.

A Bench of the Madras High Court in *Queen-Empress* v *Nanjunda Rau* (8) followed the ruling of the Calcutta Full Bench in *Karim Bakhsh* v. *Queen-Empress* (4) and dissented from the Allahabad rulings reported as *Empress of India* v. *Pitam Rai* (1) and *Queen-Empress* v. *Bisheshar* (3). One passage in this ruling may be quoted:

"It is argued that, when a charge is preferred to the Police, it merely sets them on enquiry, and they may find the charge to be false and refuse to proceed with the charge without the accused being even aware that any complaint has been made against him; but precisely the same may be said when a complaint is made to a Magistrate. He is not bound to take any action against the person accused.. .... yet it could hardly be contended that the complaint to the Magistrate did not amount to the institution of criminal proceedings within the meaning of the section.

Reference was made to the Calcutta Full Bench ruling *Karim Bakhsh* v. *Queen-Empress* (4), in a later case in the Madras High Court. *The Sessions Judge of Tinnevelly Division* v. *Sivan Chetti* (9), Full Bench, where the principle of that ruling was followed and where the majority of the Full Bench extended the principle by holding that a false complaint to a Village Magistrate or an offence which he was bound to report to the Police under s. 45, Criminal Procedure Code was an institution of criminal proceedings within the meaning of s. 211, Indian Penal Code. In 1925 the matter came before a Bench of the Patna High Court in *Parameshwar Lal* v. *Emperor* (10), and the Bench dissented from the Allahabad ruling *Queen-Empress* v. *Bisheshar* (3) and followed the Calcutta Full Bench ruling *Karim Bakhsh* v. *Queen-Empress* (4). The Allahabad ruling *Queen-Empress* v. *Bisheshar* (3) has, therefore been considered and dissented from by three other High Courts, and in one case dissented from by a Bench of five Judges. The weight of authority is, therefore, heavily against the ruling *Queen-Empress* v. *Bisheshar* (3). The reasoning contained in the rulings of the other High Courts is clear and cogent. I, therefore, consider that we should follow the rule of the other High Courts and hold that making of a false charge to the Police of a cognizable offence is the institution of criminal proceedings within the meaning of s 211, Indian Penal Code. There is another reason which inclines me to this view, which reason has not been mentioned in any of the rulings. This is the definition of "investigation" and "judicial proceedings" in s. 4 (l) (*l*) and (*m*) of the Criminal Procedure Code. "Investigation" includes

(6) 17 Ind. Cas. 791; 13 Cr. L. J. 855; 10 A. L J. 429.

(7) 14 C. 633.

(8) 20 M. 79; 7 M. L. J. 16; 1 Weir 188.

(9) 1 Ind. Cas. 187; 32 M. 258; 9 Cr. L. J. 170; 5 M. L. T. 269.

(10) 92 Ind. Cas. 885; 4 Pat. 72; A. I R. 1925 Pat. 678; 27 Cr. L. J. 373; 7 P, L. T. 657.

all the *proceedings* under this Code for the collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf." This clearly shows that "criminal proceedings" include the investigation by a Police Officer. On the other hand proceedings in Court are distinguished, as sub-s. (*m*) says 'judicial proceeding includes any proceeding in the course of which evidence is or may be legally taken on oath." These definitions show that if the second part of s. 211, Indian Penal Code were intended to apply only where proceedings had taken place in Court the language used would not have been "if such criminal proceeding be instituted" but "if criminal proceedings be instituted in Court" or "if judicial proceedings be instituted." As the section simply refers to criminal proceeding I consider that it refers to a Police Investigation as well as to a prosecution.

Another reason for accepting the Calcutta view is that it would be unlikely that the Penal Code would make such a distinction in the two parts of the section as regards the amount of punishment, and make the difference depend on consequences over which the accused had no control.

I consider that the commitment of Johri to Sessions was correct, and that the reference should be refused, and that the Sessions Judge should be directed to proceed with the trial of Johri according to law.

King, J.—I agree. The accused is alleged to have made a report to the Police falsely charging certain persons with having committed an offence under s. 304, Indian Penal Code. The Police investigated and found the charge to be totally false. The persons charged were not prosecuted. The question is whether the accused, by causing the Police to make an investigation, should be held to have caused the institution of a criminal proceeding on a false charge, within the meaning of the second paragraph of s. 211, Indian Penal Code.

I think an investigation of an alleged cognizable offence must be regarded as a "criminal proceeding." This is in accordance with the ordinary meaning of those words, as I understand them. Moreover, under s 4 (1) (*l*) an "investigation" is expressly defined as including all the *proceedings* under the Code for the collection of evidence conducted by a Police Officer. So if Police make an investigation in consequence of a false charge of a cognizable offence, I think it must be held that "criminal proceedings" have been instituted on a false charge, within the meaning of the second paragraph of s. 211, Indian Penal Code.

It may be objected that if a false charge resulting in an investigation amounts to instituting a criminal proceeding, then how are we to give effect to the distinction, made in the first paragraph of s. 211, between (1) instituting a criminal proceeding, and (2) charge a person with the commission of an offence? One answer is that the institution of criminal proceedings does not necessarily involve an accusation of any offence. For instance a man may make an application to a Magistrate that security for good behaviour should be taken from a certain person on the ground that he is by habit a robber. No charge is made of any offence, nevertheless the application must, I think, amount to the "institution of criminal proceeding" if the Magistrate holds any inquiry. The same argument would apply to all proceedings requiring security for keeping the peace or for good behaviour. The fact that they are "criminal proceedings" cannot be doubted, but they do not proceed upon the allegation that any offence has been committed. There is, therefore, at least one clear distinction between the institution of criminal proceedings and the accusation of having committed an offence. There may be other distinctions, but it is unnecessary for our purpose to [illegible] the subject further.

The Allahabad decisions, starting with *Empress of India* v. *Pitam Rai* (1), merely *assume* that the institution of criminal proceedings means the institution *in a Criminal Court*, or the institution of *judicial* proceedings. They do not even discuss the question whether "criminal proceedings" cannot be given a wider meaning so as to include a Police investigation. They only Allahabad case decided by a Bench of two Judges is *Queen-Empress* v. *Bisheshar* (3), but with all due respect to the learned Judges I do not think the judgment can be considered satisfactory. The point at issue was not argued and no reasons are given for dissenting from the Full Bench decision in *Karim Bakhsh* v. *Queen-Empress* (4). My learned brother has discussed the case law and shown that the Madras and Patna High Courts have expressly dissented from the Allahabad view and I have preferred to follow the Calcutta Full Bench decision. I also think that the

latter decision is correct and should be followed.

I concur in the order proposed.

By the Court.—We reject the reference and direct that the Sessions Judge will proceed with the trial of the case.

A. *Reference rejected.*

ALLAHABAD HIGH COURT.

Civil Revision No. 210 of 1931.
November 26, 1931.
NIAMATULLAH, J.
BINDESHARI—APPLICANT
versus
Babu BANSHI LAL—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), s. 60—'Cooking vessels', 'artisan', 'tool', meanings of—Gagra, *whether cooking vessel—Soap maker, whether artisan—Interpretation of s. 60.*

Section 60, Civil Procedure Code, ought to receive a liberal interpretation. The expression "cooking vessels" in the said section does not mean only vessels in which food is actually cooked but includes vessels necessary for cooking operations, such as, a *thali* and a *gagra*. [p. 280, col. 2.]

One who practises the art of soap making should be considered to be an artisan within the meaning of that word in s. 60, cl. (*b*), and the paraphernalia of such a person for the soap factory should be considered as tools of an artisan within the meaning of s. 60 and are, therefore, not liable to attachment and sale in execution of a decree. [*ibid.*]

Civil Revision against an order of the Small Cause Court Judge, Benares, dated the 7th March, 1931.

Mr. *Mansur Alam*, for the Applicant.

Mr. *Damodar Das*, for the Opposite Party.

Order.—This revision arises out of execution proceedings. The respondent obtained a decree for Rs. 287 against the applicant Bindeshari who is a soap manufacturer by profession. The respondent attached certain articles specified in lists A and B annexed to his application for execution. It was objected by the judgment-debtor that the articles attached were his "cooking vessels" and "tools of an artisan" within the meaning of s. 60, cls. (*a*) and (*b*) of the Code of Civil Procedure and were not liable to attachment and sale in execution of a decree. This objection was dismissed by the lower Court except as regards a *batua*. Besides the *batua* exempted, list B mentioned 2 other articles, a *thali* and a *gagra*. List A gave particulars of a number of articles which formed the paraphernalia of the judgment-debtor's soap factory. It includes a brass seal for making soap cakes, an iron pan, canisters, tubs etc. It cannot be disputed that all these articles are necessary for manufacturing soap. The order of the lower Court proceeds on the ground that *gagra* and *batua* are not cooking utensils and that the articles specified in list A cannot be considered to be tools of an artisan. Accordingly it directed the sale of all the properties attached except a *batua* as already stated. In revision it is contended that all the articles aforesaid are exempt from attachment and sale in execution of a decree in view of the prosions of s. 60, cls. (*a*) and (*b*), Civil Procedure Code.

In my opinion, s. 60, cls. (*a*) and (*b*) ought to receive a liberal interpretation. A *thali* is one of the most necessary cooking vessels in a Hindu household. *Gagra*, which is a brass jug for water, though not indispensable, is generally part of kitchen requirements in the society to which the judgment-debtor belongs The expression 'cooking vessels' does not mean only vessels in which food is actually cooked but includes vessels necessary for cooking operations. I am satisfied that these two articles are "cooking vessels" within the meaning of s. 60, cl. (*a*), Civil Procedure Code.

As regards the paraphernalia for manufacturing soap, the question is whether the judgment-debtor can be considered an artisan within the meaning of s. 60, cl. (*b*) and the articles which form such paraphernalia can be considered to be his "tools". The meaning of the word "artisan" as given by Murray in his Dictionary is "one who practices or cultivates an art", an "artist". If this definition of the word "artisan" be accepted, and there is no reason why it should not be, (though in common parlance it is generally taken to mean handicrafts man) one who practises the art of soap making should be considered to be an artisan within the meaning of that word in s. 60, cl. (*b*). The word "tool" is defined in the same dictionary as. "Any instrument of manual operation, a mechanical implement for working upon something as by cutting, striking, rubbing, or other process, in any manual art or industry, usually one held in and operated directly by the hand (or fixed in position, as in a lathe), but also including certain simple machines, as the lathe". This is a very comprehensive definition of the word "tool" and would *prima facie* include the entire paraphernalia for the soap factory of the judgment-debtor. I hold that all the articles mentioned in list A should be considered as tools of an artisan within the meaning of s. 60 (*b*) Civil Procedure Code and, therefore.

exempt from attachment and sale in execution of a decree.

The result is that this application for revision is allowed. The articles attached in execution of the respondent's decree shall be forthwith released.

A. *Revision allowed.*

ALLAHABAD HIGH COURT.

Criminal Revision No. 20 of 1931.
April 10, 1931.
PULLAN, J.

ALLAH BAKSH—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), 421—Jail appeal—Summary dismissal—Discretion unfettered.

Under s. 421, Criminal Procedure Code, a Judge receiving an appeal from the Jail has power to dismiss the appeal summarily on perusing the same if he considers there is no sufficient ground for interference. He is not bound to call for the records or to state the reasons and has an unfettered discretion. *Queen-Empress* v. *Nannhu* (1), commented upon.

Mr. *Mansur Alam*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment.—This is an application in revision of an order the Additional Sessions Judge of Meerut rejecting summarialy an appeal received from the Jail The Court was doubtless acting under s. 421 of the Code of Criminal Procedure which lays down that a Judge on receiving such a petition shall peruse the same, and if he considers that there is no sufficient ground for interfering he may dismiss the appeal summarily. The same section lays down in clear words that the Court hearing such an appeal is not bound to call for the record in the case I have been referred by the learned Counsel to a Full Bench decision of the Allahabad High Court passed three years before Act No. V of 1898 was enacted *Queen Empress* v. *Nannhu* (1), which shows that at that time this Court thought that it was advisable for a Court rejecting an appeal summarily to give some reasons. But that opinion of the Full Bench of this Court was not incorporated in the subsequent Code of Criminal Procedure. The law, in my opinion, does not mean to fetter the discretion of a Court receiving such Jail appeals and there is no ground of revision arising from the action of the learned Additional Sessions Judge in this case. I have been into the case on its merits and I find that the order rejecting the appeal summarily was, in the circumstances of the case the only proper order which the Court could have passed. I dismiss the application.

The bail bond of the applicant is discharged, and he will surrender to serve out his sentence.

A. *Application dismissed.*

(1) 17 A. 241; A. W. N. 1895, 68.

ALLAHABAD HIGH COURT.

Case No. 5 of 1930.
Letters Patent Appeal No. 1033 of 1928.
March 16, 1931.
SULAIMAN, ACIG., C. J. AND BAJPAI, J.

BHUP SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SHEO SHANKER AND OTHERS—DEFENDANTS—RESPONDENTS

Agra Tenancy Act (III of 1926), s 3 (6)—Lease by mortgagee in possession—Redemption by mortgagor, whether terminates lease—Suit for ejectment of tenants in Civil Court—Maintainability.

Where a mortgagee in possession who is authorised to let out the property to tenants, lets it out to tenants in the ordinary course of the *zemindari*, the tenants do not become trespassers on the redemption of the mortgage so as to entitle the mortgagor to sue them for ejectment through the Civil Court. *Ram Chand* v. *Ran Hans* (1) and *Collector of Basti* v. *Sarnam Gharak* (2), referred to.

Letters Patent Appeal against the judgment of Mr. Justice Sen, dated the 13th December, 1929.

Mr. *Baleshwari Prasad*, for the Appellants.

Messrs. *K. D. Malaviya* and *Gopalji Mehrotra*, for the Respondents.

Judgment.—In this case although the original mortgage was simple and the mortgagor was to pay interest to the mortgagee, he executed a subsequent document in favour of the mortgagee putting him in possession of two plots in lieu of interest and authorising him to cultivate those plots or to let them out to tenants. No question was raised before the learned Judge of this Court that this document was for any reason invalid. In the ordinary course of the management the mortgagee let out these plots to defendants Nos. 3 and 4. The plaintiffs redeemed the mortgage out of Court, but instead of suing the tenants in the Revenue Court for their ejectment, in case they had such right, they brought a suit for possession in the Civil Court impleading the mortgagees also. The first Court dismissed the suit holding that the tenants could be ejected by the Revenue Court only. The

lower Appellate Court took a contrary view. A learned Judge of this Court has overruled the view of the lower Appellate Court and restored the decree of the first Court.

We are of opinion that the view taken by a learned Judge of this Court is perfectly right. The plaintiffs had given authority to the mortgagees either to cultivate the plots themselves or to let them out to tenants. They let them out to tenants. The redemption of the mortgage put an end to the mortgage of the proprietary interest but that did not make the agricultural tenants trespassers from that date. It is unnecessary for us to express any opinion as to whether these tenants can, as the law now stands, be or be not ejected by the Revenue Court. It is, however, obvious that the only remedy, if any, which the plaintiffs have is to eject these tenants through the Revenue Court. The learned Advocate for the appellant relies on the case of *Ram Chand* v. *Ran Hans* (1). On the other hand the learned Advocate for the respondent relies on the case of the *Collector of Basti* v. *Sarnam Gharak* (2).

We think that when the mortgagees were in possession of these plots and had full authority to let them out to tenants and they gave them to tenants in the ordinary course of their management of the *zamindari* these latter tenants did not become trespassers on the redemption of the mortgage so as to entitle the plaintiffs to use them for ejectment through the Civil Court.

The appeal is accordingly dismissed with costs.

A. *Appeal dismissed.*

(1) 3 A. L. J. 517.
(2) 11 Ind. Cas. 817; 8 A. L. J. 802.

ALLAHABAD HIGH COURT.

Miscellaneous Case No. 194 of 1931.
March 16, 1931.

SULAIMAN, ACTG. C. J. AND BAJPAI, J.

Babu GURU CHARAN PRASHAD AND ANOTHER—PETITIONERS

versus

Babu Rao VISHNU PARARKAR—OPPOSITE PARTY

Contempt of Court—Judicial proceedings—Publication of disputed Will in newspaper—Contempt.

Where during the pendency of a suit in which the genuineness of a Will was seriously disputed, the editor of a newspaper published a certified copy of the Will, as a paid advertisement, and the object of the publication was to make the public believe that it was genuine :

Held, that the editor was guilty of contempt of Court.

Dr. *K. N. Katju* Messrs *Iqbal Ahmad* and *K. Verma*, for the Applicants.

Messrs. *K. D. Malaviya* and *J.C. Mukerji*, for the Opposite Party.

Judgment.—This is an application for taking proceedings against Babu Rao Vishnu Pararkar, Editor, Printer and Publisher of the '*Aj*' newspaper. The facts are not now in dispute and may be accepted as substantially set forth in the written statement filed by the editor. On the 28th of January 1931 one Beni Ram Shukul brought a certified copy of a document purporting to be a Will of one *Musammat* Raj Rani and showed it to the assistant manager Sri Baldeo Das and requested him to publish it as an advertisement. Rupees 15 were paid for the costs of printing and the copy was published in the paper. We may assume in favour of the editor that the certified copy was actually shown to the assistant manager and was taken back after a copy of it had been retained in his office. The editor however does not deny that the assistant manager understood that this was a document filed in a suit pending in the Court of the Subordinate Judge of Benares. As a matter of fact the copy itself purported to have been taken from a document filed in that suit. It is also now an admitted fact that in the proceedings relating to the substitution of names in that suit the genuineness of the alleged Will of *Musammat* Raj Rani was seriously disputed by the opposite party.

On these facts there cannot be the slightest doubt that the whole object of publishing the Will in the advertisement column was to announce to the public that a Will of *Musammat* Raj Rani existed and that the contents of it were as put in the paper. The whole purpose obviously must have been to make the public believe in the genuineness of the document and to act upon it. It is obvious that this was likely to prejudice the mind of the public against the party to the suit who was impugning the genuineness of the document. The publication undoubtedly helped to create an atmosphere in favour of the party relying upon it and adverse to them who were contesting it. If before the disposal of a pending suit in which a Will is disputed newspapers are allowed to interfere in this way with a fair administration of justice there would be a serious harm done.

In Oswald's Contempt of Court (3rd Edition, page 95) it is noted that 'printing, even without comments, and circulating the brief, pleadings, petition, or evidence of one side only, is a contempt; and accounts of a case by notices, advertisements, or circulars, which misrepresent, or present mere *ex parte* statements of the case, are a contempt.' The publication of this Will was in no sense the publication of a *bona fide* report of the proceedings of the Court. As a matter of fact it was not published as such. The editor, therefore, cannot claim a qualified privilege on that account. We are satisfied that the publication of this document if unchallenged would seriously prejudice the other party and he has a just right to complain.

We are satisfied that the act of the persons responsible for this paper amounted to a contempt of Court.

Before we pass our final order we would like to have a statement to be made on behalf of the editor, printer and publisher of '*Aj*' whether he is prepared to publish an unconditional apology in his paper without delay.

Mr. Malaviya on behalf of the editor states that the editor will be prepared to publish such an apology. Mr. Iqbal Ahmad states before us that in view of the fact that the editor has agreed to publish an apology he does not press for anything except nominal costs. We accordingly issue only a warning to Babu Rao Vishnu Pararkar the editor, printer and publisher and order him to pay one rupee as nominal costs of the applicants.

A. *Order accordingly.*

ALLAHABAD HIGH COURT.

Civil Revision No. 116 of 1930.

March 11, 1931

SULAIMAN ACIG, C. J., AND BAJPAI, J.

FIRM DWARKA DAS-BABU RAM—PLAINTIFF—APPLICANT

versus

THE VAISH FLOUR MILL—DEFENDANT—OPPOSITE PARTY

Civil Procedure Code (Act V of 1908), ss. 151, O. IX, r 13, O. XXI, r 90—Application to set aside sale—Dismissal for default—Inherent power to restore—O. IX, whether applies.

Order IX, Civil Procedure Code, is not applicable to the dismissal of an application under O. XXI, r. 90, but there is an inherent jurisdiction in the Court to restore such an application if good cause is made out. *Thakur Prasad* v. *Fakir Ullah* (1) and *Ganesh Prasad* v. *Bhagelu Ram* (2), referred to.

Civil Revision against an order of the Subordinate Judge, Agra, dated the 21st December, 1929.

Mr. *Damodar Das*, for the Applicant.

Mr. *Panna Lal*, for the Opposite Party.

Judgment.—This is a revision from an order of the Subordinate Judge of Agra dismissing an application for the restoration of a previous application under O. XXI, r. 90, Civil Procedure Code.

After the sale had taken place the applicant applied to have it set aside on the ground of material irregularities and fraud as well as substantial loss. On three occasions he took steps to get service effected on the opposite party but each time the summons was returned with the report that he could not be found. On the fourth occasion the Court ordered him to deposit the necessary costs but he failed to do so on the date fixed and no one appeared on his behalf. The application was accordingly dismissed on the 3rd of August 1929.

The applicant then applied to have the dismissal set aside on the ground that he had been ill and could not attend the Court. He subsequently filed an affidavit in support of his application. The application did not expressly mention that it was made under O. IX, Civil Procedure Code.

The learned Subordinate Judge by a summary order has dismissed the application on the ground that the objection admittedly was an execution proceeding and that O. IX, did not apply to such proceedings.

It is contended on behalf of the applicant that O. IX, read with s. 141 Civil Procedure Code applied to the case. While the old Code was in force it was held by their Lordships of the Privy Council in the case of *Thakur Prasad* v. *Fakir Ullah* (1) "that inasmuch as Chap. XIX of the Code consisting of 121 sections, is devoted to the procedure in executions, it would be supporting if the framers of the Code had intended to apply another procedure, mostly unsuitable, by saying in general terms that the procedure for suit should be followed as far as applicable."

Order XXI, r. 90 had a corresponding section in Chap. XIX, of the old Code and the remarks of their Lordships apply with an equal force to this procedure. It is, therefore, very difficult to hold that merely because of the

(1) 17 A. 106; 22 I. A. 44; 5 M. L. J. 3; 6 Sar. 526 (P. C.).

general provision contained in s. 141 the procedure provided in this Code for suits shall, as far as it can be made applicable, be followed in all proceedings under O. XXI, so as to make O. IX, applicable to the application for setting aside a sale.

This was the view expressed by one of us in the case of *Ganesh Prasad* v. *Bhagelu Ram* (2), where it was remarked that it was difficult to accept the view that O. IX would in terms be applicable to such miscellaneous proceedings. It was further pointed out, that the proper remedy was by applying to the Court to invoke its inherent jurisdiction under s. 151, Civil Procedure Code, Daniels, J, however, relying on certain Oudh cases took a contrary view on the question of the applicability of O. IX, Civil Procedure Code, but agreed that s 151 would certainly apply. Since that case the Calcutta High Court has agreed that the correct view to take is that O IX, is not applicable but that there is an inherent jurisdiction in the Court to restore an application if a good case is made out. We think that O. IX, Civil Procedure Code cannot be applied to the dismissal of the application under O. XXI, r. 90. As pointed out in *Ganesh Prasad's case* (2) the applicability of O. IX might involve a further difficulty of allowing appeals from such orders. We, therefore, think that the learned Subordinate Judge was correct in his view when he remarked that O. IX did not apply to these proceedings, although he was wrong in thinking that it was in the nature of an execution proceeding.

We have already pointed out that the application was not limited to O. IX, Civil Procedure Code. The learned Judge has not at all considered the question that he had inherent jurisdiction to intervene if a good case was made out. This point is not expressly taken in the grounds of revision before us, but we think that as the learned Judge has not considered the application on the merits but has merely dismissed it thinking that it is not entertainable, he has failed to exercise jurisdiction which was vested in him.

We accordingly allow this revision and setting aside the order of the learned Subordinate Judge, send the case back to his Court for disposal of the application on the merits. He need only interfere if he is satisfied that good cause was shown.

In the circumstances we direct that the parties should bear their own costs of this revision and that the costs in the Court below should abide the event.

A. *Case sent back.*

(2) 89 Ind. Cas. 350; 23 A. L. J. 817; L. R. 6 A. 412 Civ; 47 A. 878 A. I. R. 1925 All. 773.

ALLAHABAD HIGH COURT.
FULL BENCH.

First Civil Appeal No. 134 of 1927.
March 2, 1931

SULAIMAN, MUKERJI AND YOUNG, JJ.

PITAM LAL AND OTHERS—APPELLANTS.

versus

KALLA RAM AND OTHERS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 62 - Succession Act (XXXIX of 1925), s. 276—Oral Will—Application for probate, maintainability of—Fact that substance of oral Will was taken down at the time, effect of.

An application for the grant of probate of an oral Will can be entertained under the Probate and Administration Act (V of 1881). [p 286, col. 2.]

The fact that the substance of the oral Will was taken down at the time the Will was made would not make any difference in the eye of the law. That fact would only be a strong piece of evidence to prove the contents of the oral Will. *In re the Will of Haji Mohamed Abba* (2) referred to. *Gokul Chand* v. *Mangal Sen* (1), followed. [p. 287, col. 1.]

First Appeal from a decision of the District Judge, Agra, dated the 16th December, 1926.

On 16th December, 1930, Sulaiman and Young, JJ, made the following

Order of Reference to a Full Bench.—This appeal arises out of an application for grant of Probate, said to have been made by one Pandit Chunni Lal orally on the 29th of April, 1925. Four witnesses were produced on behalf of the applicants to prove the making of this Will by the deceased Chunni Lal. The learned District Judge has remarked that he accepts the evidence of these four witnesses. He has, however, thought that the evidence of these witnesses coupled with a piece of paper containing a note of the substance of the oral Will made by one of the witnesses only makes out the wish of Chunni Lal to make a Will and not a complete Will made by him.

The valuation of this case is over Rs. 15,000 and there is a possibility of the matter going before their Lordships of the Privy Council.

The first point which ought to be settled is whether an application for the grant of a Probate of an oral Will can at all be entertained under the Probate and Administration Act of 1881, which is applicable to this case. Both the oral Will and the application for the grant of Probate were

prior to the coming into force of the new Act (Act XXXIX of 1925).

Undoubtedly there is the authority of *Gokul Chand* v. *Mangal Sen* (1) in favour of the applicants. That case followed an earlier case of the Bombay High Court *In re the Will of Haji Mahomed Abba* (2).

The learned Judges of the Bombay High Court thought that if a nuncupative Will was not admitted, the result would be that although the Succession Act expressly permitted an oral Will, it would at the same time be practically nullified. The Allahabad Judges considered that the question of admitting an oral Will to Probate was one of some difficulty, but following the practice of the English Law which, according to them, presented a bridge by which they could escape from the difficulty of finding that whereas a Hindu or Muhammadan can make a good oral Will, no effect can be given to that Will, such as would be given to a written document they were led in that direction by the Bombay ruling.

As far as we can find, these rulings have not been reconsidered since then. It is not necessary to refer to cases relating to Wills prior to Act V of 1881.

An examination of the provision of the Probate and Administration Act of 1881 raises a considerable doubt as to the correctness of the rule of law laid down in these cases. No doubt in s. 3 the definition of "Will" is wide enough to include an oral Will. The definition of "codicil" which does not arise in this case, will however exclude such an idea, because it refers to an instrument. The word "Probate" is defined as "the copy of a Will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator".

Under s. 62 of the Act, an application for Probate has to comply with certain requirements. It should either have the original Will annexed to it, or, in cases mentioned in ss. 24, 25 and 26, it may have a copy, draft or a statement of the contents thereof annexed to it. A reference to ss. 24, 25 and 26 would make it clear that they contemplate the existence of a written Will, which has either been lost, mislaid or destroyed or is in the possession of a person outside the province who refuses or neglects to deliver it up, but has transmitted a copy. None of these sections refer to an oral Will. It would therefore, seem to follow that the application for Probate must either have the Will annexed or, where the original Will exists but is not forthcoming, a copy or draft statement of its contents annexed. Furthermore, s. 62 requires a declaration that the writing annexed was the last Will of the testator and that it was duly "executed" Section 63 also provides that where the Will, copy or draft is written in a language other than English or than that in ordinary use in the Court, there shall be a translation duly certified to be a true and accurate translation.

Section 27 also shows that administration may be granted of the original Will, where it is in existence but not produced, limited until a Will or an authenticated copy of it is produced.

In view of these provisions of law, it is extremely doubtful that a Probate can be granted by a Court of an oral Will.

We also think that, if a Probate could not be granted of an oral Will, it would not necessarily follow that the right of a Hindu or a Muhammadan to make an oral will would be taken away by the Act, and that such an oral Will would be wholly ineffective and inoperative. The property might vest under the Will, unless there is any express provision of law prohibiting it.

We are, therefore, of opinion that before finally disposing of this appeal it is necessary that the following questions of law may be referred to a Full Bench for an authoritative pronouncement :—

(1) Whether an application for the grant of Probate of an oral Will can be entertained under the Probate and Administration Act (Act V of 1881)?

and (2) Whether the Act would apply to a case where the substance of the oral Will was taken down by a witness at the time?

Let this case, therefore, be put up before the Hon'ble the Chief Justice for constitution of a Full Bench to decide the above two points.

Messrs. *N. S. Asthana* and *Nanak Chand*, for the Appellants.

Messrs. *U. P. Bajpai*, *S. N. Chaube* and *Hari Ram Jha*, for the Respondents.

Judgment.—Two questions have been referred to this Full Bench for consideration. They are :—

(1) Whether an application for the grant of Probate of an oral Will can be entertained under the Probate and Administration Act (Act V of 1881).

and

(2) Whether the Act would apply to a case where

(1) 25 A. 313; A. W. N. (1903) 63.
(2) 24 B. 8; 1 Bom. L. R. 715.

the substance of the oral Will was taken down by a witness at the time?

If the questions were *res integra* and we had to consider nothing but the provisions of the Probate and Administration Act (Act V of 1881) there would be considerable difficulty in holding that a Probate of an oral Will could be granted.

No doubt the definition of "Will" though not that of "codicil", in s. 3 was wide enough to include an oral Will. But "Probate" was defined as meaning the copy of a Will certified under the seal of a Court of competent jurisdiction, with a grant of administration to the estate of the testator. We then had ss. 24, 25, 26 and 27 relating to the grants limited in operation. The language of these sections presupposed that the Will has been lost or mislaid, or was in the possession of a person residing outside the province or that it was in existence but was not forthcoming. The language of these sections was, therefore, appropriately related to a written Will and not to an oral Will. Lastly, we had s. 62 which referred to the application to be made for Probate which must have the Will annexed or in the cases mentioned in ss. 24, 25 and 26, a copy, draft or a statement of the contents thereof annexed and must also state that it was duly executed. It did not expressly say what was to be done in the case of an oral Will. Section 63 referred to the case where the Will was in a language other than English, of which a translation had to be annexed.

Reading these sections together, it would have followed that the procedure laid down for the grant of a Probate related to the Probate of a written Will and not an oral one.

No doubt under the Succession Act (Act X of 1865) privileged Wills made by soldiers or mariners need not be wholly in writing. Then there was s. 187 which laid down that no right as executor or legatee could be established in a Court of Justice unless a Court of competent jurisdiction had granted Probate of the Will under which the right was claimed. But the language of s. 244 of the Succession Act though similar in some respects to that of s. 62 of the Probate and Administration Act, was not absolutely identical, as the latter section had the words allowing the annexing of "a copy, draft or statement of the contents of the original Will" limited to the cases covered by contents 24, 25 and 26. It might also have been difficult to interpret s. 62 of the Probate and Administration Act not according to its plain language but in the light of the difficulties which might arise under the Succession Act. However, the fact remains that the Bombay High Court *In re the Will of Haji Mahomed Abba* (2) held that a Probate of a nuncupative Will could be granted. This case was followed by the Allahabad High Court in *Gokul Chand* v. *Mangal Sen* (1) where the difficulties were fully appreciated but it was considered more convenient and in accordance with the practice in England to admit Probate of an oral Will.

The Legislature has now consolidated these two Acts and passed the Indian Succession Act (Act XXXIX of 1925). It permits of oral Will being made by Muhammadans as well as by soldiers, mariners and airmen whose Wills are not required to be in writing. The language of s. 276 is almost identical with that of the old s. 62 of the Probate and Administration Act. It does not expressly refer to oral Wills. It must be presumed that the Legislature was aware of the trend of rulings in this country. And when in re enacting the Statute it has adhered to the former phraseology, we are justified in inferring that the interpretation laid down in the rulings has been approved of by the Legislature.

If oral Wills are not to be admitted to Probate there would certainly be one serious difficulty in the way of soldiers, mariners and airmen. Section 213 of the new Act does not exempt them and lays down that their executor or legatee cannot establish the Will without having obtained Probate or Letters of Administration. If s. 276 does not permit of a Probate being granted of an oral Will, their Wills would be nullified in their effect.

We may further note that although the Will in this case was made before the new Act came into force and would accordingly not be invalid, the application was made shortly before the coming into force of the new Act. The Act lays down a rule of procedure and not a substantive law and, therefore, there is no reason why the new Act should not govern these proceedings. It is also obvious that there was nothing to prevent the applicant from withdrawing this application and filing a fresh application as soon as the new Act came into force. Having given the case our best consideration we think that the

rule laid down in *Gokul Chand* v. *Mangal Sen* (1) should be followed.

Our answer to the first question is, therefore, in the affirmative.

In our opinion the fact that the substance of the oral Will was taken down at the time the Will was made would not make any difference in the eye of the law. That fact would only be a strong piece of evidence to prove the contents of the oral Will.

A. *Answered in the affirmative.*

ALLAHABAD HIGH COURT.
SPECIAL BENCH.

Case No. 40 of 1930.
February 5, 1931.

BOYS, BANERJI AND NIAMATULLAH, JJ.

In the matter of Pandit SHANKAR LAL.

Legal Practitioners—Misconduct—Enquiry should not be started without grave consideration.

It is right and proper that all judicial officers high or low should keep a vigilant eye on the conduct of legal practitioners, of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Legal Practitioners Act or make complaints under the Bar Councils Act according to the status of the legal practitioner concerned, but legal practitioners are one and all of whatever status, entitled also to the protection of the Court, and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. Permanent and undeserved harm may be caused to the reputation of any legal practitioner against whom ill-considered proceedings are taken. [p 288, cols. 1 & 2]

Judgment.—This case came up before us on the 7th of March, 1930, for consideration as to what action, if any, should be taken by this Court under s. 10 (2) of the Bar Councils Act, XXXVIII of 1926, in reference to a complaint forwarded by a Magistrate of the First Class, Mr. Waliullah, charging *Pandit* Shankar Lal, an Advocate practising at Fatehpur, with gross misconduct, in that he instigated a false complaint against Sub-Inspector Mukhtar Ahmad. The complaint against Mukhtar Ahmad was filed by one Sheodarshan who alleged that, having come to Court for the purposes of giving evidence in a case, he was taken by Sub-Inspector Mukhtar Ahmad from the verandah of the Court to a little distance away under a tree and was there told that he must give evidence identifying a particular accused in another case. Sheodarshan, according to his own account then given, had refused and was threatened by the Sub-Inspector that he would be challaned under s. 110 of the Code of Criminal Procedure, and upon his persisting in his refusal he was slapped once or twice by the Sub-Inspector. On hearing the commotion two or three of the Vakils, according to Sheodarshan, arrived, and the Sub-Inspector went away. Sheodarshan says that he went straight to the Court of Mr. Ganga Ram, Sub-Divisional Officer of Khaga, and complained that he had been beaten by the Sub-Inspector. The Sub-Divisional Officer Mr. Ganga Ram in his evidence corroborates Sheodarshan on this point, and apparently sent for the Sub-Inspector and the Sub-Inspector came and the latter alleged that Sheodarshan was to have been a witness in the case and had been got at by the other side and refused to give evidence. Apparently Mr. Ganga Ram took no further action, and one can only assume that he let the matter slide. Sheodarshan then about 5 o'clock in the evening, the incident having taken place between 1 and 2 o'clock, filed a complaint against Sub-Inspector Mukhtar Ahmad. This all took place on 19th April, 1928, nearly three years ago.

On 11th June 1929 after many delays (we do not suggest that the Magistrate was wholly responsible) the Magistrate, Mr. Waliullah, acquitted the accused Sub-Inspector Mukhtar Ahmad, writing a very lengthy judgment criticising the witnesses for the prosecution, the great bulk of those criticisms having, in our view, no value whatever.

On 17th October, 1929, Mr. Waliullah forwarded his judgment to the District Judge with the present complaint of gross misconduct against *Pandit* Shankar Lal Advocate, alleging that he had instigated the false complaint made by Sheodarshan against Sub-Inspector Mukhtar Ahmad. This complaint was based on the statements of defence witnesses in the criminal case that *Pandit* Shankar Lal and another legal practitioner, a Pleader, Mr. Hashmat Ali, had instigated Sheodarshan to make a false complaint against Sub-Inspector Mukhtar Ahmad.

Similar proceedings but under the Legal Practitioners Act were instituted against Mr. Hashmat Ali a Pleader and on 7th March, 1930, when this matter first came before us, we were of opinion that we should not pass any orders until the result of the proceedings against Mr. Hashmat Ali under the Legal Practitioners Act were

known. We have now received the report of Mr. Waliullah dealing with the case of Mr. Hashmat Ali. We have been unable to discover that there is any substantial difference between the case against *Pandit* Shankar Lal and the case against Mr. Hashmat Ali. In the former case, however, Mr. Waliullah's report is unfavourable to *Pandit* Shankar Lal, while in the latter case he has found that the main charge against Mr. Hashmat Ali has not been proved. In the former case he proceeded merely upon his findings in the case against Mukhtar Ahmad. In the latter case he has held his separate inquiry. The difference in the procedure adopted is due to the fact that *Pandit* Shankar Lal was an Advocate of this Court and proceedings against him are governed by the Indian Bar Councils Act, while Mr. Hashmat Ali is a Pleader and action against him is governed by the Legal Practitioners Act. The result is that the complaint against *Pandit* Shankar Lal was forwarded to this Court without any notice to him or any opportunity being given to him of showing cause.

Before we had had the advantage of seeing the result of the inquiry into the conduct of Mr. Hashmat Ali we were disposed on reading the judgment in the case, *Sheodarshan* v. *Sub-Inspector Mukhtar Ahmad*, to hold—

(*a*) that there was no reason for believing that the complaint made by Sheodarshan against Sub-Inspector Mukhtar Ahmad was at the very least very probably a true complaint

(*b*) that there was certainly not sufficient material on the record for issuing any notice to *Pandit* Shankar Lal calling upon him to explain his conduct or directing the District Judge to make any inquiry.

That opinion of ours even so held has been amply strengthened by the report in the case of Mr. Hashmat Ali. We hold that there is no ground for directing any inquiry into the conduct of *Pandit* Shankar Lal, and we summarily reject the complaint.

We cannot, however, leave the matter at that without putting on record our view that the Magistrate was unduly hasty in making that complaint. It is right and proper that all judicial officers high or low should keep a vigilant eye on the conduct of legal practitioners, of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Legal Practitioners Act or make complaints under the Bar Councils Act according to the status of the legal practitioner concerned, but legal practitioners are one and all of whatever status, entitled also to the protection of the Court, and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. As much injustice may be done to a legal practitioner by ill-conceived proceedings against him as may be done to the public interest and to the general body of legal practitioners by failure to keep a vigilant eye upon and take proper strong action against cases of misconduct. It is manifest that permanent and undeserved harm may be caused to the reputation of any legal practitioner against whom ill considered proceedings are taken. We say advisedly "ill-considered" proceedings. It is equally the bounden duty of every judicial officer to initiate proceedings where he has upon grave consideration, reason to believe there has been misconduct as it is to refrain from ill-considered proceedings and *vice versa*. In the present case the Magistrate could at least and should have refrained from initiating proceedings against *Pandit* Shankar Lal until he made inquiry into the proceeding which he was intiating against Mr. Hashmat Ali. Even though there may have been no suggestion that *Pandit* Shankar Lal and Hashmat Ali were acting in concert a failure to establish the case against the latter would have suggested doubts as to the truth of the case against the former. We hold that in this case no complaint should have been filed and the proceedings have disclosed nothing whatever to the discredit of *Pandit* Shankar Lal, and on the other hand it is more than probable that such action as he took was properly taken. The complaint is rejected.

A copy of the order in the Miscellaneous Case No. 102 against Mr. Hashmat Ali will be attached to this order. Copies of these orders will be sent free of cost to *Pandit* Shankar Lal.

A. *Complaint rejected.*

PATNA HIGH COURT.

Criminal Revision No. 615 of 1931.
January 14, 1932.
SCROOPE, J.
J. AGARWALA—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Factories Act (XII of 1911), ss. 34, 41—Failure to report accident—Liability of occupier—Joint trial of occupier and manager—Legality—Criminal Procedure Code (Act V of 1898), ss. 5, 239 (a)—Offences under Factories Act, whether offences of the same kind.

Although s. 34, Factories Act, makes the manager liable for failure to report an accident, under s. 41 of the Act the occupier is also liable for such failure jointly and severally with the manager.

Under s. 41, Factories Act, the liability is fastened on the occupier irrespective of the actual offender for the breach of certain provisions.

Offences under ss. 41 (*h*) and s. 41 (*j*) of the Factories Act are offences of the same kind within the meaning of s 239 (c), Criminal Procedure Code, and so persons jointly and severally liable for offences under the said clauses may be tried together for two offences committed by them.

Criminal Revision against an order of the Sessions Judge, Manbhum Sambalpur, dated the 13th October, 1931

Mr. *S. P. Verma*, for the Petitioner.

Mr. *Manzar*, for the Assistant Government Advocate, for the Crown.

Judgment—The petitioner Mr. J. Agarwala has obtained a rule from this Court against his conviction under ss. 41 (*h* and 41 (*j*) of the Indian Factories Act. He was tried along with Mr. Rakhit for offences under these sections and they were sentenced to pay a fine of Rs 100 each under s. 41 (*h*) and they were sentenced to pay a fine of Rs. 100 each under s. 41 (*j*). On appeal to the Sessions Judge of Purulia the separate sentences of fine were set aside and it was directed that the fine in each case should be jointly payable as laid down in s. 41. The case for the prosecution was that the petitioner Mr Agarwala was the occupier of the Tatanagar Foundry at Jamshedpur. The other person with whom he was tried, Mr. Rakhit, was the manager of the factory. These facts are not disputed now, nor is it disputed that when the Inspector of Factories inspected the factory in June last he found that there was no register of workers maintained in the factory as required by s. 35 of the Act. It was also discovered that there had been two serious accidents in the factory but no notice had been sent to the authorities as required under s. 34. Mr. Agarwala, who is now the petitioner and with whose offence alone we are now concerned, pleaded that he was not the occupier of the factory and he could not, therefore, be guilty of any offence. Both the lower Courts have found that in fact he was the Managing Agent of the factory and in fact had control of the factory and was an occupier within the meaning of the Act and Mr. Verma for the petitioner does not dispute this finding now. But his first contention is that under s. 34 it is the duty of the manager to give information about accidents, and not the duty of the occupier and as no duty has been cast on the occupier by this section he should not have beed made jointly liable with the manager. But s. 41 is to my mind perfectly clear. It lays down that in case of breach of certain provisions and it is not disputed here that these provisions have been infringed, the liability is fastened on the occupier irrespective of the actual offender. Section 34 is the section which makes the manager liable for failure to report an accident and s. 41 the occupier of the factory, and the reference to "the manager" in the latter section emphasises his joint and several liability along with the occupier.

The next point taken was that the joint trial of the petitioner along with Mr. Rakhit is bad, but I do not see any substance in this when s. 41 (*j*) makes them jointly and severally liable. Such joint and separate liability could not be enforced in two separate trials. This is a particular provision of the Factories Act and is one of the cases contemplated by sub cl. (2) of s. 5 of the Code of Criminal Procedure. The other argument on this point was that assuming that there could be a joint trial of the petitioner along with Mr. Rakhit for each separate offence they could not be jointly triable for both offences at the same time. In other words the contention amounts to this that there should have been two trials of both the petitioner and Mr. Rakhit for the two offences. Section 239 (c) of the Code of Criminal Procedure answers this argument. In my opinion the offences under the Factories Act are offences of the same kind within the meaning of that section.

The petition must therefore be rejected.

A. *Petition rejected.*

PATNA HIGH COURT.

Civil Appeal No. 36 of 1928.
November 21, 1930
ROSS AND DHAVLE, JJ.

BHEKDHARI SINGH AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
SRI RAMCHANDERJI AND OTHERS—
DEFENDANTS—RESPONDENTS.

Hindu Law—Religious endowments—Dedication—Essentials—Delivery of possession to trustee, necessity of—Construction of deed—Absolute dedication or mere charge—Tests—Estoppel of reversioner—Evidence—Admission of loose zemindari papers at late stage—Civil Procedure Code (Act V of 1908), O. XIII, rr 1, 2.

Where an endowment deed purported to be a deed of dedication of the settlor's properties to certain deities but there was failure to carry out the dedication into effect by delivery of the property by the settlor to the *mutawalli*, nor was there any change effected in the mode of expenditure of the properties dedicated, a large part being spent for the settlor and a very small one for the deities as before:

Held, that under the circumstances all that the settlor effected by the deed was the creation of a charge on the properties for the service and worship of deities therein mentioned, and not an out and out dedication. *Ganga Narain Sircar* v. *Brindabun Chunder* (2), *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (3), *Madhub Chandra* v. *Saratkumari Devi* (4), *Sri ThakurParmod Banabihari* v. *Atkins* (5), *Jadunath Singh* v. *Thakur Sitaramji* (6), *Sonatun Bysack* v. *Juggat Sooadree Dosee* (7), *Ashutosh Dutt* v. *Doorga Churn Chatterji* (8), *Sri Thakurji* v. *Sukhdeo Singh* (9), *Harnarayan* v. *Surja Kunwari* (10), *Deosaran Bharthi* v. *Deoki Bharthi* (11), *Abadi Begum* v. *Kaniz Zainab* (12), *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (13) and *Muzhurool Huq* v. *Puhaj Ditary Mohapattur* (14), referred to. [p. 296, col. 2.]

Where the donor of a religious endowment constitutes himself the *mutawalli* there must be some unmistakable act to show that the possession was transferred to the deities and that the donor completely divested himself of the ownership of the property. The effective way of showing this transfer of possession is by altering the land register. *Deosaran Bharthi* v. *Deoki Bharthi* (11), relied on. [p. 295, col. 2.]

Where a *mutawalli* has been appointed to look after the temple properties, an acceptance by the temple *pujari* of a gift on behalf of the deities would not amount to an acceptance in law because the gift to the deities must be accepted on their behalf by the *mutawalli*. [*ibid*.]

Where a reversioner bought a portion of a village, the other portion of which was bought by the deceased for settling that portion on certain deities and both the purchases were effected by the same deed:

Held, that the purchase by the reversioner under the same deed did not raise any estoppel and it was open for him to challenge the settlor's dedication to the deities. [p. 295, col. 1.]

Ordinary *zemindari* papers on loose-sheets can be fabricated at any time and such papers should not be admitted by the Court at a late stage of the case O. XIII, rr. 1, 2, Civil Procedure Code is intended to provide for papers of this kind. [*ibid*.]

Civil Appeal from the decision of the Sub-Judge, Gaya, datad the 31st August, 1927.

Messrs. *S. M. Mullick*, *Ganesh Sharma* and *S. N. Rai*, for the Appellants.

Messrs. *Hasan Imam*, *G. S. Prosad* and *N. K. Prosad*, for the Respondents.

ROSS, J.—This is an appeal by the plaintiffs in a reversioners' suit. Plaintiff No. 1 is admittedly the next reversioner to Nanhuprasad Singh who is said to have dedicated his property to certain deities by two deeds. Plaintiff No. 2 is the son, and plaintiff No. 3, the nephew, of plaintiff No. 1. The plaintiffs in effect seek a declaration that the deeds of dedication are colourable and inoperative and do not bind the reversioners. Defendants Nos. 2 to 5 are the deities to whom the dedication was made, defendant No. 6 is the widow of Nanhuprasad Singh and defendant No. 7 is the minor daughter of Nanhuprasad Singh and was represented, after an amendment of the plaint, by her maternal grandfather; defendants Nos. 8 to 13 are the managers under the deeds of dedication of whom defendants Nos. 8 to 11 were named in the first and second deeds and defendants Nos. 12 and 13 in the second only. Three written statements were filed; the first by defendants Nos. 1 to 6 who pleaded a valid dedication; the second by defendants Nos. 8 to 13 whose defence was similar, and the third by defendant No. 7 who supported the plaintiffs.

The Subordinate Judge decided in favour of the dedication and dismissed the suit. The appeal is resisted by defendants Nos. 1 to 6 and by defendants Nos. 8 to 12.

The dedication was by two deeds: (*a*) Ex. E, dated 2nd November, 1922; and (*b*) Ex. C, dated 27th August, 1925. The execution and registration of these deeds, though disputed at the trial, has been admitted in the appeal. Nanhuprasad Singh at the time of the first deed had a wife Chandrajote Kuer who was his fourth wife and a daughter by her *Musammat* Bachhi Kuer (defendant No. 7). Chandrajote Kuer died in August or September, 1924, and Nanhuprasad Singh married a fifth wife Jaitoon Kuer (defendant No. 6) in June or July, 1925, and died shortly after the execution of the second deed on 12th September, 1925. By the second deed he purported to cancel the first and to re-dedicate the property with certain changes. The first deed was in favour of four deities and by the second a fifth was added, Sri Prabatiji Maharani, whose name was said to have been omitted in the first

deed by mistake. Apparently there was a clerical mistake in the first deed because although only four deities are named the word "five" is used in two places in the deed; and the second deed may, therefore, be valid to the extent of this amendment, even if the first deed constituted a valid *wakf*. Chandrajote Kuer, who had been designated in the first deed as *mutawalli* after Nanhuprasad Singh, having died, Jaitoon Kuer was in the second deed named in her place. One of the five managers Sheodayal Singh named in the first deed had died and in his place Dasi Singh (defendant No. 12) was nominated in the second deed and Rameswar Prasad Singh (defendant No. 13) was appointed as head *panch* with certain powers over the others. In the second deed provision was also made for the devolution of the *mutawalli* ship in the event of Nanhuprasad Singh's leaving male heirs; but this event did not happen. It was the case of both sides that the second deed was intended merely to confirm and supplement the first deed and that it had no effect in law if the first deed was a valid dedication, so far as it varied or added to the first deed. Whether Jaitoon Kuer and the two new managers have been validly appointed depends upon whether Nanhuprasad Singh reserved to himself in the first deed power to make such appointments.

Exhibit E, the deed of 2nd November, 1922, which is the most important document in the case, recites that the executant had no heir except his wife Chandrajote Kuer and a minor daughter, *Musammat* Bachhi Kuer, and that he had installed the idols of Sri Ramchandra, Lachuman, Jankiji and Sheoji, that is to say, the five deities, and he had been meeting the costs of their worship etc, from his own funds and from the income of the *zemindari*, but so far he had not been able to make any permanent arrangement for management of the *thakurbari* which would meet the costs of festivities and *Rajbhog* of the said deittes in the way in which these were made in his life. He fears that on his death his heirs and representatives would not perform these works after his wishes and there would be difficulty in holding festivities and in offering the *Rajbhog* and therefore he was advised to create a *wakf* of his moveable and immovable properties, which were and should be in his possession, in favour of the deities, to make them absolute owners of the same and to establish for administration and supervision of the said properties a Committee of management.

Therefore he dedicated his whole and entire properties specified in the schedule to the deed, without any exception together with his entire *dakhli* and *khariji* rights and incidents of *zemindari* which he had acquired or should acquire later on to the aforesaid deities and made them absolute owners of his moveable and immoveable properties. The deed then goes on to appoint the five persons named therein as managers and *mutawallis* for the management and administration of the said properties with the proviso that among the said managers and *mutawallis* he in his lifetime and his wife in her lifetime on his death should be the first (*sadr*) manager. They were to get their names registered in the Land Registration Department as manager and *mutawalli* of the said deities. They (*i. e.*, the executant and his wife) were to be in possession and occupation of the *wakf* properties in the capacity of manager and *muttawalli*. Then were set forth the objects upon which the income of the *wakf* properties was to be expended; first, the payment of public demands; secondly, the salaries of *amlas* and costs of boundaries and earth work and of suits relating to the *wakf* properties; thirdly, the residue of income was to go towards the maintenance of worship, the offering of *Rajbhog* and festivities of Sri Thakur Maharaj and the other deities installed in the said *thakurbari* and temple; and fourthly if any surplus remained after meeting all these expenses, this should be utilized for chanting of *kathas* and *purans*, for payment of *dakshina* to the *pandits*, for opening of a Sanskrit *Pathsala* connected with the *thakurbari* for Sanskrit and Hindi education of boys, for establishment of a *sadabarat* institution to offer help to *fakirs*, *sanyasis* and hungry people. Then comes the following clause:

"Whereas in my lifetime (the original contains words omitted in the official translation "and, after my death, in the lifetime of my wife") I shall get my personal expenses (*kharach zati*) as well as that of my dependants of my family from the income of the said *wakf* properties dedicated to Sri Thakurji aforesaid according to my position in life (*hasab liyakat apne*) and when my minor daughter *Musammat* Bachhi Kuer reaches her marriageable age, her marriage expenses shall be met by the income of the *wakf* property; whereas for the performance of her marriage it will be incumbent upon the manager to meet all suitable expenses from the income of the *wakf* properties and they shall have no objection whatsoever regarding it."

Then follow provisions for the maintenance of a priest and servant and for the managers' keeping accounts and holding

monthly meetings to check the accounts and provisions for the constitution of these meetings. Then come the words:

"Whereas I reserve the right of appointment of managers in my own hand during my lifetime and on my death my wife *Musammat* Chandrajote Kuer shall exercise this power and on her death the appointment of *mutawallis* shall be with the consent of all or with the consent of the majority of the surviving managers; whereas if any of the abovenamed managers dies, is turned out or resigns after my or my wife's death, the surviving *panches* shall hold a meeting and appoint in place of the deceased one, another manager.."

And then follow certain provisions relevant to the appointment of managers. Then comes a clause declaring that the properties are inalienable and that there is only a limited power of leasing for five years; and finally the following clause:

"If any property is acquired from the income of the *wakf* property, the same shall also be treated as accretion to the *wakf* property and cannot be conveyed by sale or any other deed by anyone."

Before dealing with the construction of this document as a whole, I shall refer briefly to the position of *Musammat* Jaitoon Kuer and defendants Nos. 12 and 13. The deed is very inartistically drawn and it is by no means clear that the settlor intended the Committee of management to function during his life or the life of his widow; and I am inclined to think that this was not the meaning of the deed. No real distinction seems to be drawn between manager (*muntazim*) and *mutawalli*. The settlor reserves to himself and to his wife (if she survived him) the power to appoint managers; but this appears to be merely a power to fill up vacancies among the managers and there does not seem to be any power reserved to appoint a manager who would hold the same position as the settlor and his wife Chandrajote Kuer; and, after the death of the settlor and his wife Chandrajote Kuer it is quite clear that any vacancies in the management are to be filled by the surviving managers. While therefore the appointment of defendant No. 12 Dasi Singh in place of the deceased manager Sheodayal Singh appears to be within the powers reserved, and possibly though doubtfully, the appointment of Rameswar Prasad Singh (defendant No. 13) who however has not appeared to defend the appeal, there seems to be no power to appoint *Musammat* Jaitoon Kuer as *mutawalli* if this deed as a whole is read as a dedication out and out of the settlor's property. If however it is construed as creating a charge only, these questions do not arise.

The argument for the appellants is that on the proper construction of the deeds of dedication there was no valid gift, but at the most a charge was created in favour of the deities for their service and wordship; and that on the evidence it should be held that the deeds did not take effect as an absolute gift.

Before dealing with this argument it will be convenient to examine some of the authorities on the subject of *wakf* in order to ascertain how deeds of this nature are to be tested. In *Kasheshuree Dassee* v. *Krishna Kamenee Dassee* (1), their Lordships after construing the deed in that case as a deed of endowment said:

"The lower Court has not.. .....tried the fact of the *bona fide* nature of the endowment with reference to the use of the proceeds from the time of the confirmation of the endowment exclusively for religious and pious purposes, but has confined its decision to the inference drawn from the wording of the deeds If however the result of this enquiry establish that Koylass himself never intended that the proceeds were so to be used, and accordingly they were not used, the case for the plaintiff must fail."

In *Ganga Narain Sircar* v. *Brindabun Chander* (2) their Lordships said:

The tests of a *bona fide* or a nominal endowment are, how did the founder treat this property, or how have his descendants treated it. Has the income of the endowed lands been continuously applied to the object of dedication. We can never assent to the doctrine—that because a nominal endowment has been once made it is to be regarded as an endowment for ever."

In *Ram Pershad Doss Adhikaree* v. *Sreehuree Doss Adhikaree* (3) it was said:

"It may be that a portion of the profits of the lands in the possession of the defendant had been for some time used for the worship of the idol, but that circumstance cannot impose on the respondent the liabilities attached to the office of a shebait"

These decisions were relied upon in 6 Ind. Cas. 26 *Madhub Chandra* v. *Saratkumari Devi* (4) and from these and other decisions the conclusions were drawn that in order to support the case that the lands in suit formed the subject of a valid public endowment, it must be established that an absolute grant was in the first place made with the intention that the profits should be applied for the services of the idol; that the profits have since been so applied and that the members of the family of the founder have not treated the property as one the profits of which were mainly intended to be applied for their benefit. This decision was followed in this Court in *Sri Thakur Parmod Banabihari* v. *Atkins* (5), where it was said that a dedication to be

(1) 2 Hay. 557.
(2) 3 W. R. 142.
(3) 18 W. R. 399.
(4) 6 Ind. Cas. 26.
(5) 53 Ind. Cas. 106; 4 Pat. L. J. 583.

effectual must be real and not nominal and it must be shown that the grantor completely divested herself of every portion of the property which was the subject-matter of the grant.

It was pointed out that the property had always stood recorded in the name of the estate in the Land Registration Department and that the mode of dealing with the property by the parties interested in the endowment showed that they regarded the property as belonging to the estate; and it was held that the original endowment was altogether ineffectual and that the trust in favour of the idol was never brought into existence. In *Jadunath Singh* v. *Sitaramji* (6) their Lordships of the Judicial Committee were dealing with the construction of a deed of endowment and they referred to *Sonatun Bysack* v. *Juggut Soondree Dosee* (7) and to *Ashutosh Dutt* v. *Doorga Churn Chatterji* (8). In both of these cases there was a nominal gift at the beginning to the idol, but the subsequent dispositions so cut down that gift that there was no right to the idol such as to make the property pass as an absolute and entire interest in its favour. In the case with which their Lordships were dealing, it was held that there was no such cutting down although half the income was reserved for the remuneration of the members of the grantor's family as managers. But it was pointed out that if the income of the property has been large a question might have been raised in the circumstances, as throwing some doubt about the integrity of the settlor's intention but, as the entire income was only Rs. 800 the payment was of a trifling kind and it was held that there was no impropriety in the ear-marking of a certain part of the money to remunerate the members of the family as managers so long as they should so continue.

In *Sri Thakurji* v. *Sukhdeo Singh* (9) it was held that there was no dedication on the following facts: (1) the transfer was of the whole property; (2) the failure to obtain mutation of names; (3) the failure to produce any accounts; (4) the fact that the expenditure on the idol was at the most one-tenth of the whole income; and (5) the absence of any explanation by the widow on any of the above points and of any accounts by her of her managership and dealing with the income. On these facts it was held that although the deed purported to make over the property irrevocably to the idol, there was in fact no intention to dedicate. In *Harnarayan* v. *Surja Kunwari* (10) the Judicial Committee laid down that the question whether the idol itself should be considered the true beneficiary, subject to a charge in favour of the heirs for their upkeep, or the heirs should be considered the true beneficiaries of the property subject to a charge for the upkeep of the worship and expenses of the idol is a question which can only be settled by a conspectus of the entire provisions of the instrument. The instrument in that case was a Will The question therefore was one purely of construction.

In *Deosaran Bharthi* v. *Deoki Bharthi* (11) it was held by this Court that there must be something shown to indicate an acceptance on the part of the donee and whether there has been an acceptance and what constitutes acceptance depends on the circumstances of each case. The giving away of the property as the essential ingredient for a valid gift implies a divesting of the ownership in the property by the donor; and it was held that a registered deed of gift cannot take the place of those essentials among which is the complete divesting of the ownership by the donor; and it must be proved in each case, apart from the registration of the document that there was a complete divesting of the ownership and that a registered deed of gift, as any other such document, may be merely a nominal transaction. The essential ingredient that constitutes a gift whether of movable or immovable property in the Hindu Law is the *sankalp* and the *samarpan* whereby the property is completely given away, and the owner completely divests himself of the ownership of the property. The evidence of the actions of the party after the deed was gone into as determining the question whether there had been a real dedication *i. e.*, the *sankalp* and the *samarpan* of the property; and one of the points emphasized was that there had been no attempt by the donee to have his name mutated in the landlord's *sharista*. In

(6) 42 Ind. Cas. 225; A. I. R. 1917 P. C. 177; 44 I. A. 187; 39 A. 553; 21 C. W. N. 953; 22 M. L. T. 52; 20 C. C. 200; 19 Bom. L. R. 687; (1917) M. W. N. 605; 26 C. L. J. 309; 4 O. L. J. 586 (P. C.).

(7) 8 M. I. A. 66; 2 Suther. 37; 1 Sar 721 (P. C.).

(8) 5 C. 436; 6 I A. 182; 5 C. L. R. 296 (P. C.).

(9) 58 Ind. Cas. 883; 42 A. 395; 2 U. P. L. R. (A), 91; 18 A. L. J. 390 (F. B.).

(10) 63 Ind. Cas. 31; A. I. R. 1921 P. C. 20; 48 I. A. 143; 43 A. 291; 25 C. W. N. 961; 14 L. W. 633 (P. C.).

(11) 80 Ind. Cas. 980; A. I. R. 1924 Pat. 657; 3 Pat. 842; 5 P. L. T. 305.

Abadi Begum v. *Kaniz Zainab* (12), a case of a Muhammadan *wakf*, their Lordships pointed out the significance of the absence of mutation of names and the suppression of accounts on the question whether there was a dedication or not. In *Mahomed Ahsanullah Chowdhry* v. *Amarchand Kundu* (13) the Judicial Committee were dealing with a Muhammadan *wakf* but the principles are equally applicable to the case of a Hindu endowment. It was observed as follows:

"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift..... ..... Their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*,"

and then quote the opinion of Kemp, J., in *Muzhurool Haq* v. *Puhaj Ditary Mohapattur* (14):

"We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan Law."

In that case it was held that the effect of the deed was only to create a charge on the property for the religious and charitable purposes therein mentioned.

Turning now to the construction of the deed as a whole it appears from the recitals that the object of the deed was to provide for the maintenance of the service and worship of the deities in the way in which they had been celebrated in the settlor's lifetime. The operative words, however, purport to dedicate the whole property to the deities and to provide for the expenditure of the entire income under four heads which are exhaustive of everything Thereafter comes the clause which I have quoted in full; and it is on this clause that the appellants rest their main argument. It is contended that the effect of this clause is to cut down the grant in favour of the deities and in effect to reduce it to a charge on the estate, because the settlor reserves the right to his personal expenses and those of his wife and family according to his position in life, as well as the marriage expenses of his daughter. The clause indicates that no change was to be made in the settlor's scale of expenditure. The words used are *hasab liyakat apne*, that is to say, he was to get his personal expenses and the expenses of his family out of the estate according to their position in life or according to their means. It is contended that this imposes no limit and further that these expenses are not reserved to the settlor for his expenses as manager. On the contrary they are his personal expenses according to his position in life. Now it is to be observed that this clause follows the clauses which completely exhaust the income of the property. And if it is to be given a meaning it seems as if that the intention was that the donor and his family were to be provided for as they had been in the past, and that what was available for religious purposes was the balance of the income.

On the other hand due weight must be given to the clauses appointing *mutawallis* and managers of the property. These persons are not members of the settlor's family and that fact that the property to be handed over to them after the death of the settlor and his wife is a strong indication that the intention was to dedicate the property; and reading the deed as a whole, as a pure matter of construction, I should hold that although it is not altogether consistent in its terms, it was an out and out dedication of the property charged with the maintenance of the settlor's family. But that does not conclude the case.

Besides the question of the construction of the deed, a further question is whether it was put into operation by delivery of the dedicated property to the deities and how the property was in fact dealt with after the deed. Learned Counsel for the respondents referred to the finding of the learned Subordinate Judge that the *sankalp* and *samarpan* ceremonies had been performed; a finding which was not contested and argued that this completed the gift. It was further argued for the respondents that the settlor showed his intention to dedicate the property by taking two conveyances in the name of the deities a conveyance of *Mauza* Rampur which was purchased by the deities through Nanhuprasad Singh and by his relations Jaldhary Singh, Bhekhdhari Singh and Mohipnara Singh in equal shares on 26th June, 1925: (Ex. A), and a conveyance of an interest in *Mauza* Chapuk on 14th March, 1923, to Nanhuprasad Singh for the deities Ex. A-1. On the other hand there are two other deeds a sale-deed of 17th December, 1923,

(12) 99 Ind. Cas. 669; A. I. R. 1927 P. C. 2; 54 I. A. 33; 6 Pat. 259, (1927) M. W. N. 72; 25 A. L. J. 51; 38 M. L. T. 33; 4 O. W. N. 153; 8 P. L. T. 107; 31 C. W. N. 365; 52 M. L. J. 430; 29 Bom. L. R. 763; 25 L. W. 710; 45 C. L. J. 408 (P. C.).

(13) 17 C. 498; 17 I. A. 28; 5 Sar. 476 (P. C.).

(14) 13 W.R. 235.

and a *mukarrari* lease of the same date both of which Nanhuprasad Singh took in his own name Exs 9 and 10. These deeds therefore do not carry the matter further.

I should here refer to the finding of the Subordinate Judge that the fact that the reversioners joined in the purchase of Rampur by Ex. A amounted to an estoppel barring the suit. In my opinion this view is wrong. The fact that the reversioners or some of them may have purchased 8 annas of a village of which the other 8 annas was purchased by the same deed by Nanhuprasad Singh for the deities does not seem to me to raise any estoppel. There is nothing in this which changed the position of the deities nor is there anything in their entering into the transaction to prevent the reversioners from raising the question as to what the true effect of the dedication was.

The other documents upon which the respondents rely are village papers. It is argued for the appellants that the learned Subordinate Judge erred in admitting these documents in evidence. They were admitted at a very late stage, more than a year after the issues were settled. The learned Subordinate Judge has not recorded any reason for admitting these documents which were produced by the defendants' *patwari*. They are ordinary *zamindari* papers on loose sheets which might be fabricated at any time and it is precisely to meet papers of this kind that rr. 1 and 2, O. XIII, were framed. It seems to me that the learned Subordinate Judge paid too little regard to these rules of the Code in admitting these papers. So far as the village collection papers are concerned, all that they show is that the names of the deities are entered at the top. This is consistent with the deed (Ex. E) but does not really advance the case. Nor are the papers uniform, because the counterfoil rent receipts (Exs. 2 and 3) show receipts by Nanhu Prasad Singh personally. Two other documents were referred to by the respondents; Exs. Z and Z 1. These are decrees for rent in suit of 1926. As rent was claimed for the year 1333 it is clear that the suits must have been instituted in or about September, 1926. But the present suit was brought in February, 1926 and consequently these documents have no probative value.

The decisive questions on this part of the case are whether possession was delivered under the deed and whether the income was appropriated to the deities. The first question is not answered by the formal finding that the *sankalp* and *samarpan* ceremonies were performed. The real meaning of the *samarpan* ceremony has been made clear by the decision which I have quoted at length above in *Deosaran Bharthi* v. *Deoki Bharthi* (11). Here the donor is himself *mutawalli* for the deities. Consequently the donor and the donee are the same and there must be some unmistakeable act to show that the possession of the property was transferred. The learned Subordinate Judge has found that the *pujari* accepted the gift on behalf of the deities, but this would not amount to acceptance in law because the gift is to the deities and must be accepted on their behalf by the *mutawalli* and the effective way of showing this acceptance is by altering the land register. But not only did the settlor not effect registration of the names of the deities in substitution for his own name, for these properties, but he actually applied for registration of his own name; subsequently to the deed of dedication in the case of a property which came to him in 1924 Ex. 13. This was part of one of the dedicated properties *Mauza* Kurwa in which a female member of the family had had a life interest for her maintenance The fact that the settlor applies for registration of his own name in respect of this property is irreconcilable with the terms of the dedication. The land revenue *chalan* (Ex. 16-*h*) of 8th June, 1925 shows that the land revenue was paid by Nanhuprasad Singh as proprietor. Judged by this test therefore the dedication fails.

Nor does the matter stand otherwise when the appropriation of the income is examined.

[His Lordship referred to the evidence and continued:—]

The result then is that on the defence evidence there is an annual expenditure of Rs. 1,700 on the objects of the trust, while the net income of the property appears to be at least Rs. 5,300. This means that Rs. 3,600 was spent by the settlor's family on themselves. It was argued by learned Counsel for the respondents that to this expenditure must be added what was paid for Rampur and Chapuk: Exs A and A 1. But the purchase of property is not one of the objects upon which the income is to be expended and the fact that income was spent in this way is a clear indication that it was not in fact devoted to the objects set forth in the deed, In

my opinion the way in which the money has been spent since the so called dedication leads to the conclusion that the deed in fact did not make an absolute dedication or lead to any change in the manner of expenditure The same inference is to be drawn from the fact that when this deed was executed the settlor was still having children. In fact his wife subsequently died in child-birth and he married again. It is most unlikely in these circumstances that he intended an out and out dedication of his property, especially as the deed on the face of it purports to dedicate his entire estate thus leaving his descendants, of whom he might still have several entirely unprovided for after his own, and his wife's death. A further indication of the nature of his intention is to be found in the fact that he actually executed a second deed by which he made provision for his possible descendants. This shows that he did not understand the full legal effect the apparent language that he used and that he considered that he could still deal with the property. All this seems to me to indicate quite clearly that all that was intended was to charge his property with the service of the deities in order that that service might be maintained as heretofore.

The conclusion to be drawn from the whole evidence in the case is that although as a pure matter of construction the deed is properly to be read as a deed of dedication yet from the failure to carry the dedication into effect by delivery of the property and by effecting a change in the mode of expenditure of the income it must be held that all that the settlor effected by the deed was the creation of a charge on the property for the service and worship of deities therein mentioned and not an out and out dedication. The result is that the appeal must be decreed and the decree of the Subordinate Judge set aside and in lieu thereof there will be a decree declaring that the true effect of the deeds in the plaint mentioned is to charge the property of the settlor with the service of the deities therein named and that the deeds do not effect a dedication of the property. The plaintiffs are entitled to their costs of both Courts but in view of the nature of the litigation and of the absence of any personal intereet in the defendants in defending the suit the costs will come out of the estate and not from the defendants personally.

Dhavle, J.—I agree.

A. *Appeal allowed.*

PATNA HIGH COURT.

Appeal from Original Decree No. 193 of 1929.

April 16, 1931.

MACPHERSON AND FAZL ALI, JJ.

Mahanth RAM DAS—APPELLANT.

versus

PREM DAS—RESPONDENT.

Succession Act XXXIX of 1925), s. 283 (1)(c)—Probate—Application for revocation—Person disclaiming interest in estate—Locus standi.

A person disclaiming interest in the estate is not entitled to citation and has no *locus standi* in the probate Court.

Where an application for revocation of a probate was made on the ground that the deceased had no estate and that the properties which the testator purported to make over by will were properties which he held not in his personal but in his official capacity:

Held, that the petitioners had no *locus standi* to maintain the application.

Abhi Ram Das v. *Gopal Das* (1), *Srigobind Pershad* v. *Laljhari Kuar* (2), *Kalajit Singh* v. *Parmeshar Singh* (3), *Mahasundar Kuar* v. *Ratan Prasad Sahi* (4), *Davendra Prasad Sukul* v. *Surendra Prasad Sukul* (5), *Pirojshah Bikhaji* v. *Pestonji Merwanji* (6) and *Gopal Chandra Bose* v. *Asutosh Bose* (7), relied on.

Appeal from a decision of the District Judge, Patna, dated the 24th August, 1929.

Mr. *Baldeo Sahay* (with him Messrs. *Kishundeo Prasad* and *J. K. Prasad*), for the Appellant.

Messrs. *A. A. Syed Ali* and *Ahmed Reza*, for the Respondent.

Macpherson, J.—In this appeal we have not found it necessary to call upon the respondents.

It is preferred from a decision of the District Judge of Patna rejecting an application of February 1929, for revocation of a probate granted in 1916 of the unregistered Will of one Beni Das, dated the 21st Jeth, 1321 *Fasli*.

The first petitioner states that he is *mahanth* of the Piparpanti *math* in the District of Monghyr to which the Pundarak *math* in the Patna District, of which Beni Das, deceased, was *mahanth*, is subordinate. The other two petitioners state that they and Beni Das were descended from *mahanth* Nanak Baksh Das as shown in the genealogy annexed to the petition. They all set out that Prem Das who has obtained probate, having accepted the post of *pujari* under them and having in 1927 refused to account for the proceeds of the properties they made inquiry and learned of the Will for the first time, whereupon they filed a regular suit but were confronted with the difficulty that the genuineness of the Will could not be gone into except in the probate Court. It is admitted that in the regular suit mentioned they claimed that the properties

in suit did not belong to the testator but were properties of his *math* or of the *Thakurji*. In their application for revocation they also set out as follows in para. (9):

"For that the applicant obtained the grant of probate fraudulently also by concealing from the Court the fact that Beni Das had no property of his own and all the properties detailed in his petition belonged either to the *math* or to the *Thakurji* and thus no citation was issued to the ultimate *mahanth* your petitioner No. 1."

Upon this issue No. 5 was framed:

"Are the applicants disqualified from maintaining this application by their denial in para. 9 thereof that the testator had any estate of his own."

This reference is of course to s. 283 (1) (c) of the Succession Act, under which a citation is to be issued to all persons claiming to have any interest in the estate of the deceased and the numerous decisions that a person disclaiming interest in the estate is not entitled to citation and has no *locus standi* in the Probate Court. When this issue was framed the petitioners-appellants applied to withdraw para. (9) of their application on the ground that the averment therein contained that the properties detailed in the application for Probate never belonged to Beni Das is liable to misconstruction, and purported to explain their ground for revocation as really heirship. The application was rejected by Mr. Wali Mahomed as inconsistent and confusing, and when the case came to trial his successor cited numerous rulings, including *Abhi Ram Das* v. *Gopal Das* (1), *Srigobind Pershad* v. *Laljhari Kuar* (2), *Kalajit Singh* v. *Parmeshar Singh* (3), *Mahasundar Kuar* v. *Ratan Prasad Sahi* (4), *Devendra Prasad Sukul* v. *Surendra Prasad Sukul* (5), and came to the conclusion that, on the state of the authorities which could not be distinguished and which were binding upon him, he had no option but to hold that the petitioners had no *locus standi* to maintain the application to revoke the grant of Probate.

Mr. Baldeo Sahay on behalf of the appellants eventually comes to the position that he cannot withstand the weight of authority which has been cited. Indeed there are also other decisions to the same effect: *Pirojshah Bikhaji* v. *Pestonji Merwanji* (6) and *Gopal Chandra Bose* v. *Asutosh Bose* (7) (20 Ind. Cas. 342) and the law may be taken to be settled. But the learned Advocate strenuously contends that the rulings cited do not cover his case inasmuch as petitioners Nos. 2 and 3 are heirs of the deceased in any view of the case. To my mind the petition itself in particular para (3) taken with the genealogy by which it is expressly controlled, goes to show that the petitioners Nos. 2 and 3 are not at all blood relations of the deceased Beni Das. The genealogy is a mixture of blood and spiritual relationship and a perusal of it leaves no room for a claim that there is any actual relationship at all between the deceased and the petitioners Nos, 2 and 3. The application for revocation is really based upon the same dispute as to title as the civil suit is. There is indeed a definite allegation that the deceased had no estate, and the substance of the application is that the properties which the testator purported to make over by Will were properties which he held not in his personal but in his official capacity and which actually belonged to the *math* or the *Thakur*. In my mind it is clear that the decision under appeal is correct and that the petitioners had no *locus standi* to maintain the application for revocation of the probate.

I would accordingly dismiss the appeal with costs: hearing fee five gold *mohurs*.

Fazl Ali, J.—I agree.

A. *Appeal dismissed.*

(1) 17 C. 48.
(2) 2 Ind. Cas. 402; 14 C. W. N. 119.
(3) 39 Ind. Cas. 573; 1 P. L. W. 308.
(4) 35 Ind. Cas. 416; 1 P. L. W. 370.
(5) 54 Ind. Cas. 807; 1 P. L T. 19; 5 P. L. J. 107; (1920) Pat. 83.
(6) 6 Ind. Cas. 523; 34 B. 459; 12 Bom. L. R. 459.
(7) 20 Ind. Cas. 342.

PATNA HIGH COURT.

Appeals from Appellate Decrees Nos. 478, 479, 480 and 481 of 1929
November 14, 1930.

JWALA PRASAD AND JAMES, JJ.

BANKE BIHARI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM ANUGRAH CHAUDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 107 (1)—Issue of area decided under s. 106—Decision to the contrary in rent suit—Validity—Res judicata—*Civil Procedure Code (Act V of 1908), s. 11.*

Under the provisions of s. 107 (1) of the Bengal Tenancy Act, read with s. 11 of the Civil Procedure Code, a Court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under s. 106 of the said Act.

So while the decree in a rent suit ought to be regarded as a valid decree so far as the liability of the parties during the years then in suit is concerned, a decision therein that *bhaoli* rent is payable

only in respect of certain areas cannot be treated as *res judicata* to determine the areas for which such rent shall be payable in subsequent years, where such decision is at variance with an earlier decision under s. 106 of the Act. *Maharaja Sir Rameshwar Singh Bahadur* v. *Younus Momin* (1), followed.

Appeals from a decision of the District Judge, Darbhanga, dated the 2nd January, 1929, modifying that of the Munsif, Samastipur, dated the 2nd July, 1927.

Messrs. *Parmeshwar Dayal* and *Siva Narayan Bose*, for the Appellants.

Messrs. *L. K. Jha* and *P. Jha*, for the Respondents.

James, J.—These appeals arise out of four suits for arrears of cash and produce rents. After the preparation of the Record of Rights there were proceedings under ss. 105 and 106 of the Bengal Tenancy Act by which the tenants' cash rents were settled; and it was determined for what land *bhaoli* rent was payable. In 1923 the landlords instituted suits for arrears of rent based on the Record of Rights as finally framed under s. 107 of the Bengal Tenancy Act. The tenant-defendants took the defence that the rents had been reduced by agreement immediately after they were settled, and that remissions had been annually made by the landlords. They also contended that the area for which *bhaoli* rent was payable was less than that stated in the plaint. The Munsif found that since the settlement of rent the landlords of the holdings had always realised rents at lower rates than those settled; and he decreed the suits at the rents which appeared in the finally published Record of Rights before proceedings had been taken under s. 105. For the area for which *bhaoli* rent was payable the Munsif, apparently not noticing that this area had been increased by the operation of the decrees under s. 103 of the Bengal Tenancy Act, gave decrees to the plaintiffs in accordance with the Record of Rights as finally published under s. 103-B of the Act. The plaintiffs have now again sued for arrears of rent. There is not at present any dispute between the parties regarding the amounts payable as cash rent, but the plaintiffs claimed *bhaoli* rent for the areas which were recorded as *bhaoli* in accordance with the decisions under s. 105, while the defendants took the plea that the *bhaoli* rent was payable only for the area finally published under s. 103 B of the Bengal Tenancy Act as *bhaoli* land. The Munsif of Samastipur held that the decision under s. 106 operated as *res judicata* and that the decision of the Rent Court in 1924, so far as it was at variance with the decrees under s. 106, was without jurisdiction. His decision was reversed on appeal by the District Judge of Darbhanga, who held that the decision of 1924 operated as *res judicata* on the question of the area for which *bhaoli* rent was payable.

The learned Advocate for the plaintiff-appellants argues that the decision of 1924, so far as it is concerned with the area for which *bhaoli* rent is payable, should be regarded as affecting only the years in respect of which rent was then claimed; and that in view of the provision of ss. 107 and 109 of the Bengal Tenancy Act the Munsif and the District Judge had no jurisdiction to determine what was the permanent character of this land. He relies mainly on the decision in *Maharaja Sir Rameshwar Singh Bahadur* v. *Younus Momin* (1) in which it was held that the provisions of s. 109 of the Bengal Tenancy Act had this effect, that the decision of a Rent Court, which was at variance with the previous decision under s. 105 of the Act, could not operate as *res judicata*. Mr. Pitamber Jha on behalf of the respondents does not suggest that the decision under s. 106 of the Bengal Tenancy Act did not operate as *res judicata* in 1924; but he argues that when the question was raised by the defendant it was necessary for the Munsif to decide it, and the effect of his decision as *res judicata* is not affected by the question of whether he committed an error of law in arriving at it. He also points out with respect to the decision in the case of *Maharaja Sir Rameshwar Singh Bahadur* v. *Younus Momin* (1) that s. 109 of the Bengal Tenancy Act though it prohibits a Court from entertaining suits or applications which have formed the subject matter of a suit under s. 106, does not prohibit a Court from entertaining defences which may be at variance with the decision of Revenue Officers under s. 106. Now, it is true that the question of whether the Court in arriving at its decision committed errors of law may not affect the question of whether the decision operates as *res judicata* between the parties; but the question is of whether the Courts in 1924 had jurisdiction to determine whether *bhaoli* rent was or was not payable for the land in dispute in

(1) 65 Ind. Cas. 474; 6 Pat. L. J. 588; 3 P. L. T. 130; (1922) Pat. 68; A. I. R. 1923 Pat. 101.

the years subsequent to those years in respect of which the suits of 1923 were instituted. On this matter I consider that the case should be held to be governed by the decision in *Maharaja Sir Rameshwar Singh Bahadur* v. *Younus Momin* (1). Section 109 of the Bengal Tenancy Act may not in express terms prohibit a Civil Court from entertaining a defence which is at variance with a decision under s. 106; but it is clear from the provisions of s. 107 (1) of the Bengal Tenancy Act, read with s. 11 of the Civil Procedure Code, that a Court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under s 106 of the Bengal Tenancy Act. In these circumstances I consider that while the decrees of 1924 ought to be regarded as valid decrees so far as the liability of the parties during the years then in suit are concerned, the decision that *bhaoli* rent is payable only in respect of certain areas cannot be treated as *res judicata* to determine the areas for which such rent shall be payable in subsequent years, in defiance of the provisions of s. 107 of the Bengal Tenancy Act.

I would, therefore, allow the appeals, set aside the decision of the lower Appellate Court and restore the decrees of the Munsif. The plaintiffs will be entitled to their costs throughout

Jwala Prasad, J.—I agree.

A. *Appeals allowed.*

PATNA HIGH COURT.

Appeal from Original Orders Nos. 169 and 193 of 1929.

May 5, 1931.

KULWANT SAHAY AND JAMES, JJ.

BISESWAR CHAUDHURI AND OTHERS —APPELLANTS

versus

KANHAI SINGH AND OTHERS —RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 4, 53—Benami *transfer by insolvent—Jurisdiction of Insolvency Court to consider nature of transaction, whether controlled by s. 53.*

In the case of *benami* transactions the limitation of two years imposed by s. 53, Provincial Insolvency Act, does not apply, and an Insolvency Court can decide the question whether a transfer by an insolvent is *benami* under s. 4 of the Act even if the transaction took place more than two years before the presentation of the petition in insolvency. *Anwar Khan* v. *Muhammad Khan* (3), *Hari Chand Rai* v. *Moti Ram* (4), *Chittammal* v. *Ponnusami Naicker* (5) and *Wazir Singh* v. *Janki Das* (6), followed, *Sheikh Amjad Ali* v. *Nand Lal Tandon* (7), and *Fool Kumari Dasi* v. *Khirod Chandra Das Gupta* (8) distinguished. [p. 302, col. 1.]

Section 4 of the Act is controlled by s. 53 only in respect of real transfers made by the insolvent. [p. 301, col. 1.]

Appeal from an order of the District Judge, Muzaffarpur, dated the 19th July, 1929.

Messrs. *S. N. Sahay*, *R. N. Lal*, *S. N. Rai* and *B. N. Rai*, for the Appellants.

Messrs. *P. Dayal* and *Bhagwan Prasad*, for the Respondents.

Kulwant Sahay, J.—Pattilal Chaudhuri and his sons, who are members of a joint family, were adjudged insolvent on an application presented on the 9th of September, 1926. The order of adjudication is dated the 8th of June, 1927. One of the creditors, Radhakishun, filed a petition before the Receiver appointed in the insolvency proceedings, stating that the insolvents had fraudulently concealed some of the properties belonging to them and that some other properties had been fraudulently transferred by them within two years of the presentation of the petition for insolvency, and he asked the Receiver to take proceedings to annul those transfers and to take possession of the properties sold. The Receiver made a report on the 25th of August, 1927, to the District Judge in which he dealt with no less than fifteen properties and he asked the Court to annul the transfers in respect of the properties which had been transferred within two years of the presentation of the petition in insolvency, and he further asked the Court to make a declaration to the effect that certain other properties belonged to the insolvents and that they had vested in the Receiver. On the same date he filed a regular petition before the District Judge for annulling some of the transfers and for declaring other transfers to be void so far as the Receiver was concerned. Objections were made by the persons claiming the properties set out in the Receiver's petition and the learned District Judge proceeded to act under s. 53 in respect of the transfers which were made within two years of the presentation of the petition and under s. 4 of the Provincial Insolvency Act in respect of the other properties which the Receiver alleged really belonged to the insolvents but in respect of which fictitious deeds of *benami* nature had been executed. The learned District Judge has, it appears, made an order annulling all the transfers made within two years of the petition of insolvency and, declaring the other tran-

sactions to be *benami* and fictitious transactions, declared that the properties covered by those transactions had vested in the Receiver.

Two of the claimants in respect of two of the properties have come up in appeal to this Court. Appeal No. 169 is by Bisesar Chaudhury who claims the property which is serial No. 13 in the Receiver's petition to the District Judge. This property consists of 2 *bighas* 2 *dhurs* of occupancy *kasht* land in village Sharfuddinpur, bearing *khata* No. 3. The appellant in Appeal No. 193 claims the property No. 8 in the said Schedule and consists of 1-anna *milkiat* share in village Madhopur, *tauzi* No. 1774.

The facts relating to these two properties have to be dealt with separately; but there is one question which is common to both the appeals and may be disposed of in the beginning. As regards property No. 13 the allegation is that this property, *viz*, the 2 *bighas* 2 *dhurs* of occupancy *kasht* land in Sharfuddinpur was purchased by the insolvents under a deed of sale, dated the 2nd of March, 1909, in the *farzi* name of one Bhondu Lal Chaudhuri. The Receiver's case is that Bhondu Lal Chaudhuri was a mere *benamidar* for the insolvents and the purchase was really made by the insolvents and that they have continued in possession ever since the purchase. The case of the Receiver as regards property No. 8 is that the insolvents had executed a *benami* deed of sale in respect of this property on the 24th of July, 1923, in the name of one Jaikishun Chaudhuri, but as a matter of fact there was no transfer and that Pattilal Chaudhuri the insolvent has continued in possession of this property also. The question for consideration, therefore, is, whether the two properties forming the subject-matter of these appeals do really belong to the insolvents and whether the deed of sale taken in the name of Bhondu Lal and the deed of sale executed in favour of Jaikishun Chaudhuri were mere *benami* transactions. These two transactions took place more than two years before the presentation of the petition in insolvency, and it is contended by the learned Advocate for the appellants that having regard to the provisions of s. 53 of the Provincial Insolvency Act the Court had no jurisdiction to annul these transactions and to make the declaration that these properties belonged to the insolvents and had vested in the Receiver. As I have already stated the learned District Judge proceeded in respect of these two properties under s. 4 of the Act. This section is comprehensive in its terms and gives power to the Court to decide all questions, whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognisance of the Court, for which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case. *Prima facie* therefore, the District Judge had under this section complete jurisdiction to decide the question whether the properties in dispute do really belong to the insolvents or to the persons who claim them. It is, however, contended that the opening words of this section:—

"Subject to the provision of this Act"

indicate that the Court in exercising jurisdiction under the section is bound by the limitations imposed by s. 53; in other words, that in every case in which a transaction is challenged such transaction must have taken place within two years of the presentation of the petition in insolvency in order to give jurisdiction to the Court to decide the question of title raised before it. In my opinion this contention is not sound. Section 4 is controlled by s. 53 only in respect of transfers made by the insolvents. Section 53 deals with a real transfer of the property made by the insolvent whereby title has passed from the insolvent to the transferee. In such cases the law gives power to the Court to annul such real transfers if made within two years of the presentation of the petition provided they are not transfers made before and in consideration of marriage or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration. The transactions that we are now concerned with are alleged by the Receiver not to be transfers at all. It is alleged in one case that, although the property was purchased in the name of one Bhondu Lal, it was really a purchase made by the insolvents. In the other case it is alleged that although the insolvent purported to execute a deed of sale in favour of Jaikishun Chaudhuri, as a matter of fact there was no sale and the property still belongs to the insolvents. Section 53, therefore, has absolutely no application to the facts of the present case, and the jurisdiction of the Court in dealing with these two transactions under s. 4 is in no way controlled by the limitation imposed by s. 53.

Section 4 was introduced for the first time in the Act of 1920 and did not find a place in the Act of 1907. There was a difference of opinion between the Calcutta and the Allahabad High Courts on the question whether the Insolvency Court could or could not deal with the question of title to property. The Calcutta High Court had in the year 1918 held that the question of *benami* could not be determined by the Insolvency Court, and any claim made by the Receiver or the creditor that the property is really the property of the insolvent can only be enforced by a suit in the regular course [*see Nilmoni Choudhury* v. *Durga Charan Choudhury* (1).] The learned Judges, however, had observed even then that "where the *benami* character of the title is admitted or where the veil is transparent and the insolvent is in substantial beneficial possession, the Court may order the delivery of the property to the Receiver". The Allahabad High Court, however, had in 1914 come to the contrary conclusion in *Bansidhar* v. *Kharagjit* (2). There were thus two conflicting decisions on the same point under the Provincial Insolvency Act of 1907. The Legislature when enacting the Act of 1920 introduced s. 4 in the Act for the first time, whereby extensive powers have been given to the Court to decide all questions of title or priority or of any nature whatsoever which may arise in any case of insolvency coming within the cognisance of the Court.

That the Court has jurisdiction to decide questions of *benami* under s. 4 and that its jurisdiction in this respect is not controlled by the limitations imposed by s. 53 has been held in various cases in the Allahabad, Lahore and Madras High Courts. In the Full Bench decision of the Allahabad High Court in *Anwar Khan* v. *Muhammad Khan* (3) the majority of the Judges held that an Insolvency Court can try a question of title raised on the basis of a transfer which took place more than two years prior to the adjudication of the transferor as an insolvent, and they observed that s. 53 does not deal with the jurisdiction of the Insolvency Court but only lays down certain rules of law affecting those transactions which fall within its scope and that it does not control or restrict the jurisdiction conferred upon a Court by s. 4 to decide on questions of title. Sen, J., no doubt took a different view, but the decision of the majority of the Judges was in favour of the view that s. 4 is not controlled by s. 53.

In *Hari Chand Rai* v *Moti Ram* (4) Sulaiman, J., held that a transfer which is wholly fictitious from the very beginning is of no effect and does not require to be annulled, but all that the Court has to do in such a case is to decide that it is void and that such decision will bind the claimant of the property as if it were by an ordinary Civil Court; and he further held that the limitation of two years prescribed by s. 53 applied only to such cases where the transfers when originally made were good transfers of property and not to cases in which there was no real transfer at all. In this case also the other learned Judge, Mukharji, J., took a different view; but the Full Bench decision of the Allahabad High Court referred to above must be held to have overruled the view expressed by Mukharji, J. In fact, one of the learned Judges, Dalal, J., observed that every Judge of the Allahabad High Court except one, who had to consider the point, had decided in favour of the jurisdiction of the Insolvency Court.

In 92 Ind. Cas. 573 [*Chittammal* v. *Ponnusami Naicker* (5)] the Madras High Court held that it was open to the Court on a proper application being made under s. 4 of the Provincial Insolvency Act to try the issue whether the insolvent is entitled to the property or not.

The same view was taken by the Lahore High Court in 97 Ind. Cas. 174 [*Wazir Singh* v. *Janki Das* (6).]

The learned Advocate for the appellants has referred to the decision of the Oudh Chief Court in 123 Ind Cas. 217 [*Sheikh Amjad Ali* v. *Nand Lal Tandon* (7).] This case, however, does not support the appellants at all. In this case the transaction under consideration was a release by the insolvent made more than two years before the date of adjudication. In considering the transaction the learned Judges observed as follows: We cannot accede to the argument of Counsel that a deed of release accompanied by mutation and transfer of possession is not a transfer. It may have been a fraudulent transfer in order to defeat the creditors of

(1) 46 Ind. Cas. 377; 22 C. W. N. 704.

(2) 26 Ind. Cas. 926; 37 A. 65; 12 A. L. J. 1273.

(3) 113 Ind. Cas. 819; 51 A. 550; A. I. R. 1929 All. 105; Ind. Rul. (1929) All. 211; (1929) A. L. J. 155 (F. B.).

(4) 94 Ind. Cas. 429; 48 A. 414; 24 A. L. J. 495; A. I. R. 1926 All. 470.

(5) 92 Ind. Cas. 573; 49 M. 762; 23 L. W. 94; (1926) M. W. N. 121 & 172; 50 M. L. J. 180; A. I. R. 1926 Mad. 363.

(6) 97 Ind. Cas. 174; A. I. R. 1926 Lah. 679.

(7) 123 Ind. Cas. 217; Ind. Rul. (1930) Oudh 169; 7 O. W. N. 377; A. I. R. 1930 Oudh 314.

the transferor, but it is none the less a transfer." It was, therefore, on a finding that there had been a transfer that the learned Judges held that s. 53 applied and that it could not be voided if made more than two years before the adjudication, They, however, distinguished the decision of the Calcutta High Court in 102 Ind. Cas. 115 in [*Fool Kumari Dasi* v. *Khirod Chandra Das Gupta* (8)] with the observation that that decision dealt with a case in which the transaction was held to be *benami* and that there had been no transfer in fact, nor was the Court required to annul the transfer. This decision, therefore, is in favour of the view that in *benami* transactions the limitation of two years imposed by s. 53 does not apply, and the Court can decide the question under s. 4 even if the transaction took place more than two years before the presentation of the petition in insolvency.

There is another fact which also deserves consideration. Under s. 28 (2) of the Act the effect of the making of an order of adjudication is that the whole of the property of the insolvent vests in the Court or in the Receiver and becomes divisible among the creditors. Section 56 provides that upon the appointment of the Receiver the property of the insolvent shall vest in him and s. 59 provides that subject to the provisions of the Act the Receiver *shall* with all convenient speed realize the property of the debtor and distribute dividends among the creditors entitled thereto. Therefore, all properties belonging to the insolvent vest in the Court or in the Receiver. When a question is raised whether a certain property is a property of the insolvent or not, it is clearly the duty of the Court to determine the question, and the determination of this question is in no way controlled by the provisions of s. 53. As I have already stated, s. 53 deals with cases where title to the property has passed from the insolvent to a third person. The cases we are now dealing with are cases in which the allegation is that the property is still the property of the insolvents and title has not passed to third persons. I am, therefore, of opinion, that the order made by the District Judge was with jurisdiction.

[His Lordship then dealt with the facts of the case and with reference to the property in dispute in Appeal No. 169 came to the following conclusion :—]

Having regard, therefore, to the evidence of the case, I am not prepared to hold that the view taken by the learned District Judge in this case was incorrect. I would, therefore, hold that the property is a property of the insolvent and that the Receiver may sell this property in order to pay off the creditors. Appeal No. 169 must, therefore, be dismissed with costs.

[His Lordship then discussed the evidence with regard to the property in dispute in Appeal No. 193 and concluded as follows:]

I am, therefore, of opinion that the evidence adduced in the case is not sufficient to prove that the transaction was a *benami* transaction, or that Pattilal the insolvent continued in possession thereof. It is said that there was no reason why Jaikishun should stand surety for him. It appears that they were friends, and that subsequently they have become relations by marriage. There is the further fact that ultimately the property was mortgaged in order to pay off the debts of the insolvents; but these are circumstances which merely raise a suspicion of *benami* and they do not amount to legal evidence of the fact of *benami*. I would, therefore, hold that in the case of this property (No. 8 of the Receiver's Schedule) the view taken by the learned District Judge is not correct. I hold that it has not been established that the deed of sale of the 24th of July, 1923, was a *benami* transaction. I would set aside the order of the District Judge and decree Appeal No. 193 with costs.

James, J.—I agree.

A. *Appeal No. 169 dismissed.*
Appeal No. 193 decreed.

(8) 102 Ind. Cas. 115; 31 C. W. N 502; A. I. R. 1927 Cal. 474.

PATNA HIGH COURT.

Miscellaneous Judicial Case No. 86 of 1929.

May 20, 1931.

COURTNEY-TERRELL, C. J. AND DHAVLE, J.

BASANT LAL RAMJIDAS—ASSESSEE—APPLICANT

versus

COMMISSIONER OF INCOME TAX, BIHAR AND ORISSA—OPPOSITE PARTY.

Income Tax Act (XI of 1922), ss. 61, 66 (2)—Application for copy of Judgment of Assistant Commissioner—Proper Court-fee—Court Fees Act (VII of 1870), Sch. II, Art. 11 (a)*—Application by person not expressly authorised—Validity.*

The words "judgments, decrees or orders passed by such Court, Board or Officer" in Sch. II, Art. 1-A, Court Fees Act, are wide enough to cover an application to an Assistant Commissioner of income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preferring an appeal to the Commissioner under the Income Tax Act and such an application, therefore, requires a Court-fee stamp of two annas. [p. 304, col. 1.]

An application for copy of the judgment in an Income-tax appeal is properly within the meaning of the words 'attendance before an Income Tax officer' in s. 61, Income Tax Act, and can be made only by the assessee or a person expressly authorised in writing in that behalf. Further, it does not follow that because an agent is duly authorised to conduct the business of the appeal before the Assistant Commissioner, he is *ipso facto* authorised to obtain copies of the Assistant Commissioner's judgment. [p. 304, cols. 1 & 2.]

Messrs. *K. P. Jayaswal* and *A. K. Mitra*, for the Assessee.

Mr. *C. M. Agarwala*, for the Commissioner of Income-tax.

Courtney-Terrell, C. J.—The first and preliminary point which has to be decided in this case is one of limitation and it has been stated by the Commissioner for the opinion of the Court. The question is whether the application which was made under s. 66 (2) of the Indian Income-tax Act by the assessee was in time reckoning the period of one month from the date of the passing of the appellate order made by the Assistant Commissioner. The appellate order was passed on the 31st March, 1929. The first application purporting to be under s. 66 (2) was received in the office of the Commissioner on the 16th May, 1929, that is to say, it was, if that date was to be taken as the correct date, 16 days out of time. The applicant purports on this basis to say that the 16 days was consumed in obtaining a copy of the appellate order.

On the 15th April the Pleader who had argued the case before the Assistant Commissioner sent a letter to the office of the Assistant Commissioner accompanied by a one anna stamp asking for a copy of the Assistant Commissioner's appellate order. He further asked to be informed of the estimate of cost for the certified copy and said that on receipt of that notification he would deposit the sum in the local treasury. Furthermore, his application was not accompanied by a *vakalatnama* from the assessee expressly authorising him to obtain a copy of the Assistant Commissioner's decision. The applicant was asked by postcard to file a Court-fee stamp of two annas as well as an express authorisation to enable the Pleader to obtain the copy. On the 21st April he did in fact file the authorisation and the Court-fee stamp of two annas and his application was then found to be in order and the copy was made ready on the 3rd May and was despatched by post to the address of the applicant and received by him, it must be presumed, on the 4th May. Such are the facts as found by the Commissioner.

The Department say that the application of the 15th April was not an application at all. It suffered from two defects which prevented it from being considered as such, the first defect being that it did not bear a stamp of two annas but one of one anna only, the second being that it did not contain an express authorisation in writing signed by the assessee himself. In answer to this objection by the Department the assessee contends that the fee of two annas cannot legally be exacted. If we turn to the Second Schedule of the Court Fees Act we see set forth detailed provisions as to certain documents in the nature of applications or petitions which must bear the stamp-fee prescribed by the particular Local Government, the matter of the precise stamp fee being within their purview as independent finance authorities. Now the scale of so called fixed fees set forth in this Schedule is divided up into classes respectively marked (*a*) and (*b*). Taking the documents referred to in group (*a*) first, the first paragraph refers to applications or petitions which are made by any persons having dealings with the Government and relating to the subject-matter of these dealings when such application is presented to any officer of the Customs or Excise Department or to any Magistrate and a fee of two annas is leviable upon such applications. The second paragraph refers to applications or petitions by persons holding temporarily settled land under direct engagement with the Government and relating to such subject-matter. The third paragraph refers to applications which relate to conservancy or improvements of a municipal character. The fourth paragraph refers to applications to Civil Courts and Small Cause Courts and to Collectors of Revenue in cases where the amount of the value of the subject-matter is less than fifty rupees. The fifth paragraph, which is the one with which we are particularly concerned, refers to applications for obtaining copies or translations of judgments, decrees or orders which have been passed by Courts, Boards or Officers and in respect of those applications also a

fee of two annas is required. That particular paragraph opens with the words

"or when presented to any Civil, Criminal or Revenue Court or to any Board or Executive Officer"

and it is argued by Mr. Jayaswal on behalf of the assessee that in this matter the Assistant Commissioner cannot come under the head of Revenue Court and he is not, according to his argument, an Executive Officer and, therefore, that judgments, decrees or orders which are passed by him do not come within the purview of this paragraph. In my opinion that is giving in the first place undue weight to the first words of the paragraph which are not the most material words. The most material words of the paragraph are the words "judgments, decrees or order passed by such Court, Board or Officer" and they are intended to cover every case of every kind in which a judgment, decree or order has been passed by any Court, Board or officer capable of passing such judgment, decree or order and having regard to what I think is the proper meaning of the words it certainly covers an application to an Assistant Commissioner of Income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preferring an appeal to the Commissioner under the Income-tax Act.

The second defect in the notice of the 15th April was that it was not properly authorised by a *vakalatnama*. The justification for the demand of such express authorisation is to be found in two matters in the Income-tax Act. In the first place there is s. 61 which states as follows:—

"Any assessee, who is entitled or required to attend before any Income-tax authority in connection with any proceedings under this Act, may attend either in person or by any person authorised by him in writing in this behalf."

The next point to be considered in the Income-tax Act is that the proceedings are of a most secret character and heavy penalties are imposed upon any officer who makes disclosures of matters which under the Act are confidential and nothing can be considered more confidential than the actual assessment which is made. Now it does not follow that because an agent is duly authorised to conduct the business of the appeal before the Assistant Commissioner he is *ipso facto* authorised to obtain copies of the Assistant Commissioner's judgment or indeed to perform any act preparatory or incident to the conduct of an appeal. It is, as the learned Assistant Government Advocate points out, quite conceivable that whatever the merits of the gentleman who was employed in conducting the appeal before the Assistant Commissioner his services may be dispensed with after the matter had passed the Assistant Commissioner's hands and it is quite conceivable that circumstances might arise in which it was considered by the assessee highly undesirable that he should receive copies of the decision which had actually been given. In these circumstances it was reasonable and proper for the Department to require that any person asking for a copy of the judgment should be expressly authorised in writing in that behalf and the application for a copy of the judgment is properly within the meaning of s. 61—"attendance before an Income tax Officer" in connection with proceedings under the Act. Inasmuch as the application dated the 15th April cannot be considered to be a valid application and inasmuch as the authorities are not bound to take any notice of an application which is not in order, the time which the assessee was entitled to deduct would only run from the 21st April when he in fact put his application in order forwarding the proper stamp and the letter of authorisation and in these circumstances the time which he is allowed to deduct falls short by one day of the allowance which would bring him within the period of one month. In these circumstances the application before the Commissioner for the statement of the case was barred and we are not competent to go into the other matters which were raised by the Commissioner on the hypothesis that his view as to limitation might be unsound. I would, therefore, answer the question of the Commissioner as to whether the application before him was barred in the affirmative and would decline to go into the other points raised in the statement of the case. The application to state a case was made at the instance of the assessee who fails and he must pay Rs. 200 by way of costs.

Dhavle, J.—I agree.

N. K. & A *Application rejected.*

MADRAS HIGH COURT.

Second Civil Appeal No. 478 of 1928.

July 29, 1931.

MADHAVAN NAIR, J

PERIA VEEDU ABDUL MAJID SAHIB —DEFENDANT—APPELLANT

versus

ARUNACHALA MUDALIAR AND OTHERS —PLAINTIFFS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 101—Merger—Prior mortgagee purchasing property—Keeping alive of mortgage—Presumption.

Where a man who pays off a prior mortgage has a right to extinguish it and a right to keep it alive, in the absence of express evidence of intention, he should be assumed to have acted according to his interest. Thus, where a prior mortgagee purchases the property in the absence of any intention to the contrary he must be assumed to have kept alive the mortgage in his favour as a shield against the subsequent mortgagee *Srinivasachari* v. *Gnanaprakasa Mudaliar* (5), not followed. *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1), *Mohamad Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (2), *Ayyareddi* v. *Gopala Krishnayya* (3), *Thiruvengadam Pillai* v. *Sabapathi Pillai* (4), *Govindasami Tevan* v. *Dorasamy Pillai* (6), *Subramania Pillai* v. *Palaniappa Mudali* (7), *Kutti Tevan* v. *Rayappa Goundan* (8), *Madho Singh* v. *Pancham Singh* (9), *Jasodha Kumar Roy* v. *Kali Kumar Dey* (10) and *Kalimuddin Shaik* v. *Baidya Nath Saha* (11), referred to. [p. 305, col. 2.]

Second Appeal against a decree of the District Court, North Arcot, Vellore, in A. S. No. 20 of 1917, preferred against that of the Court of the District Munsif, Vellore, in O. S. No. 172 of 1926.

Messrs. *A. Viswanatha Ayyar* and *A. Ramaswami Ayyar*, for the Appellant.

Mr. *B. C. Seshachala Ayyar*, for the Respondents.

Judgment.—The 3rd defendant is the appellant. He held a mortgage dated the 26th May, 1919, over the suit property which consists of two items. A mortgage of the same property had been executed in favour of the plaintiffs on 10th July, 1919. On 23rd November, 1925, the first item of the suit property was sold to the 3rd defendant in discharge of the mortgage over the two items. The 3rd defendant thus became the owner of the 1st item and as a result of his purchase the 2nd item was freed from his mortgage. When he purchased item No 1, the 3rd defendant did not know about the existence of the mortgage in plaintiffs' favour. The suit property belonged to the father of defendants Nos. 1 and 2. The second appeal arises out of a suit instituted by the plaintiffs to enforce their mortgage over the two items. The appellant contended that his prior mortgage-right over the first item should be regarded as still alive and that the plaintiffs should redeem it before they could succeed. This contention was rejected by the lower Courts and the only question argued in the second appeal is whether this contention should have been upheld.

It is common ground that the question should be decided with reference to the intention of the appellant as to when he purchased item No. 1, whether he had intended to keep his own mortgage over it alive as a shield against the other mortgagees. Section. 101 of the Transfer of Property Act provides that if a mortgagee or a charge-holder of property acquires the interest of the mortgagor or the owner, his own charge or mortgage becomes extinguished unless he declares by express words or necessary implication that it shall continue to subsist or such continuance would be for his benefit. The section raises a presumption in favour of merger rebuttable by proof of an intention to the contrary. This is no evidence regarding the intention of the 3rd defendant either way In *Gokaldas Gopaldas* v. *Puranmal Premsukhdas* (1) their Lordships of the Privy Council held that, where a man who pays off a mortgage has a right to extinguish it and a right to keep it alive, in the absence of express evidence of intention, he should be assumed to have acted according to his interest. See also *Mohamed Ibrahim Hossain Khan* v. *Ambika Pershad Singh* (2). In *Ayyareddi* v. *Gopalakrishnayya* (3), the Privy Council has again remarked as follows:—

"It is now settled law that where in India there are several mortgages on a property, the owner of the property, subject to the mortgages may, if he pays off an earlier charge treat himself as buying it and stand in the same position as his vendor, or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee."

As pointed out by Sir Gour in his Transfer of Property Act, Vol. II the Privy Council 'by laying emphasis on the proviso and the intention of the parties in s 101" were inclined to minimise the force though without entirely ignoring the existence of

(1) 10 C. 1035; 11 I. A. 126; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543 (P. C.).

(2) 14 Ind. Cas. 496; 39 C. 527; 11 M. L. T. 265; (1912) M. W. N. 367; 2 A. L. J. 332; 14 Bom. L. R. 280; 16 C. W. N. 505; 15 C. L. J. 411; 22 M. L. J. 468; 39 I. A. 68 (P. C).

(3) 79 Ind. Cas 592; 47 M. 190; 19 L. W. 215; 22 A. L. J. 45; 46 M. L. J. 164; A. I. R. 1924 P. C. 36; 26 Bom. L. R. 204; 34 M. L. T. 1; 2 Pat. L. R. 99; 10 O. & A. L. R. 269; (1924) M. W. N. 290; 39 C. L. J. 204; 28 C. W. N. 1025; 51 I. A. 140; L. R. 5 A. (P. C) 49; 1 O. W. N. 27 (P. C.).

the initial statutory presumption in s. 101 of the Transfer of Property Act." In *Thiruvengadam Pillai* v. *Sabapathi Pillai* (4) Phillips, J, went to the extent of holding that "when a person purchasing property discharges a prior mortgage on the same and claims subrogation therefrom, the Court should start with the presumption that a person paying off a mortgage intends to keep it alive if it is for his benefit to do so:" (See the head note). Effect to the decisions of the Privy Council has been given in the new s. 101 of the Transfer of Property Act which replaces the old section. The new section runs as follows:

"Any mortgagee of, or person having a charge upon, immovable property, or any transferee from such mortgagee or charge-holder, may purchase or otherwise acquire the rights in the property of the mortgagor or owner, as the case may be, without thereby causing the mortgage or charge to be merged as between himself and any subsequent mortgagee of, or person having a subsequent charge upon the same property; and, no such subsequent mortgagee or charge-holder shall be entitled to foreclose or sell such property without redeeming the prior mortgage or charge, or otherwise than subject thereto."

If we give effect to the principle of the Privy Council decisions, in the present case, there being no intention either way, I think it should be assumed that the appellant intended to keep alive his mortgage since it was to his interest to do so, there being another mortgage on the same property. In *Srinivasachari* v. *Gnanaprakasa Mudaliar* (5) the decision relied on by the lower Court, it was held that "where a person paying off a prior mortgage, purchases a portion of the mortgaged property in consideration of the amount so paid by him, the lien acquired by such payment is extinguished and cannot be used by such purchaser as a shield agaist a subsequent mortgagee." This decision no doubt supports the respondents This case has been referred to and distinguished in *Govindasami Tevan* v. *Dorasamy Pillai* (6) and *Subramania Pillai* v. *Palaniappa Mudali* (7). In *Kutti Tevan* v. *Rayappa Goundan* (8) the 8th defendant had bought the equity of redemption in 3/10 (that is, item No. 3 of the property over which he held a mortgage) and the learned Judges observed thus:—

"If the 8th defendant's mortgage was executed first, he must, on the facts found, be regarded as having intended to keep alive his mortgage rights when he purchased the equity of redemption in item No. 3."

This observation supports the appellant and in my opinion gives full effect to the spirit of the Privy Council decisions. No doubt the observation is in the nature of an *obiter dictum* and it does not refer to the decision in *Srinivasachari* v. *Gnanaprakasa Mudaliar* (5). The decisions of the other Courts in *Madho Singh* v. *Pancham Singh* (9), *Jasodha Kumar Roy* v. *Kali Kumar Dey* (10), and *Kalimuddin Shaik* v *Baidyanath Saha* (11) brought to my notice by the learned Advocate for the appellant fully support him. Having regard to the decisions of the Privy Council, the general trend of the decisions of this Court and the new s. 101 of the Transfer of Property Act, I am not inclined to treat the authority of *Srinivasachari* v *Gnanaprakasa Mudaliar* (5) on this particular point as going beyond the actual decision. I would, therefore, hold that the plaintiffs are not entitled to a decree for sale without paying the mortgage amount due to the 3rd defendant under his mortgage. The decree of the lower Court will be modified accordingly. The appellant will get his costs throughout.

N. P. & R. L *Decree modified.*

(4) 90 Ind. Cas. 767; 49 M. L. J. 361; (1925) M. W. N. 608; A. I. R. 1925 Mad. 1217.

(5) 30 M 67; 2 M L. T. 36.

(6) 6 Ind. Cas 781; 34 M. 112; 20 M. L. J. 380; 8 M. L. T. 132; (1910) M. W. N. 390.

(7) 21 Ind. Cas. 978; 26 M. L. J. 94, 14 M. L. T. 585.

(8) 65 Ind. Cas. 961; 14 L. W. 422; (1921) M. W. N. 703.

(9) 101 Ind. Cas. 409; 49 A. 233; 25 A. L. J. 45; A. I. R. 1927 All. 211.

(10) 128 Ind. Cas. 111; A. I. R. 1930 Cal. 619; 34 C. W. N. 673; Ind. Rul. (1931) Cal. 31.

(11) 128 Ind. Cas. 192; A. I. R. 1930 Cal. 572; 51 C. L. J. 565; Ind. Rul. (1931) Cal. 48.

MADRAS HIGH COURT.

Letters Patent Appeal No. 349 of 1926.

September 1, 1931.

REILLY AND ANANTHAKRISHNA AYYAR, JJ.

KASARABADA VENKATACHALAPATHI RAO—DEFENDANT—APPELLANT

versus

GADIRAJU VENKATAPPAYYA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Res judicata—*Execution proceedings—Sale by judgment-debtor during execution proceedings—Decision in execution as to validity of attachment etc., whether binding on purchaser—Purchaser claiming title under judgment-debtor*—Lis pendens, *doctrine of.*

Orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and cannot be called in question by the parties or their representatives. When once the said orders become final, that effect cannot be sought to be avoided by making allegations that the previous decisions were wrong on the merits because full facts were not placed before the Court or

that all available evidence was not let in on the former occasion. *Venkatachalapati Rao* v. *Komeswaramma* (1), *Sinnappan* v. *Arunachalam Pillai* (2) and *Ram Kirpal* v. *Rup Koeri* (3), referred to. [p. 310, col 2.]

When proceedings by way of attachment of immoveable property in execution of a money decree have been taken by the executing Court in an execution application filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment-debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser would be bound by the Court's decision of the question in the execution department as a person claiming title under the judgment-debtor. [p. 309, col. 2.]

The principle of *lis pendens* would also apply to such sale. It is not open to a party to a proceeding to nullify the effect of the proceedings already properly taken with reference to that property by transferring the same to strangers. It does not really matter whether the actual decision of the Court as to the effect of past proceedings is given only after the purchase by the, stranger, if the adjudication is really with reference to matters that happened before such purchase and regarding the effect of the legal proceedings that were taken prior to the same. To safeguard the purchasers' rights the purchasers should in such circumstances get themselves impleaded as parties. [*ibid.*]

Letters Patent Appeal against a decree of Mr Justice Devadoss dated the 20th August, 1926, and made in S. A. No. 1805 of 1923 on the file of the High Court preferred against that of the Court of the Subordinate Judge, Narasapur, in A. S. No. 12 of 1922 (A. S. No. 416 of 1921, Sub Court, Ellore) preferred against that of the Court of the Additional District Munsif, Narasapur, in O. S. No. 142 of 1920 (O. S. No. 508 of 1920 on the file of the Principal District Munsif's Court, Narasapur).

Messrs. *S. Varadachariar* and *V. Viyyanna*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

Judgment.—The first defendant in O. S. No. 142 of 1920 on the file of the Additional District Munsif's Court of Narasapur is the appellant before us. He was the plaintiff in O. S. No. 38 of 1912 on the file of the Principal District Munsif's Court, Narasapur, wherein he obtained a decree for money against M. Venkataramanayya on 30th September, 1913. He applied to execute his decree in O. S. No. 38 of 1912 by attachment and sale of certain immovable property and on the 14th of March, 1914, the District Munsif passed an order for attachment. In the meantime, M. Venkataramanayya, having filed an appeal against the District Munsif's decree, obtained *ad interim* order staying execution, from the Appellate Court on 13th March, 1914. The *interim* stay order was received in the District Munsif's Court on 16th March, 1914, and before the *amin* was informed of the order, the *amin* reported on the 17th March, 1914, that attachment was carried out on that very date (17th of March) by affixing a copy of the proclamation on the land. Subsequently *ad interim* order was vacated on the 15th of April 1914 as the judgment-debtor failed to furnish security as required by the Appellate Court. Venkataramanayya filed an application—M. P. No. 1950 of 1914—on 6th October, 1914, under s. 57 of the Code alleging that the attachment made on 17th March, 1914, after the Appellate Court ordered stay of execution was *ultra vires* and illegal, and that the application for sale made by the decree-holder on the strength of the said attachment was not maintainable, and he prayed that 'the Court may cancel the attachment and the sale application made by the decree holder.' The District Munsif overruled the contentions of the decree-holder and directed that 'the attachment in question be raised and all further proceedings following thereon quashed.' On appeal the said order was confirmed by the Subordinate Judge. When the appeal was pending, Venkataramanayya died and his widow—Krameswaramma—was brought in, as his legal representative by the Appellate Court. The decree-holder in O. S. No. 38 of 1912 preferred a Civil Miscellaneous Second Appeal to the High Court. There was a reference to the Full Bench in that Civil Miscellaneous Second Appeal. The Full Bench held, "Where subsequent to an *ad interim* order for stay of execution made by an Appellate Court without notice to the decree-holder, but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid, and that the order is effective only from the time it is communicated to the first Court: *Venkatachalapati Rao* v. *Kameswaramma* (1). The case came on for final disposal before the referring Judges (Justice Abdur Rahim and Justice Bakewell), and they passed the following judgment in the case on 18th December, 1917.

"The appeal will be allowed, the respondent's petition dismissed, and the attachment restored. The

(1) 43 Ind. Cas. 214; 41 M. 158; 6 L. W. 617; 22 M. L. T. 330; 33 M. L. J. 515; (1917) M. W. N. 785 (F. B.).

appellant will recover his costs from the respondent throughout."

On the allegation that by a sale deed dated 27th May, 1914, Gadiraju Venkatappayya and others had purchased the property in question from Venkataramanayya, they (the vendees) filed a petition on 26th August, 1918, under O. XXI, r. 58, Civil Procedure Code, to raise the attachment on the ground that there was no valid attachment on the properties on the date of their purchase. The decree-holder contested the position with the result that the petition was dismissed on 31st October, 1919. The vendees (Gadiraju people) filed O S. No. 142 of 1920 purporting to be under O. XXI, r. 63, Civil Procedure Code, for setting aside the order passed on the 31st October, 1919, and they made the decree-holder in O. S. No. 38 of 1912 as the first defendant to their suit and Kameswaramma (the widow of the judgment-debtor in O. S. No. 38 of 1912) was made the second defendant. Various contentions were raised by the parties, such as, for example, whether there was a valid attachment of the properties, whether the question was *res judicata* by reason of the order passed by the High Court on 18th December, 1917, whether the plaintiffs were estopped from questioning the attachment, and whether the suit was barred by s. 47, Civil Procedure Code. Both the lower Courts having dismissed the suit, the plaintiffs (Gadiraju people) preferred a second appeal to the High Court. The learned Judge who heard the second appeal was of opinion that on the facts disclosed by evidence in the present case there was no legal and valid attachment on the properties, that the plaintiffs who were not parties to the proceedings that came before the High Court in connection with the execution of the decree in O. S. No. 38 of 1912 were not bound by the orders passed therein, and that it was open to the plaintiffs to show that there was no valid attachment on the property when they purchased the same on the 27th of May, 1914. The learned Judge came to the conclusion that after the *ad interim* stay order passed by the Appellate Court on the 13th of March, 1914, was received in the District Munsif's Court on the 16th of March, 1914, no proceedings in execution could be legally taken in the case, and that the attachment which was effected by affixing a notice on the properties on the 17th March, 1914, and on the Court-house and the Collector's Office on the 23rd March, was not merely irregular but illegal and void. Holding that the plaintiffs were not bound by the orders passed against their vendor—the judgment-debtor—after the judgment-debtor had sold the properties to them, the learned Judge reversed the judgments of both the lower Courts, and set aside the order passed in the claim petition on the 31st of October, 1919.

The first defendant has preferred this Letters Patent Appeal.

Though several points were sought to be raised before us by the learned Counsel on either side, we thought it advisable to restrict arguments in the first instance to the issue whether the main question has become *res judicata* by reason of the order passed by the High Court on the 18th December, 1917, and whether the plaintiffs are bound by the said order. After hearing full arguments on that question, we have come to the conclusion that the plaintiffs are so bound, and that it is not necessary to consider the other points raised in the case.

Venkataramanayya—the judgment-debtor—in O. S. No. 38 of 1912 must be taken to have had full knowledge of all the proceedings that took place in execution of the decree in that suit, and pending the disposal of the appeal he got an *ad interim* order of stay of execution on the 13th March, 1914. The further proceedings that took place in the District Munsif's Court in connection with the attachment proceedings also must have been known to him, *viz.*, that the *amin* reported on the 17th March, 1914, that he had in pursuance of the order passed by the District Munsif on 14th March, 1914, carried out attachment by affixing a copy of the proclamation on the lands on 17th March, 1914, and that similar copies were affixed to the notice board in the Court-house and in the Collector's Office on 23rd April, 1914, though the stay order passed by the Appellate Court was received in the District Munsif's Court on the 16th of March, 1914. All this is not denied. He also knew that the said *ad interim* stay order was vacated on 15th April, 1914, by the Appellate Court as he had failed to furnish security as directed by that Court. It is in these circumstances that he sold the property to the Gadiraju people on 27th May, 1914. What the exact effect of the proceedings that had taken place in the District Munsif's Court would be, in the circumstances, is a matter essentially relating to the execution of the decree in O. S. No. 38 of 1912. The judgment-debtor would be bound by the

decision of the executing Court as regards the effect of these proceedings, and *prima facie* any person who claims title under the judgment-debtor after the happening of those events would also be bound by the decision of the executing Court as to the exact effect of those proceedings. The judgment-debtor could not, by transferring the property at that stage, render the decision that may be—and in ordinary circumstances would be—passed by the executing Court as regards the effect of those past events, nugatory as far as the decree-holder is concerned. On the other hand, the purchaser from the judgment-debtor in such circumstances would *prima facie* take the property only subject to the disabilities they were under when in the hands of the judgment-debtor. When, therefore, the decree-holder sought to proceed further with his execution application which he had already filed in March, 1914, and wanted to bring the property to sale in pursuance of the steps taken by him in March, 1914, the executing Court had to decide whether there was a valid attachment of the properties in March, 1914 The circumstance that the Court was called upon to decide that question formally only after the judgment-debtor had sold the properties to the plaintiffs should not alter the essential nature of the said proceedings, nor take away the jurisdiction of the Court in which the said execution proceedings were then pending to adjudicate on that question; nor is it material that the question came up for consideration on a petition filed by the judgment-debtor. It is clear from that petition (C. M. P. No. 1950 of 1914) that the decree-holder in O. S. No. 38 of 1912 had applied for sale in pursuance of the attachment effected in March, 1914. The Courts had accordingly to consider what exactly would be the effect of the proceedings that had taken place in March, 1914, and the High Court on 18th December, 1917, passed final orders on that question in the following terms:—

"The appeal will be allowed, the respondent's petition dismissed, and the attachment restored."

The judgment-debtor's widow was a party to the said proceedings in the High Court, and she could not, therefore, contest the binding nature of the said decision; but are the present plaintiffs (the vendees from the judgment-debtor under a sale-deed dated in May, 1914,) in a better position?

We were not referred to any reported decision directly bearing on the point

After consideration of the question, we have come to the conclusion that they are not.

In our opinion, when proceedings by way of attachment of immovable property in execution of a money decree have been taken by the executing Court in an execution application filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment-debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser would be bound by the Court's decision of the question in the execution department though he was not party to the same. To hold otherwise would be to impair the rights of the decree-holder and to enable the judgment-debtor to set at naught decisions of Courts competent to adjudicate on the rights of parties, and give the go-by to the principle of law giving finality to decisions of Courts in matters properly before them.

The present is not a case where the proceeding pending before the Court is only an execution application to attach property Further proceedings by way of actual attachmant had taken place; and the proceedings by way of attachment of the properties in dispute took place in a Court of competent jurisdiction; it was when those proceedings were pending that the present plaintiffs purchased those properties from the judgment-debtor; *prima facie* they must be taken to have purchased it subject to the result of those proceedings. The principle of the doctrine of *lis pendens* would apply to such a case. If for any reason the proceedings that were had relating to the properties in question prior to the plaintiff's purchase should prove abortive and infructuous, and the decree-holder had to take entirely fresh execution proceedings after the plaintiff's purchase, then there would be force in the respondents's contention that such fresh execution proceedings would not be binding on them unless they were made parties to the same. On the other hand, it is not open to a party to a proceeding to nullify the effect of proceedings already

properly taken with reference to that property by transferring the same to strangers. As already remarked, it does not really matter whether the actual decision of the Courts as to the effect of the past proceedings is given only after the plaintiff's purchase, if the adjudication is really with reference to matters that happened before such purchase and regarding the effect of the legal proceedings that were had prior to the same To safeguard the purchasers' rights, the purchasers should in such circumstances get themselves impleaded as parties.

To take an analogous case, in a suit to recover money, if questions should arise whether the plaint contained sufficient allegations claiming and justifying a charge, and whether the prayer claiming a charge on certain properties was specific or not, the trial Court would have to decide those questions by its final judgment and decree, and if the Court should decide the questions in favour of the plaintiff and give him a decree for money charged on the properties mentioned, it would seem that the decision would be binding on a purchaser from the defendant pending suit, though he be not actually a party to the decree. He would not be allowed to show in a subsequent suit that the prior decision was wrong in the absence of fraud or collusion. The case might be different if the plaint was subsequently amended so as to claim a charge on a particular property, after that property had been sold away by the defendant to a stranger.

In the case before us, it is not contended (not even suggested) that the proceedings conducted by the judgment-debtor were not conducted *bona fide* or that there was any fraud or collusion between the judgment-debtor and the decree-holder in connection with the same. On the other hand, it is admitted by one of the present plaintiffs, when examined as a witness in the present suit, that he was really conducting those proceedings on behalf of the judgment debtor's representative—the widow. After the sale of the suit properties to the plaintiffs on 27th June, 1914, it is difficult to understand why the judgment debtor should have troubled himself, and why a petition—Civil Miscellaneous Petition No. 1150 of 1914—should have been filed on 6th October, 1914, to 'cancel the attachment and the sale application made by the decree holder.' As remarked by the lower Appellate Court, 'it seems difficult to avoid the inference that the plaintiffs having been worsted in their attempt to get the attachment set aside by proceedings in the name of Venkataramanayya have hit upon the expedient of a claim petition and the suit to achieve the same object.

It was further argued that the attachment made in March, 1914, should be taken to have been completed only on 23rd March, 1914, when copies of the proclamation were affixed in the Court-house and in the Collector's Office in accordance with the provisions of O. XXI, r. 54, Civil Procedure Code, and as the stay order was perused by the District Munsif on 17th March, 1914, the subsequent acts done on 23rd March, 1914 should be taken to the *ultra vires*, and that there was no complete and valid attachment in the eye of the law; and the decision of the Full Bench in *Sinnappan* v. *Arunachalam Pillai* (2) was relied on. Assuming the argument to be correct, that does not take away the binding nature of the decision passed by this Court on 18th December, 1917, that the attachment was valid and restoring the attachment.

Orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and could not be called in question by the parties or their representatives. When once the said orders became final, that effect could not be sought to be avoided by making allegations that the previous decisions were wrong on the merits because full facts were not placed before the Court or that all available evidence was not let in on the former occasion. See *Ram Kirpal* v. *Rup Koeri* (3), *Mungul Pershad Dichit* v. *Grija Kant Lahiri* 4) and *Raja of Ramnad* v. *Velusami Tavar* (5)

It, therefore, seems to us that the present plaintiffs are bound by the orders passed by the High Court restoring attachment.

It is a matter for satisfaction that we have been able to reach this result, since there is no doubt that the conduct of the judgment-debtor in getting an *interim* stay from the Appellate Court (which was finally dismissed as no security was furnished) and then transferring the properties to the plaintiffs—who had (there is no doubt)

(2) 53 Ind. Cas. 207; 42 M. 844; 10 L. W. 391; 37 M. L. J. 375; (1919) M. W. N. 678; 26 M. L. T. 181 (F. B.)

(3) 6 A. 269; 11 I. A. 37; A. W. N. 1886 286; 4 Sar. 89; 8 Ind. Jur. 214 (P. C.)

(4) 8 C. 51; 8 I. A. 123; 11 C. L. R. 113; 4 Sar. 248 (P. C.)

(5) 59 Ind. Cas. 880; 48 I. A. 45; 13 L. W. 290; 19 A. L. J. 168; 40 M. L. J. 197; (1921) M. W. N. 51; 33 C. L. J. 218; 25 C. W. N. 581; 23 Bom. L. R. 701; 29 M. L. T. 345 (P. C.).

notice of all the proceedings—thus defeating the decree-holder—would surely be reprehensible from the moral point of view.

We accordingly hold that the present plaintiffs are bound by the final orders passed in execution proceedings in O. S. No. 38 of 1912 in which it was held by the High Court in effect that there was a valid attachment in March, 1914, of the properties in dispute, and that the said 'attachment should be restored.' The plaintiffs' purchase from the judgment-debtor in May, 1914, should be taken to be subject to that attachment. Allowing this Letters Patent Appeal, we restore the decision of the lower Appellate Court with costs here and in second appeal.

N. S. & R. L. *Appeal allowed.*

MADRAS HIGH COURT.

Criminal Miscellaneous Petition No. 628 of 1931.

September 14, 1931.

BEASLEY, C J., AND CORNISH, J.

SATHAPPA CHETTIAR—ACCUSED—PETITIONER

versus

C. RAMACHANDRA NAIDU—RESPONDENTS

Contempt of Court—Essence of offence.

The essence of the offence of contempt of Court is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings must go on, even where the proceedings do not involve trial by Jury and no one would imagine that the mind of the Magistrates or Judges charged with the case would or could not be induced thereby to swerve from the straight course. *King* v. *Tibbits and Windust* (1) followed [p. 312, col. 2.]

Petition praying that the High Court will be pleased to commit the respondent herein for contempt of Court and otherwise deal with him according to law for his having published in his paper 'Tamil Nadu' *in extenso* the complaint in C. C. No. 124 of 1931 on the file of the Court of the Sub Divisional Magistrate, Coimbatore with the head lines and comments thereon as alleged in the said affidavit.

Messrs. *Nugent Grant* and *T. M. Kasturi*, for the Petitioner.

Mr. *N. Rajagopalan*, for the Respondent.

Order.—The respondent here is the Editor and Publisher of the "Tamil Nadu" newspaper whose place of business is in Broadway, Madras; and he is here to-day to show cause why he should not be committed for contempt of Court or otherwise dealt with.

The facts of the case can be stated quite briefly and they are as follows: One Sathappa Chettiar at whose instance these proceedings have been put before the Court is an accused person He stands charged in the Court of the Sub-Divisional Magistrate of Coimbatore with the offence of criminal breach of trust. He is the Secretary and Banker of the Kaleswarar Mills Ltd., and amongst other things he has two mills *viz*,, the Sree Krishna Ginning Factory and the Soma Vilas Ginning Factory under his management. A complaint was presented against him charging him with criminal breach of trust on the 1st September in the Court before mentioned. There were three heads of charge—so we gather from the opening of Mr. Nugent Grant—and they were that a certain sum which had been set apart for the payment of bonuses was received wrongly by Sathappa Chettiar, that out of a sum of money which lay in suspense account he set apart Rs. 75,000 in order to misappropriate that sum at some future date and that he was guilty of receiving secret commissions from vendors of cotton Immediately after this complaint had been presented in the Sub-Divisional Magistrate's Court of Coimbatore a search warrant was moved for and obtained and certain mills were searched by the Police. Two of them were the Sree Krishna Ginning Factory and the Soma Vilas Ginning Factory which, as before stated, were under his management. On the 4th September in the issue of that date of the respondent's newspaper there appeared a report of the criminal charges against Sathappa Chettiar in the Sub Divisional Magistrate's Court of Coimbatore. We understand that the report contained an accurate statement of the complaint which was set out *in extenso*. Had the matter ended there, no proceedings for contempt of Court could have been taken against the respondent, and Mr. Nugent Grant does not here rely upon what appeared with regard to that complaint in the respondent's newspaper. He, however, complains of something which was done by the newspaper on the same date In the poster or 'Contents Bill' relating to this issue and in the head lines the matter was dealt with in Tamil in four lines, the official translation of which is as follows: "Sathappa Chettiar in trouble; Police search at Tiruppur;

Thousands of rupees missing; Cotton Mills in danger." Mr. Rajagopalan who appears for the respondent argues that the correct rendering of that passage is as follows: "Sathappa Chettiar put to trouble; Police search at Tiruppur; Thousands of rupees missing; Cotton Mills plight" and argues that read in that way the conduct of the respondent does not amount to contempt of Court in so far as what he has done is not likely in any way to prejudice the fair trial of Sathappa Chetttiar. With regard to the first line, in our view, there is not much difference between the official translation and the interpretation put upon it by the respondent. It called the attention of the public who were invited to read the newspaper to the fact that some trouble or worry had fallen upon Sathappa Chettiar. That by itself of course would not amount to anything but it is linked up with the next line which, in our opinion, clearly shows what those words were intended in the first line to convey to the public. As a result of this criminal complaint Sathappa Chettiar was certainly in trouble and of course those people who read the "Contents Bill" but had not then read the newspaper would find some indication of the sort of trouble that had been put upon him by the words "Police search at Tiruppur". Tiruppur was the place where these two factories which were under the management of Sathappa Chettiar were and there was a search and as a result of the search—that is the conclusion to be drawn from the third line—thousands of rupees were found to be missing. As a result of that you get the fourth line that cotton mills were either in danger or in trouble or in a plight, it does not matter which construction is put upon the Tamil words. Taking these four lines together, we are of the opinion that readers of the poster and the head lines would gather that Sathappa Chettiar was in trouble, that the Police were connected with the trouble, that the trouble he was in occasioned a search of the mills under his management at Tiruppur and that as a result of that search thousands of rupees were found to be missing which was a disastrous matter for the cotton mills. It is argued here that in the third line which after all is the most important one, one Tamil letter "*ma*" meaning "alleged" was accidentally omitted by the compositor and that the line should read "Thousands of rupees alleged to be missing." Had the words "alleged" been there, then this matter probably would never have come up before this Court. It is an important omission and we are not going to assume that it was an accidental omission. Even if it were an accidental omission, we have got to ask ourselves whether that omission, accidental or otherwise, does not convey to the public that as a fact thousands of rupees were missing as a result of the Police search at Tiruppur and that Sathappa Chettiar was in trouble with regard to it and in consequence of it. That being so, we have got to consider whether the conduct of the respondent in publishing those lines so worded constitutes a contempt of Court, and we can do no better than to refer to the observations of Lord Alverstone, C. J., in the case of *King* v. *Tibbits and Windust* (1), where he says as follows:—"It would, indeed, be far-fetched to infer that the articles would in fact have any effect upon the mind of either Magistrate or Judge,"—we may pause here and say that it is not in the least likely that the words complained of would have any effect on the Sub-Divisional Magistrate of Coimbatore and indeed it is extremely doubtful whether he would ever have seen these words at all—"but the essence of the offence is conduct calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. Publications of that character have been punished over and over again as contempts of Courts, where the legal proceedings pending did not involve trial by Jury and where no one would imagine that the mind of the Magistrates or Judges charged with the case would or could be induced thereby to swerve from the straight course."

It seems to us that these words are singularly appropriate to this case and it is impossible to say that the conduct complained of is not calculated to produce, so to speak, an atmosphere of prejudice in the midst of which the proceedings must go on. That being so, the respondent is guilty of contempt of Court and the only other matter to be considered is, how is he to be dealt with by us. Whilst we think that it is a serious thing to have omitted the word "alleged" thereby stating it as a fact, when it possibly is not, that thousands of rupees were missing in the factories, it is a case which does not amount to serious contempt of Court. We think that under the circumstances justice will be done by ordering the respondent to pay

(1) (1902) 1 K. B. 77 at p. 88; 71 L. J. K. B. 4; 85 L. T. 521; 50 W. R. 125; 66 J. P. 5; 20 Cox. C. C. 70.

the petitioner's costs which we fix at Rs. 250.

N. S. & R. L. *Petition allowed.*

MADRAS HIGH COURT.

Criminal Revision Petition No. 2 of 1931.

May 12, 1931.

JACKSON, J.

KALASTRI MUDALI AND ANOTHER —PETITIONERS—

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 203, 476—Application to make complaint—Dismissal—Second application—Competency of.

The dismissal of an application for making a complaint under s. 476, Criminal Procedure Code, does not preclude the Magistrate from entertaining a second application for the same purpose. *Emperor* v. *Chinna Kaliappa Goundan* (1), *Emperor* v. *Maheshwara Kondaya* (2) and *Harekrishna Parida* v. *Emperor* (3), referred to.

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise the order of the District Court, Salem, dated the 21st November, 1930 and made in O. P. No. 28 of 1930.

Messrs. *K. S. Jayarama Aiyar*, *R. Sundaralingam* and *V. Sankaran*, for the Petitioners.

The Public Prosecutor, for the Crown.

Judgment.—The petitioner seeks to revise the order of the District Judge, Salem, complaining against him under s. 476, Criminal Procedure Code, for offences under ss. 467 and 471, Indian Penal Code.

On 15th November 1929, a private party applied to the District Munsif, Salem, praying that he would lodge a complaint under s. 476. This was dismissed on 27th February, 1930 and there has been no appeal.

Then on the same day 27th February, 1930, another petition was put in, and ultimately dismissed. On appeal from that dismissal the District Judge, Salem, has complained under s. 476.

The question is whether the petition of 27th February and the consequent appeal were competent after the petition of November was dismissed.

This opens up a field which is occupied by two schools of thought. There are those who hold that apart from his statutory powers and limitations a Magistrate is circumscribed by the maxim "*nemo bis vexari*" and he cannot expose an accused person to jeopardy twice; and those who hold that if not expressly forbidden a Magistrate can act within the powers given by Statute, as often as he likes irrespective of his previous action. The two views are fully expressed in *Emperor* v. *Chinna Kaliappa Goundan* (1), when the latter view prevailed by a bare majority of 3 to 2. Since then it has always been the law in this presidency at least that a Magistrate can dismiss a complaint under s. 203, and re-hear it on the following day. It would seem to follow that he is equally competent to dismiss an application to complain and to re-entertain it.

As the Chief Justice points out on page 133 of *Emperor* v. *Chinna Kaliappa Goundan* (1), if a discharge does not operate so as to prevent a revival, *a fortiori* the dismissal of a complaint will not. Subramania Aiyar, J., argues that it is unjust that a discharged man should be again put upon his trial, which may be unexceptionable as an abstract principle of law (page 137*), but the Code allows it, and a Bench of this Court in *Emperor* v. *Maheswara Kondaya* (2), clearly lays down that a Magistrate may himself re-open a prosecution although he has discharged the accused. It is argued that when the Code expressly provides an appeal, it cannot be assumed that the Magistrate can proceed in contravention of his previous order. The same argument is not inapplicable to discharges on complaints. Why should s. 436, provide special machinery by way of revision, if the Magistrate can himself override his order? The answer would seem to be that the Magistrate is left free to change his mind, and at the same time the party, if the Magistrate will not change his mind, may have recourse to superior authority.

Limitation will run from the order on the second application; and it cannot be said that the appeal to the District Judge was time-barred. There is no need, therefore, to discuss the applicability of s. 5 of the Indian Limitation Act as though the appeal were against the first order of dismissal.

That applications under s. 476 can be re-heard in spite of previous dismissal has

(1) 29 M. 126; 16 M. L. J. 79; (F. B.)
(2) 31 M. 543.

*Page of 29 M.—[*Ed.*]

been held in *Harekrishna Parida* v. *Emperor*. (3).

The petition is accordingly dismissed as regards 1st petitioner. As regards the abettor, 2nd petitioner, the petition is allowed. *Vide* judgment in *Sengowda Goundan* v. *Vayyapuri Goundan* (4).

N. S. & A. *Petition dismissed.*

(3) 120 Ind. Cas. 629; 8 Pat. 736; A. I. R. 1929 Pat. 242; Ind. Rul. (1930) Pat. 53; 31 Cr. L. J. 143; 11 P. L. T 75.

(4) 136 Ind. Cas. 48; 61 M. L. J. 684; (1931) M. W. N. 1047; A. I. R. 1932 Mad. 129; 33 Cr. L. J. 318 (1); Ind. Rul. (1932) Mad 256.

MADRAS HIGH COURT.

Criminal Appeal No. 299 of 1931.

September 3, 1931.

WALLER AND PANDALAI, JJ.

Kota POTHARAJU—PRISONER—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 300, Excep. 1, s. 304—Grave and sudden provocation—Tests—Social morality, how far a guiding factor.

The question of provocation is a psychological question and one cannot apply considerations of social morality to such a question.

Where a man sees a woman in the arms of another, and looses control over himself, the circumstance that she was his mistress and not wife does not make any real difference for the purposes of s. 304, Penal Code.

Criminal Appeal against the order of the Sessions Judge, Kistna Division, in Case No. 4 of 1931.

The Public Prosecutor, for the Crown

Judgment.—Two questions arise in this appeal. The first is what offence has been committed; the second, what the sentence should be. The appellant does not deny that he killed his mistress a woman called Mahalakshmi, but he pleads that he did so in consequence of grave and sudden provocation. The Judge has found that he discovered the woman in the arms of a former lover (P. W. No. 17), lost control of himself and stabbed her. The finding is probably correct. Prosecution Witness No. 17 admitted to the Police that he was seated on Mahalakshmi's cot when the appellant entered the hut but not that she was in his arms. As he admitted further that she had solicited him, it is difficult to believe his pretence that he had refused her advances. On this finding, the Judge came to the conclusion that the offence committed was one under s 302, Indian Penal Code. He was of opinion that though the provocation was sudden it was not so grave as to justify him in convicting of culpable homicide not amounting to murder. This opinion he based on the fact that Mahalakshmi was the appellant's mistress. Had she been his wife, his conclusion would have been different and more favourable to the appellant. We find it impossible to agree that the fact that Mahalakshmi was the appellant's mistress and not his wife makes any real difference. One cannot apply considerations of social morality to a purely psychological problem. The question is not whether the appellant ought to have exercised, but whether he lost control over himself When a man sees a woman be she his wife or his mistress, in the arms of another man, he does not stop to consider whether he has or has not the right to insist on exclusive possession of her person as the case cited by the Judge puts it She is a woman, of whose person he desires to be in exclusive possession and that is for the moment, enough for him, he thinks of nothing else. The question in each particular case is whether the circumstances are such as to justify the Court in giving the accused the benefit of the exception. In the present instance we should have altered the conviction to one under s. 304, Indian Penal Code but for two circumstances. It is in evidence that after P. W. No. 17 had escaped the appellant fastened the door of the hut and he admits himself that having no knife in his hands he removed some baskets from the top of his box, opened it and took out the knife with which he committed the murder. All this must have taken some time and indicates a certain amount of preparation for an intended murder. Had he taken a knife from his belt and used it at once, it would have been a different matter. As it is, we think that he has been rightly convicted and sentenced. The conviction and sentence are confirmed and the appeal is dismissed.

N. S. & A. *Appeal dismissed.*

MADRAS HIGH COURT.

Criminal Revision No. 354 of 1931

(Case Referred No. 27 of 1931.)

August 13, 1931.

LAKSHMANA RAO, J.

EMPEROR—APPLICANT

versus

VARADARAJULU NAIDU—ACCUSED—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 245—

Acquittal without examining complainant or his witnesses, legality of.

It is not open to a Magistrate to acquit an accused person under s. 245, Criminal Procedure Code, without examining the complainant and witnesses produced by him.

Case Referred by Sessions Judge, West Tanjore, in his letter, dated the 26th February 1931.

The Public Prosecutor, for the Crown.

Mr. *R. Gopalaswami Ayyangar*, for the Accused.

Order—It was not open to the Magistrate to refuse to examine the complainant and the witnesses produced by her and the acquittal of the accused under s. 245, Criminal Procedure Code, without recording any evidence is clearly illegal. It cannot therefore be upheld and the recommendation of the Sessions Judge who has referred the case to this Court on the application of the complainant is accepted. The order of acquittal is therefore set aside and the complaint should be inquired into by such other Magistrate as the District Magistrate of Tanjore may direct.

N. S. & A *Acquittal set aside.*

MADRAS HIGH COURT.

Civil Revision Petition No. 507 of 1931.

September 30, 1931.

CORGENVEN, J.

ANDIAPPAN AMBALAM AND ANOTHER—PETITIONERS

versus

SUBBAYYA AMBALAM AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8—Suit against representative defendant, when competent—Debt incurred by managers of community—Suit against managers—Permission for defendants to be sued as representatives.

As a general rule a suit against representative defendants cannot be brought upon a debt, as it is not possible to proceed against the common property unless all those who possess an interest in the property are actually made parties to the suit. But this rule does not apply to a case in which managers or trustees or some other persons whom the plaintiff alleges have power to bind the property of the association or community are before the Court. Thus, where a promissory-note is executed by five persons and the holder of the note sues them alleging that they are managers appointed by their community with powers of borrowing and dealing with common property and that the common property is bound by the debt, an order under O. I, r. 8 permitting the defendants to be sued as representative of the community is competent. *Walker* v. *Sur* (1), *Sahib Thambi* v. *Hamid* (2) and *Ideal Films Ltd.* v. *Richards* (3), referred to. [p. 315, col. 2; p. 316, col. 1.]

Petition under s. 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge, Devakottah, dated the 16th December, 1930, and made in I. A. No. 569 of 1930, in O. S. No. 80 of 1930.

Mr. *M. Patanjali Sastri*, for the Petitioners.

Messrs. *S. Varadachariar* and *K. S. Venkatarama Ayyar*, for the Respondents.

Judgment.—This revision petition has been brought against an order of the Subordinate Judge of Devakottah passed under O I, r. 8, of the Code of Civil Procedure allowing the defendants in O. S. No. 80 of 1930, on his file to be sued as representative of a community known as the Karaikkudi Nattars which comprises, I understand, some 300 *pattadars* The plaintiff in that suit, now respondent, holds a promissory note for Rs. 25,000 executed by five persons who, he alleges, were managers appointed by the community and invested with such powers as borrowing and dealing with the common property, etc Four of these five executants he has impleaded as defendants Nos. 1 to 4. The 5th defendant is said to be the adopted son of the remaining manager and the 6th defendant is the 5th defendant's natural father, while the 7th defendant is a Receiver in a suit which is simultaneously proceeding for the partition of common properties. The petitioners before me are the 8th and 9th defendants, members of the Nattar community, who say that they got themselves impleaded in the suit in the interests of the community and who resist the order now under consideration.

The principal argument employed before me is that a suit against representative defendants cannot be brought upon a debt, as it is not possible to proceed against the common property unless all those who possess an interest in the property are actually made parties to the suit. This no doubt as a general proposition, is true enough and may be accepted on the authority of an English case, *Walker* v. *Sur* (1). In that case an action was brought for fees for professional services rendered to an unincorporated religious society, and as representatives of that society four persons were impleaded as defendants. It was not contended that these four persons were chosen for any special fitness to represent the society, and partly for that reason and partly because the society's property could

(1) (1914) 2 K. B. 930; 83 L. J. K. B. 1188; 109 L. T. 888; 30 T. L. R. 171.

not be proceeded against otherwise than in the presence of all the members of the society, the application was disallowed. I think it is clear that the decision does not necessarily apply to a case in which managers or trustees or some other persons whom plaintiff alleges had power to bind the property of the association or community are before the Court. In fact, Vaughan Williams, L. J., expressly bases his decision upon grounds of that nature, and I gather from what the learned Lord Justice says that if managers of the body had been before the Court he might have taken a different view as to the application of the corresponding English provision for constituting a representative suit. Buckley, L. J., approaches the question from the point of view of the accessibility of the property and there again I think that if persons had been before the Court who were competent to represent the property, the objections which he took would lose their force. It has been said in *Sahib Thambi* v. *Hamid* (2), that "the general rule of law, undoubtedly, is, that in suits where one person is allowed to represent others as defendant in a representative capacity any decree passed can bind those others only with respect to the property of those others which he can in law represent." Accordingly, I think that the circumstances that the managers or the representatives are sued in the present case may get over the difficulty with regard to proceeding against the property. The circumstances of the case more closely resemble those which arose in *Ideal Films Ltd.* v. *Richards* (3). That was a suit brought against an un-registered association for articles supplied, and the Committee of the association were made defendants on behalf of all the members and the trustees were also impleaded as representing the property. The suit accordingly was a representative one so far as the Committee was concerned and it also comprised parties whose presence enabled the property to be proceeded against. The argument used in the present case is that the managers were competent to contract the debt on behalf of the community and were also competent in so doing to bind the property That has been made the subject of issues in the suit and it is unnecessary and indeed, undesirable for me to express any opinion upon it. It may be that if the managers were so competent there was no need to go further than to sue them. But at the worst, it can only be said that it may not have been necessary to resort to O. I, r. 8 That is not the same as to say that in the circumstances it could not be applied. I think that the main objection which is raised by Mr. Patanjali Sastri on behalf of the petitioners, namely the question of the liability of the common property, is one which can only be decided in the suit, and issues have been framed for a complete enquiry in that respect. No substantive rights have been lost by defendants or those whom they represent in allowing a suit to be brought in this form. It is merely a matter of processual expediency. I can accordingly find no sufficient ground to interfere with the lower Court's order and I dismiss the revision petition with costs.

N. S. & R. L. *Petition dismissed.*

(2) 12 Ind. Cas. 1006; 36 M. 414 at p. 417; (1911) 2 M. W. N. 534; 22 M. L. J. 109; 10 M. L. T. 515.

(3) (1927) 1 K. B. 374; 96 L. J. K. B. 161; 136 L. T. 295; 70 S. J. 1138; 43 T. L. R. 7.

MADRAS HIGH COURT.

Civil Revision Petition No. 857 of 1928.

September 2, 1931.

CURGENVEN, J.

MARUDACHALA NADAR—PLAINTIFF—PETITIONER

versus

CHINNA MUTHU NADAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1 (2)—Application to withdraw from suit with liberty to bring fresh suit—Allowing application without giving leave for fresh suit—Legality—Proper procedure.

An application under O. XXIII, r. 1 (2), Civil Procedure Code, for permission to withdraw from the suit with liberty to institute a fresh suit on the same subject-matter must be treated as an indivisible whole, and if the applicant is not allowed liberty to institute a fresh suit, his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained on the file. *Bhagwat Pershad* v. *Lachmi Pershad* (1) and *Biharidasji* v. *Parshotamdas* (2), followed.

Civil Revision Petition against an order of the District Munsif, Coimbatore, dated the 26th October, 1927, in O. S. No. 709 of 1926.

Messrs. *S. Muthiah Mudaliar* and *B. Venkataraman*, for the Petitioner.

Mr. *T. S. Anantaraman*, for the Respondents.

Judgment.—The petitioner as plaintiff applied under O. XXIII, r. 1, sub-r. 2, Civil Procedure Code, for permission to withdraw from his suit with liberty to institute a fresh suit in respect of the same

subject-matter. The learned District Munsif, while refusing to grant such liberty, has thought that it was open to him to accept the former portion of the application and to allow the withdrawal of the suit. I think there is no doubt that an application of this kind must be treated as an indivisible whole and if a party is not allowed liberty to institute a fresh suit his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained upon the file. This is the view taken in *Bhagwat Pershad* v. *Lachmi Pershad* (1) and 10 Ind. Cas. 346, *Biharidasji* v. *Parshotamdas* (2), and appears to me to be clearly reasonable. I must therefore allow the petition, set aside the District Munsif's order and direct the District Munsif to rehear and dispose of the application. As the respondent has not contested the petition before me each party will bear his own costs.

N. S. & A. *Petition allowed.*

(1) 10 Ind. Cas. 346.
(2) 32 Bom. 345; 10 Bom. L. R. 293.

MADRAS HIGH COURT.

Letters Patent Appeal No. 375 of 1926.
September 23, 1931.

REILLY AND ANANTHAKRISHNA AYYAR, JJ.

SUPPAN CHETTY—PLAINTIFF—APPELLANT

versus

YEGNANARAYANA AYYAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (2)(xi)—Endorsement of payment on mortgage-deed—Necessity of registration—Return of mortgage-deed—Discharge of mortgage by payment of smaller sum, proof of—Evidence Act (I of 1872), s. 92.

The discharge of a mortgage-debt by payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of the mortgage contract and can be proved without evidence of such an agreement. *Balasundara Naicker* v. *Ranganatha Ayyar* (1), followed. [p. 317, col. 2.]

Where an endorsement does not on its face purport to extinguish the mortgage it does not require compulsory registration. The return of the mortgage-deed by the mortgagee is not conclusive in such cases nor even of itself any indication that the mortgage is extinguished. *Hari Narain Banerji* v. *Kusum Kumari Dasi* (2), *Piari Lal* v. *Makhan* (3) and *Seshayya* v *Subbamma* (4), referred to. [*ibid.*]

Letters Patent Appeal against the judgment and decree of Mr. Justice Waller, dated the 17th November, 1926, and passed in S. A. No. 605 of 1924, preferred against the decree of the Court of the Subordinate Judge, Dindigul, in A. S. No. 93 of 1922, (O. S. No. 1191 of 1919, on the file of the Court of the District Munsif, Periyakulam.)

Messrs *T. R. Ramachandra Ayyar* and *S. R. Dikshit*, for the Appellant.

Mr. *S. Srinivasa Ayyangar* for Messrs. *T. M. Krishnaswamy Ayyar* and *R. Ramamurthi Ayyar*, for the Respondents.

Judgment. It is not now disputed that the discharge of the mortgage-debt represented by Ex. A by the payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of the mortgage contract and can be proved without evidence of such an agreement—*Balasundara Naicker* v. *Ranganatha Ayyar* (1). In this case the plaintiff pleaded such an oral agreement of 25th June, 1919. But the learned Subordinate Judge found that the discharge of the mortgage by payment of Rs. 1,500 on 5th July, 1919, was true without referring to the alleged agreement to vary the terms of the mortgage and without using any evidence regarding that agreement. It is objected that he used the endorsement of discharge on Ex. A, which it is contended was inadmissible in evidence because it was unregistered. But that endorsement in our opinion comes within s. 17 (2) (*xi*) of the Registration Act and need not have been registered. Without discussing on this occasion the question whether all endorsements of payment on mortgage-deeds are exempt from registration or only those which do not purport to extinguish the mortgage, we find in this case that the endorsement does not on its face purport to extinguish the mortgage. The return of the mortgage-deed by the mortgagee is certainly not conclusive in such cases nor even of itself any indication that the mortgage is extinguished—*Hari Narain Banerji* v. *Kusum Kumari Dasi* (2), *Piari Lal* v. *Makhan* (3) and *Seshayya* v. *Subbamma* (4). It was also suggested for the defendants that, if the oral agreement of 25th June, 1919, to vary the mortgage contract cannot be proved, the agreement made on the same occasion to assign the decree against his father-in-law to the plaintiff, on which the plaintiff sues, also cannot be proved, as they were really parts of one agreement. But, because the plaint-

(1) 122 Ind. Cas. 641; 53 M. 127; 30 L. W. 293; A. I. R. 1929 Mad. 794; Ind. Rul. (1930) Mad. 385; 58 M. L. J. 503.
(2) 6 Ind. Cas. 159; 37 C. 589; 11 C. L. J. 551.
(3) 34 A. 528.
(4) 8 M. L. J. 269.

iff cannot prove any such agreement to vary the mortgage contract by taking less than what was due on it in full discharge, he is not necessarily shut out from proving the actual discharge of the mortgage by the payment and acceptance of a lesser amount and the payment of the balance, for which he now sues, in accordance with a separable agreement that defendant No. 1 should assign the decree to him.

In our opinion, this appeal must be allowed and the Subordinate Judge's decree restored with costs throughout.

N. S. & E. L. *Appeal allowed*

MADRAS HIGH COURT.

Appeal against Order No. 30 of 1928.
September 10, 1931.

MADHAVAN NAIR AND JACKSON JJ

A. R. M. KARUPPAN CHETTIAR—APPELLANT.

versus

K. L. S. V. E. SUBRAMANIAM CHETTIAR—PETITIONER.

Civil Procedure Code (Act V of 1908), s. 145—Surety's liability for costs, nature of—Extension of liability to decree of Appellate Court—Permission to withdraw security, effect of.

A suit dismissed on default was restored on the condition of the plaintiff furnishing security for Rs. 1,000 for costs of the suit. The surety deposited Rs. 1,000 as security. The suit being decreed the security was withdrawn. On appeal the suit was dismissed and the defendant applied to the trial Court for an order directing the surety to bring into Court his costs of the suit. The surety resisted the application on three grounds, namely (1) that he had undertaken no personal liability, (2) that his liability came to an end with the decree of the first Court and did not extend to the decree passed in appeal and (3) that the order permitting him to withdraw the money operated as *res judicata*:

Held, that the surety was personally liable and the bare fact that he deposited Rs. 1,000 did not exclude his personal liability.

Held, further, that liability of the surety did not cease with the decree of the trial Court but extended to decree passed in appeal.

Held, also, that the order permitting withdrawal of the money did not operate as *res judicata*.

Appeal against an order of the Subordinate Judge, Sivaganga, dated the 21st September 1927 and made in E. P. No. 42 of 1927, in O. S. No. 67 of 1919.

Mr. *K. S. Venkatarama Ayyar*, for the Appellant.

Mr. *K. S Sankara Ayyar*, for the Respondent.

Judgment—In this case the appellant stood surety for the costs payable by the plaintiff in O. S. No. 67 of 1919. This suit was originally dismissed for default. On appeal it was restored and the High Court made it a condition precedent to the restoration of the suit that the plaintiff should furnish security for Rs. 1,000 for costs of the suit. The appellant deposited Rs. 1,000 as security. In the first Court a decree was given for the plaintiff. Then the appellant withdrew the amount deposited into Court. On appeal that decree was set aside. An application was made by 1st defendant to the lower Court for an order directing the appellant to bring into Court his costs of the suit on the ground that he has stood surety for costs and the lower Court made an order in terms of the application. The appeal is against this order.

Three points have been argued before us. The first point is that the appellant has not undertaken any personal liability for the costs and so under s. 145 of the Code of Civil Procedure no proceedings can be instituted against him. It is argued that the fact that the appellant deposited Rs. 1,000 as security would show that no personal liability was contemplated between the parties. The decision in *Brajendra Lal Das* v. *Lakhmi Narain Khanna* (1) is relied on in support of the contention. But in that case the facts clearly show that, when the promissory notes were deposited as security, it was distinctly understood that there was to be no personal liability so far as the surety was concerned. It is admitted that the appellant is a surety, and from the bare fact that he deposited Rs. 1,000 it cannot be inferred that personal liability, which attaches to every surety, is excluded. We think that the lower Court is right in holding that the appellant is personally liable for the costs.

The second point urged is that the obligation of the surety came to an end with the decree of the first Court and that it did not extend to the decree passed by the High Court. The question is one of some difficulty in this case as no security bond has been executed by the appellant; we have to infer from the order passed by the High Court the scope of the liability of the appellant. The decisions relied on by his Counsel do not give us very much help. In *Subbarama Aiyar* v. *Subba Aiyar* (2) the facts show that the security was given in connection with O XXXVIII, r. 5. The learned Judges held that as soon as the suit was dismissed

(1) 29 Ind. Cas. 149; 19 C. W. N. 961.
(2) 82 Ind. Cas. 461; 47. M. L. J. 523; (1924) M. W. N. 495; A. I. R. 1925 Mad. 114.

the security ceased to exist. That case does not apply; and so we have to decide the case on the wording of the order passed by the High Court. The order is in general terms, "For the costs of the suit" The learned Judges have not restricted the security to be given to the costs of the defendants which might be ordered by the decree of the first Court. We think on a construction of the order of the High Court it cannot be said that the obligation of the surety is limited to the decree of the first Court.

The next point argued is that the order permitting the appellant to withdraw the money operates as *res judicata* and that none of the questions argued can be raised now. Having regard to the order, it is difficult to see how the respondent is precluded from raising these questions. His counter-affidavit filed in connection with the petitions says that he had *then* no objection to the withdrawal of the money. That is all. It cannot be held that all the questions now raised between the parties can be constructively said to have been decided in the course of that proceeding

In these circumstances we uphold the order of the lower Court and dismiss this appeal with costs.

N. S. & R. L. *Appeal dismissed.*

MADRAS HIGH COURT.

Civil Miscellaneous Petition No. 4516 of 1931.

September 29, 1931.

BEASLEY, C. J. AND CORNISH, J.

In re K. SOMASUNDARA MUDALIAR AND OTHERS—PETITIONERS.

Madras District Municipalities Act (V of 1920), s. 45(1)(c)—Claim to appear on electoral roll on ground of assessment to tax—Revising authority, enquiry into propriety of assessment—Certiorari, *writ of—Another remedy open, effect of.*

If a person claims that he has been assessed and that his name should appear on the electoral roll, then it is for the Revising Authority to enquire into that claim, and, if satisfied that the claimant has been assessed, to put his name on the roll. On the other hand, if an objection is made that a person whose name is included in the roll is not an assessee then all that the Revising Authority can enquire into is the fact whether he has been assessed. The question whether the assessee has been illegally or improperly assessed is a matter which does not lie within the scope of the Revising Authority's enquiry. [p. 320, col. 2.]

Where a person has another remedy open to him he can not come to the High Court by way of *certiorari*. [*ibid.*]

Petition for issuing a writ of *certiorari* to the Respondents Nos. 1 to 3, namely, the Revising Authority of the Saidapet Municipality (1) commanding them to send to this Court all records relating to certain objections with all things touching the same as fully and perfectly as they have been made by them and now remaining in their custody or power and to quash the proceedings dated 25th September, 1931, of the said Revising Authority with respect to the said objections and to issue an interim order of injunction restraining the 4th respondent herein in the meanwhile from publishing the final electoral Roll.

Mr. *S. Jagadisa Ayyar*, for the Petitioners

Beasley, C. J.—This is an application for a writ of *certiorari* upon the Revising Authority of the Saidapet Municipality commanding them to send up to this Court the records relating to certain objections to the preparation of the Electoral Roll and quash the proceedings of the Revising Authority of the 25th September, 1931. What happened was that when the Election Officer was preparing the Electoral Roll objection was put in to the inclusion therein of certain names by the petitioner and those interested with him. The objection was that the names of some persons which were included ought not to be included because although they were assessed to taxes, they were not properly so assessed. This means of course that the Election Officer was called upon to embark upon an enquiry into the correctness or otherwise of the assessment of these persons by the Municipal Authorities Despite this objection of the petitioner, the names were included in the Electoral Roll. Objection was then preferred to the Revising Authority under the Act and the following order was passed by that authority: "In these cases objection has been taken to the inclusion in the Electoral Roll of the voters concerned on the ground that they had been improperly and illegally assessed to profession tax We have heard arguments on both sides and are of opinion that having regard to s 45 (1) (c) of the District Municipalities Act, 1920, as it stands at present it is enough that the voters concerned were assessed in the preceding year."

That concluded the matter so far as the Revising Authority was concerned. We have before us the affidavit of the petitioner and we notice amongst other things that in para. 12 the allegations are that the names of these persons have been fraudulently inserted or caused to be inserted at the instance of the Chairman with a view to secure as many votes as possible for himself or his nominees in the coming elections, that those persons were not getting the incomes allotted to them nor were they in a position to pay the rates, that they were not even made aware of their assessments, that the taxes were paid by some unknown persons and without the authority or knowledge of those alleged to have been made so liable, that the payments did not appear to have been the assessee's own acts and that an earlier stage when these matters were represented to the Election Authority some enquiry was made and it was elicited that the said assessments were behind the back of the assessees. In my view, the Revising Authority took the proper view and were quite right in saying that as the names of these persons appeared on the Assessment Rolls of the Municipality, it was not competent for them, or indeed the Election Officer, to question the legality of such assessment. Were it otherwise, it would lead to this very strange position. A person is assessed by the Chairman or the Assessing Officer of a Municipality to profession tax and has to pay the tax. According to the argument addressed to us for the petitioner it would be open to the person, notwitstanding that he has been assessed by the proper authority, to go before the Election Officer when the Electoral Roll is being prepared and contend that he has been improperly assessed and to get from the Election Officer, who after all is not the Assessing Officer, a decision to the effect that he has been wrongly assessed, so that we have this remarkable position, if that argument is right, that the person is both assessed and not assessed. Which authority he is to be guided by has not been stated by the learned Counsel who supports his petition. Obviously that would lead to a chaotic state of affairs. In my view, it is not open to the Election Officer or the Revising Authority to go into that question at all. The Act is perfectly definite with regard to persons who are entitled to have their names included in the Electoral Roll. To be included in the Electoral Roll a person must have attained the age of 21 in the year preceding such application, he must be a British subject or a subject of a State in India, he must have been assessed for the preceding year to any tax payable to the Government of India or the local Government or to any local authority in the Presidency of Madras and he should have resided in the Municipality for 120 days in the year preceding. Directly he satisfies the Election Officer on those points, the Election Officer is bound to put his name in the Electoral Roll. In this case it is quite clear from the affidavit supporting the petition that it is alleged that it was not due to any mistake that the persons objected to were assessed but due to deliberate fraud on the part of the Chairman of the Municipality and those interested with him. If that is so, then clearly any subsequent election at which these allegations are proved and in which it is shown that the person who was elected colluded with those who brought about such things and so secured election can be set aside. There is this distinct remedy given to the petitioner here. That being so, he cannot come by way of *certiorari* here. This is yet another instance of how the process of the Court is abused by persons. This petition must be rejected.

Cornish, J.—I entirely agree. I think it is clear from the rules that under r. 8 all that the Revising Authority can enquire into are claims or objections relating to inclusion in the Electoral Roll. Among the qualifications for inclusion in the Electoral Roll set out in s. 45 (1) (c) of the Act is the qualification that a person shall have been assessed in the preceding year to any tax. If a person claims that he has been assessed and that his name should appear on the Electoral Roll, then it is for the Revising Autority to enquire into that claim, and, if satisfied that the claimant has been assessed, to put his name on the Roll. On the other hand if an objection is made that a person whose name is included in the Roll is not an assessee, then all that the Revising Authority can enquire into is the fact whether he has been assessed. The question whether the assessee has been illegally or improperly assessed is a matter which does not lie within the scope of the Revising Authority's enquiry.

N. S. & R. L. *Petition dismissed.*

OUDH CHIEF COURT.

Criminal Appeal No. 168 of 1931.

August 31, 1931.

WAZIR HASAN, C. J. AND BISHESWARNATH SRIVASTAVA, J.

Thakur JAI SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Evidence Act (I of 1872), ss. 114, Illus. (b), *133—Accomplice—Evidence—Necessity of corroboration—Nature of corroboration required—Criminal Procedure Code (Act V of 1898), s. 167 (3)—Detention in Police custody—Power to order, limits of.*

The effect of s. 133, Evidence Act, is that in very exceptional cases if the Court is satisfied that the presumption of untrustworthiness attaching to accomplices in general is rebutted by special circumstances, the Court can accept the uncorroborated testimony of the accomplice. But the established practice of all the Courts in England as well as in India is ordinarily to require corroboration of the evidence of an accomplice in regard to material particulars. *Manna Lal* v. *Emperor* (1), referred to. [p. 325, col. 1.]

There is a general consensus of judicial opinion that the corroboration must be with regard to circumstances showing that the particular accused was connected with the crime. *Durga* v. *Emperor* (2), referred to. [p. 325, col. 2.]

The policy of the Legislature as disclosed by the provisions of s. 167 cl. (3), Criminal Procedure Code, is that detention in police custody should be allowed only in special cases and for such limited periods as the necessities of the case might require. Such remands are not to be granted without sufficient cause being shown for it. [p. 326, col. 2.]

Appeal against an order, of the Additional Sessions Judge, Hardoi, dated the 22nd May 1931.

Messrs *J. Jackson*, *Avadh Behari Lal* and *Jagannath Prasad*, for the Appellants.

Mr. *H. K. Ghose*, Government-Advocate, for the Crown.

Judgment.—This is an appeal by three persons Jai Singh, Anandi Din and Mata Din, who have been convicted by the Additional Sessions Judge of Hardoi under ss. 302, 457 and 436 of the Indian Penal Code. The person first named, namely, Jai Singh has been sentenced to death and the other two to transportation for life under s. 302 Indian Penal Code. Each of them has also been sentenced to two and five years' rigorous imprisonment under ss. 457 and 436 Indian Penal Code respectively. The reference made by the learned Additional Sessions Judge for confirmation of the sentence of death passed against Jai Singh is also before us.

The learned Counsel for the appellants has not disputed the facts relating to the occurrence which gave rise to this prosecution. The prosecution and the defence are also at one up to a certain point as regards the antecedent facts concerning the history of the family of the principal appellant, Jai Singh. These facts so far as they constitute the common ground between the prosecution and the defence may be briefly stated :—

One Nirmal Singh was possessed of considerable *zemindari* property paying land revenue of about Rs. 5,000 per annum. He died about 10 years ago leaving four sons, namely, Jai Singh appellant, the eldest, and Narbir Singh the second son, by his first wife, and Bijai Bahadur and Suraj Bakhsh minor, by the second wife, *Musammat* Kirpal Kuar. Narbir Singh married *Musammat* Deo Kumari *alias* Maiyan Sahib, a near relation of the Raja of Powayan, District Shahjahanpur. He died on the 7th of January 1923 leaving him surviving his widow *Musammat* Deo Kumari and two minor daughters *Musammat* Baba and Bibo Rani. The latter died soon after. Deo Kumari, Kirpal Kuar and Jai Singh lived in separate houses in village Raigaon. The house of Deo Kumari is on the north; Kirpal Kuar's house adjoins it on the south-east. Jai Singh's old house is on the south of Deo Kumari's house but Jai Singh has for some years been living in a new house a little removed from his old house and situate on the east of it.

On the death of Narbir Singh, applications for mutation of names in place of the deceased were made by Jai Singh as well as by *Musammat* Deo Kumari, Kunwar Bijai Varma son of the Raja of Powayan intervened and the parties settled their differences by means of a compromise (Ex. 33), which was filed in the Mutation Court. The material terms of this compromise were, that mutation in respect of the entire property standing in the name of Narbir Singh should be effected in favour of Jai Singh and that the latter should pay Rs. 125 per month as maintenance allowance to *Musammat* Deo Kumari and give her two hundred *bighas kham* land in village Raigaon to be held by her as *sir*. In addition to this *Musammat* Deo Kumari was also to get twenty five maunds of grain annually from Jai Singh and to appropriate the standing *rabi* crop sown by Narbir Singh. It further provided that *Musammat* Deo Kumari should remain the proprietor and owner of all the assets of a cloth shop run by Narbir Singh. At the same time she was made liable for all the debts and liabilities relating to this cloth shop. Jai Singh also undertook to perform the marriages of the two daughters of Narbir Singh and to bear all expenses in connection therewith,

The wife of Bijai Bahadur having died, his mother Kirpal Kuar arranged his second marriage with the daughter of one Chhota Singh of Chachrapur. Jai Singh did not approve of this union but *Musammat* Kirpal Kuar paid no heed to Jai Singh's opposition. The marriage took place on the 4th of May 1928. Jai Singh did not join it.

On the night between the 20th and 21st May 1928 *Musammat* Deo Kumari went to sleep in her house with her daughter *Musammat* Baba There were six other persons in the house that night, namely, *Musammat* Pumpa wife of Sofley a servant of *Musammat* Deo Kumari together with her two sons Babua a boy aged five years and Arjun a babe of about eleven months, *Musammat* Kausila the cook and her daughter *Musammat* Puni aged about thirteen or fourteen years, and one Pearey, another servant of Deo Kumari. Thus it will be seen that amongst the inmates of the house that night, there was only one adult male person, namely, Pearey and of the remaining seven, three were women and the remaining four young children. Sometime during the night all the inmates of the house, with the exception of Pearey and Sofley's son, Babua, were massacred in cold blood. The dead body of Arjun the younger son of Sofley with its throat cut was left lying on a cot. The corpses of the remaining five were stacked in a room of the house and pieces of household furniture and everything else, which the assailants could get hold of, were heaped on them. Having poured kerosine oil over this heap, they set fire to it and locked the door of the room from outside. In the early morning of the 21st of May 1928 Pearey was found missing.

Mata Din appellant who is a *karinda* of Jai Singh accompanied by Dhani Ram *chaukidar* went to the Police Station of Pihani, a distance of ten miles from village Raigaon and lodged the first information report at 9 A. M. the same morning. In this report he stated that he had been sent to make the report by Jai Singh who had returned that very morning from Mohiuddinpur where he had gone to join a marriage party. He added that he suspected that the offence was committed by Chachrapur people along with the servants of Bijai Bahadur as they felt aggrieved by Jai Singh not joining the marriage of Bijai Bahadur. The Sub-Inspector Nurul Hasan started for village Raigaon, immediately after the recording of the report and reached the scene of occurrence at about 1 P. M. the same day. He found that the roof of some of the rooms of Deo Kumari's house had collapsed and after he had succeeded in putting out the fire, he got the corpses dug out from under the *debris* of the roof and all the articles piled upon them. He sent the dead bodies to the mortuary at Hardoi for *post mortem* examination and started investigation of the case.

Unfortunately the Police were unable to trace out Pearey or any of the other culprits. No doubt Nurul Hasan Sub-Inspector had some suspicions about Jai Singh being concerned in the crime but for want of evidence he could not be prosecuted. The Police however started proceedings under s. 110 of the Code of Criminal Procedure against Jai Singh and three of his servants including Mata Din and they were bound down to be of good behaviour by the Magistrate for a period of three years. The order of the Magistrate was confirmed by the Sessions Judge but was set aside by a Bench of this Court (Ex. 55-A).

In 1930 Sofley whose wife *Musammat* Pumpa and infant son Arjun had been killed, happened to go to his brother at Ranka, District Palamau in Behar. Garhwa, District Daltonganj, is the Railway Station nearest to Ranka. On the morning of the 10th of July 1930 when he was looking out for an *ekka* in Garhwa to take him to the Railway Station he happened to come across Pearey at a confectioner's shop. He informed the Police authorities that Pearey was an absconder, with the result that the Police arrested him. He was kept in custody in Daltonganj Jail from 10th to 24th July. After necessary inquiries made from Hardoi, Pearey was brought to Hardoi on the night of the 25th of July. The Hardoi Police assisted by Nurul Hassan Khan who was specially deputed for the purpose, took up the investigation. After several remands to which reference will be made later, Pearey was produced before the Sub-Divisional Magistrate on the 15th of August 1930, for the purpose of getting his confession recorded. The Magistrate recorded the confession in Jail on the 16th August 1930. On the basis of this confession the three appellants before us and six other persons namely, Hira Lal, Chunni, Balwa, Baji Lal, Kalaktar Singh and Murli, were arrested on the 17th of August. On the 9th of October 1930, the Sub-Divisional Magistrate on the application of the Prosecuting Inspector, granted

pardon to Pearey under s.337 of the Code of Criminal Procedure. According to the statement of Pearey, Jai Singh, Anandi Din, Mata Din, Hira Lal, Chunni, Balwa, Baji Lal Kalaktar Singh, Murli and four others belonging to Lucknow District, whose names were Bhaya Singh, Surajbali Singh, Chet Singh and Chandrika Singh together with seven or eight Pasis who were not known to him, had rushed into the house on the fatal night of the 20th of May 1928 and participated in the commission of the crime. The identification proceedings in respect of the last named four persons belonging to Lucknow District were held in Jail on the 10th of September, 1930 Pearey was unable to identify any one of them These four persons were accordingly let off and the remaining nine persons were prosecuted for offences under ss. 302, 436, 457 and 148 of the Indian Penal Code. Ultimately they were all committed to take their trial in the Court of Sessions on the said charges.

The learned Sessions Judge held that the complicity of Hira Lal, Chunni, Balwa, Baji Lal, Kalaktar Singh and Murli had not been legally established. They were therefore acquitted. The remaining three accused were convicted and sentenced as stated in the beginning.

As mentioned before, the facts and circumstances attending the crime are not in controversy. The only question requiring determination is whether the three appellants Jai Singh, Anandi Din and Mata Din did or did not commit the crime. Admittedly Pearey approver is the only eyewitness of the occurrence. The story told by him is briefly as follows:—

For some time after the compromise arrived at in the mutation case, Jai Singh continued to pay the *guzara* to Deo Kumari. Thereafter the *guzara* was stopped with the result that she began to suffer much trouble. Sometimes she sent for money from Powayan and sometimes she met her expenses by pawning her ornaments. In connection with Bijai Bahadur's marriage at Chachrapur, Jai Singh prohibited the sweeper, the barber, the *kahars* and other people from doing any work for Bijai Bahadur. He also directed Deo Kumari not to join the marriage. Jai Singh also closed the main gate and the marriage party had to pass through a back door. Deo Kumari in spite of the orders of Jai Singh joined the wedding stealthily at night. On the 20th of May, 1928, at about 12 noon or 1 P. M. Deo Kumari sent Pearey to demand her maintenance allowance from Jai Singh. When he went to make the demand Jai Singh was supervising the taking out of the grain by his servants from the store godown. When he made the demand, Jai Singh got angry and said that "The demand should be made from Bijai Bahadur under whom she (Deo Kumari) lies with opened legs."

She heard these abuses in the tin shed in front of the room in which the corpses were burnt, where she happened to be sitting at the time and retorted with great vehemence in a very loud voice. When Pearey went back she kept crying for some time and directed him to take a letter to Powayan and bring Bijai Varma or a motor car to take her home. She also said that she would now realize her maintenance through Court. About 2 hours later when he was going to the bazar, Jai Singh who was sitting on the *chabutra* in front of the room of his new *kothi* called him and inquired what Deo Kumari had been saying. He told him all that she had said. Jai Singh also asked Pearey if he was going to Powayan and on his making the reply that he would have to go if ordered, Jai Singh abused him and ordered Mata Din, Anandi Din, and Murli to take him inside the *bhusauri* and strangle him there. They dragged him twenty or twenty five paces and then on his entreaties, Jai Singh who was following a few paces behind, got him released and coming close to him told him that he would have to do as he desired, otherwise he would be given a severe beating such as had been administered to Gaddhu Gaddi and a Pasi and Pasin. As he remembered the serious injuries which had been inflicted on these persons and was terrified that he would be treated in the same manner if he failed to carry out Jai Singh's orders, he promised to obey. Jai Singh then ordered him to keep awake that night and to open the northern window of *Musammat* Deo Kumari's house when he heard a knock there. Mata Din said that everything must be finished that night and Jai Singh agreed that this should be done. He understood by these expressions that Deo Kumari was to be murdered that night. Accordingly he kept awake during the night. When after midnight he heard a knock at the window, he opened it. Soon after his opening the window ninteen or twenty persons armed with swords, spears, *bankas* and *lathis* entered the house. He recognised Jai Singh, Kalaktar Singh, Anandi Din, Baji Lal, Balwa, Chunni Kothari, Hira Lal, Mata Din, Chet Singh, Chandrika

Singh, Suraj Bali Singh and Hira Singh. He did not recognize the seven or eight *Pasis* nor did he know their names. When the assailants entered the house, everybody inside the house but himself was fast asleep. Jai Singh killed Deo Kumari and her daughter *Musammat* Baba. The others attacked the rest of those who were sleeping. A dog which was inside the house began to bark and on being ordered by Jai Singh he turned it out of the house. Jai Singh ordered the corpses to be thrown inside the eastern room which was done by those who were with him. He further ordered that the goods inside the house should be piled upon them and after sprinkling kerosine oil fire might be set to the room. All this was accomplished. A lock was put to the room in which the corpses and goods were burning. One tin containing kerosine oil was brought by Balwa from outside. Pearey informed Jai Singh that there was some kerosine oil in a tin in the house and pointed out the place where it was. All the oil in the two tins was sprinkled on the goods heaped on the corpses. On the orders of Jai Singh Pearey also helped in heaping up goods on the corpses. He also brought a few pieces of fuel woods and got the *Pasis* to bring some beams, from the upper storey which were all placed upon the corpses. The culprits then left the house and Jai Singh directed Pearey to follow him. Jai Singh took him inside his house and gave him Rs. 200 and directed him to go to the Police Station with Mata Din and lodge a report that Bijai Bahadur, Sundar Singh, Chhota Singh and many other of Chachrapur had committed the murders and set fire to the house. He promised to start after easing himself and being permitted to do so, went back inside the house of Deo Kumari. As he was feeling very thirsty he began to drink some water there. Just at that time Babua son of Sofley got up and asked him where his mother and Deo Kumari had gone. He replied that they had gone to the house of Jai Singh's daughter and he should go to sleep. He lay down again and began to sleep. As it was about 4 A. M. and Pearey was afraid to go to the *thana*, he took some clothes and left the house for Jahani Khera Railway Station. He met some people on the way and at the Railway Station, he also met Chet Singh, Chandrika Singh, Surajbali Singh and Bhaiya Singh the four men from Lucknow District referred to above. At the Railway Station he boarded a train for Sitapur where he changed for Lucknow. From Lucknow he went to Benares and from Benares to Calcutta. He made some purchases in Calcutta. Ultimately he reached Garhwa and settled down there. He used to make a living by selling goods in neighbouring bazars until he was discovered by Sofley and placed under arrest.

The learned Additional Sessions Judge has in one place in his judgment remarked that it was only through compulsion that Pearey had been made a tool of by others and therefore he could hardly be regarded an accomplice in the strict sense of the term. The learned Government Advocate did not attempt to support this view of the learned Additional Sessions Judge and we think very rightly so. The fact of Pearey having agreed to open the window with the knowledge that Jai Singh meant that Deo Kumari should be murdered that night and the act of his giving admission to the culprits inside the house when he heard the knock as well as his conduct in co-operating with the culprits as he did when they sprinkled kerosine oil and piled up goods on the corpses, clearly constitute him an accomplice in the crime. When he came to know of the conspiracy which had been hatched by Jai Singh for the murder of *Musammat* Deo Kumari, he never informed her. In his statement in the Sessions Court he clearly admitted that he agreed to the proposal of Jai Singh as he thought Maiyan Sahib was going to Powayan and his only chance was to be taken in service by Jai Singh. There can be no doubt that he was on his own showing actuated by sordid motives in joining the conspiracy. If his story is true he is guilty of the worst betrayal that one can think of and it is hardly possible to say anything in extenuation of his conduct. We can hardly believe that he committed all these acts in consequence of fear as, after he had promised to join the conspiracy, there was ample opportunity for him to give the necessary warning to Deo Kumari or to run away from the village. We have no hesitation in holding that Pearey is a guilty associate in the crime and must be regarded as an accomplice.

The learned Government-Advocate made reference to s. 133 of the Indian Evidence Act and contended that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. This section ought to be read with s. 114

illustration (*b*) of the Act, which provides that the Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars. It is a rule of general practice resting on wide human experience that an accomplice as *particeps criminis* is an immoral person and his testimony is generally tainted. When he gives evidence under promise of a pardon he may naturally be expected to favour the prosecution. Section 133 simply lays down that a conviction on the uncorroborated testimony of an accomplice is not illegal. The effect of it is that in very exceptional cases if the Court is satisfied that the presumption of untrustworthiness attaching to accomplices in general is rebutted by special circumstances, the Court can accept the uncorroborated testimony of the accomplice. But the established practice of all the Courts in England as well as in India is ordinarily to require corroboration of the evidence of an accomplice in regard to material particulars. The same view was taken by one of us in *Munna Lal* v. *Emperor* (1). Far from there being anything exceptional in the character of the accomplice with whom we are concerned, we have already observed that the conduct of Pearey, in betraying his mistress as he did is of the blackest hue. He tried to implicate four men belonging to Lucknow, none of whom he was able to identify in Jail. We cannot but reject his explanation that the culprits belonging to Lucknow might have given false names to him because he had met them several times and had come to know their names not only from them but also from several other persons. There is considerable force in the suggestion made by the defence that he mentioned these four names in order to oblige some of his fellow prisoners in Jail. The learned Sessions Judge himself has disbelieved his testimony with regard to six of the persons who were placed before him for trial. Under the circumstances we must follow the general practice which is virtually now a rule of law and insist upon Pearey's testimony being corroborated in material particulars.

The next question arises as regards the nature of the corroboration necessary in order to give effect to the testimony of the accomplice against an accused person. The corroboration may relate either to the circumstances attending the commission of the offence or it may relate to facts and circumstances connecting and identifying a particular accused with the crime. The confirmation of the testimony of an accomplice as regards the circumstances attending the commission of the offence would no doubt indicate the presence of the accomplice at the scene of the occurrence but it would not afford any confirmation of the fact that a particular accused took part in the offence. For this reason there is a general consensus of judicial opinion that the corroboration must be with regard to circumstances showing that the particular accused was connected with the crime The same rule was laid down by another Bench of the Court to which one of us was a party in *Durga* v. *Emperor* (2).

It therefore becomes necessary for us to examine the corroboration forthcoming with regard to the statement of Pearey the approver in the light of the observations made above. But before we do so it will be proper for us to discuss the contention forcibly urged by Mr. Jackson on behalf of the accused that the confession of Pearey approver recorded by the Sub-Divisional Magistrate under s. 164 of the Code of Criminal Procedure on the 6th of August 1930 ought not to be regarded as a free and voluntary statement and that the procedure adopted in securing it is open to serious objections. It is necessary to state a few facts bearing on this point. Pearey as stated before reached Hardoi on the night of 25th of July. That night he remained in the custody of the Hardoi Police.

Next day he was taken to the Magistrate who remanded him to Jail. Four days later on the 30th of July 1930 the Prosecuting Inspector made an application to the Sub-Divisional Magistrate in which it was stated that when the accused was brought to Hardoi, Police Sub Inspector Pandit Har Swaroop Sharma questioned him in connection with the case and he told him that he was ready to say the whole truth. He therefore asked that the accused be remanded to Police custody for a period of seven days for making further investigation.

On the 1st of August 1930 the Sub-Divisional Magistrate passed an order under s. 167 of the Code of Criminal Procedure directing that Pearey should be remanded to Police custody for seven days.

(1) 75 Ind. Cas. 753; 27 O. C. 40; 9 O. & A. L. R. 947; 25 Cr. L. J 49; A. I. R. 1925 Oudh 1.

(2) 132 Ind. Cas. 70; 8 O. W. N. 247; 32 Cr. L. J. 830; Ind. Rul. (1931) Oudh 230.]

The reason given by him was that having seen the diary of the case he was of opinion that the case if challaned on the evidence then available was only half mature. He also said that he had been given to understand that if the accused was remanded to Police custody further evidence would be obtained to find out the real facts of the case. In pursuance of this order Pearey was sent from Jail to the *kotwali* on the 2nd of August and was kept there till the 9th August, on which date he was again sent back to Jail. On the 12th of August Pearey made an application expressing a desire to see the Prosecuting Inspector and the Superintendent of Police before he was required to attend the Court the next day which was the date fixed for the hearing of the case. On the 13th of August the Prosecuting Inspector made another application to the Sub-Divisional Magistrate asking that as the accused had applied from Jail to see the Superintendent of Police, the latter "wishes to see the accused any time preferably tomorrow morning." He therefore requested that Pearey may be remanded to Police custody for three days with a view to obtain all the information the accused wished to give. The same day the Magistrate passed the following order:—

"For reasons recorded in my order dated the 1st of August 1930 I remand the accused Pearey in Police custody for a period of three days from to-day evening.

The same evening he was removed to the *kotwali*. Next morning the Superintendent of Police not being free to hear Pearey's statement, sent him to the Police Sub-Inspector to whom Pearey made a detailed confession (Ex. A-21). The Superintendent of Police met Pearey on the 15th of August when he made a statement to him also. The same day Pearey was produced before the Sub-Divisional Magistrate for the recording of his statement under s. 164 of the Code of Criminal Procedure. The Magistrate did not record his statement that day but sent him to Jail lock up and recorded his confession in Jail on the following day. Thus it will appear that the Police obtained in the first instance a remand into their custody for seven days on the representation that Pearey had told Pandit Har Swaroop Sharma that he was ready to say the whole truth. The statement made by Pearey in the Sessions Court on this point is to the following effect:—

'On 2nd August I was sent to *kotwali* and kept there till the 9th August when I was again sent to Jail. Up to that time I had indicated no intention about making any confession. The Sub-Inspector Sandila and others asked me to state the truth. But I did not give any reply giving them satisfaction. I made no promise to confess nor gave any clue to the crime. I had not up to the time of seeing the Superintendent of Police spoken to any person including the Police Officers anything about the crime under consideration."

Thus either this statement of Pearey is false or the representation made by the Prosecuting Inspector to the Sub-Divisional Magistrate on the 30th of July 1930 is untrue. Section 167, cl. (3) requires the Magistrate authorizing detention in the custody of the Police to record his reasons for so doing. The policy of the Legislature as disclosed by the provisions of this section clearly is that detention in Police custody should be allowed only in special cases and for such limited periods as the necessities of the case might require. Such remands are not to be granted without sufficient cause being shown for it. Assuming that the representation made by the Prosecuting Inspector was true and that the statement made by Pearey is false and unreliable, still we fail to see any sufficient reason for his being remanded to Police custody for a period of seven days If Pearey was prepared to say the whole truth he could not take more than a few hours to tell it. If he refused to make any statement when he was brought to the *kotwali* on the 2nd of August it passes our comprehension why the Police detained him in their custody till the 9th August. Pearey has stated, and this statement is accepted by the prosecution, that he did not make any confession or give any clue to the crime during these seven days. But three days later he is suddenly seized with compunction and when the Civil Surgeon was inspecting the undertrials on the 12th of August he dramatically expressed to him the desire to see the Superintendent of Police and the Court Inspector. We cannot help expressing our disapproval of the light-hearted fashion in which the Sub Divisional Magistrate granted the further remand of three days as if the Police were entitled to it as a matter of course. His order granting the remand shows a lack of appreciation of the responsiblities imposed on Magistrates in granting remands under s. 167.

The circumstances of Pearey having been detained in Police custody for so long, as stated above, lend considerable strength to the argument urged by Mr. Jackson that Pearey has been induced to make the statement which he did under the influence of the Police and that the application

made by Pearey to see the Superintendent of Police and the Court Inspector was only a preconcerted device in order to make out that when he expressed his desire to make the confession, he had been free from Police influence for three days. The circumstances are no doubt open to the greatest suspicion. However, we are not prepared to reject the confession on this ground but it does make the necessity greater for requiring independent and reliable corroboration with regard to material particulars.

The only corroboration tending to identify the accused with the crime consists of a statement of Kirpal Kuar with regard to a conversation which it is said, she heard on the 20th of May 1928. She stated as follows:—

"It was afternoon. I had to use my roof as a latrine as the sweeper who worked at my place was stopped and the latrine was too dirty to be used. When I was easing myself I heard a conversation going on in front of the *bhusari* underneath the wall where I was sitting. Somebody had said that everything should be finished to-day (*aj sab khatam kar do*). I could not recognise the voice. I stood up to see as to who was talking. I saw Jai Singh, Mata Din, Anandi Din, Murli and Pearey standing inclined towards the eastern corner of the *bhusauri* and talking."

Reliance has been placed upon this statement in confirmation of the statement of Pearey about Jai Singh conspiring to kill Deo Kumari that night and about his being forced to join the conspiracy. We find ourselves unable to believe this statement of Kirpal Kuar. Admittedly she is on terms of bitter enmity with Jai Singh more particularly since Jai Singh's active opposition to the marriage of Bijai Bahadur with the daughter of Chhota Singh of Chachrapur. She is given the lie by her own son Bijai Bahadur P. W. No. 41 who admitted that the sweeper resumed work at his house four or five days after his marriage. The marriage took place on the 4th of May. Therefore there was no occasion for *Musammat* Kirpal Kuar to use the roof of her house as a latrine on the 20th of May 1928. Bijai Bahadur in his re-examination did try to change his statement by adding that the sweeper again ceased serving him but we are unable to place any reliance upon this statement which was made the next day after he had made the admission above referred to. The note made by the learned Sessions Judge on the 19th of March 1931 after he had made an inspection of the locality shows that the southern wall of Kirpal Kuar's *zenana* house behind which is the roof which she used as a latrine, is 14 feet high. Its height from the roof is 4½ feet. The distance from the land where Jai Singh, Pearey and others were carrying on the alleged conversation to this roof of Kirpal Kuar's house is over 35 feet. "Loud talk on this land can be heard upstairs. But ordinary talk in low tones cannot be heard" It is difficult to believe that these people should have been conspiring in such loud tones as to be overheard by Kirpal Kuar. It is significant that Kirpal Kuar did not hear any other part of that conversation excepting the pregnant sentence '*aj sab khatam kar do*" which is sought to be used in corroboration of the approver's statement. It is also worthy of note that while she is familiar with the voice of Jai Singh she could not recognise the voice of the person who made this remark. She had therefore to stand up on the commode and was thus able to see the three accused as well as Pearey. It is the case of the prosecution that Kirpal Kuar's relations with Deo Kumari were quite cordial. If her story were true it was to be expected that she should at once speak to Deo Kumari of the conversation she had overheard and asked her to call upon her servant Pearey to give his explanation for it. She did not do it. If Jai Singh had any such designs in his mind it would be more natural for him to discuss the plans in the privacy of his own house where he *accosted* Pearey that afternoon instead of his doing so on the open land near the *bhusauri* below Kirpal Kuar's house.

Having given our careful consideration to all the circumstances we feel ourselves unable to place any reliance on this statement of Kirpal Kuar.

Reliance has been placed by the prosecution on the following other facts in corroboration of the statement of Pearey:—

1. That the window through which the assailants entered the house does not bear any marks of having been violently opened:

2. That the *post mortem* report shows that the throat of Deo Kumari had been cut as deposed to by the approver:

3. That the place at which Jai Singh was standing when there was an exchange of abuse between him and *Musammat* Deo Kumari at about midday on the 20th was within such distance of the place where Deo Kumari was sitting at the time that exchange of abuse between them was quite possible:

4. That P. W. No. 31 Babua son of Sofiey has sworn that when he woke up and inquired from Pearey about his mother and Deo Kumari he was told that they had gone

to Jai Singh's place and that he lay down again and slept:

5. That there is some evidence about Pearey meeting one Ram Charan and Narain Jamadar and being seen by P. W. No. 21 Sardar on the early morning of 21st of May 1928 when he was running away to the Jahani Khera Railway Station:

6. That Pearey purchased some articles of merchandise worth Rs. 37-8 at Calcutta on the 24th of May 1928.

Accepting all these facts to be correct, we are of opinion that at the very best they can bear out the presence of Pearey at the scene of occurrence but none of them can link up the appellants with the offence. As we have stated before there is no dispute about the commission of the crime which might well have been committed in the manner alleged by Pearey. All the facts stated above are fully consistent with the culprits being persons other than the appellants before us. We must therefore hold that there is no reliable corroboration about the appellants being connected with the commission of the offence.

The prosecution has also laid stress on the alleged strained relations between Jai Singh and *Musammat* Deo Kumari which make out a strong motive on the part of Jai Singh for being a party to the the crime, and on his subsequent conduct which it is claimed is more consistent with his complicity in the crime than with his innocence. In proof of the strained relations, reliance has been placed on four letters written by *Musammat* Deo Kumari, Exs. 22, 23, 24 and 25. Exhibits 22 and 23 were addressed to her people in Powayan They do not bear any date. In these letters she speaks of her hopes having been extinguished and her being very much in distress. The internal evidence afforded by the contents of these letters points to their having been written soon after the death of her husband. We do not think that they afford any proof of her relations with Jai Singh being strained. The other two letters are both addressed to Jai Singh. They are also without date. In these letters she complains of his taking away the *ukhari* which evidently refers to the standing crops which were allowed to her under the compromise and also of his unwillingness to give her the grain which he had promised. She appeals to him for help and money as she was badly in need of it. The defence has on the other hand relied on a letter, Ex A-2 written by *Musammat* Deo Kumari to one Rameshar Singh, her husband's sister's son. In this letter she speaks of the rupture between Jai Singh and the Sub-Inspector who had made a false complaint against Jai Singh resulting in an order for his licence for firearms being cancelled and excuses herself for the delay in writing to him on that ground. This letter appears to have been written in November 1927 and shows that she was not without feelings of concern for Jai Singh.

Reference has also been made to the account books of Jai Singh and three receipts, Ex. 20, 21 and 26. The case for the prosecution is that Jai Singh paid maintenance to Deo Kumari only upto December, 1923, but stopped payment of it thereafter. The defence case on the other hand is that the maintenance was paid in full up to June, 1925. Thereafter the payment was discontinued as Jai Singh had to pay certain debts of Narbir Singh for which *Musammat* Deo Kumari was liable and was authorised by her to deduct these payments from her maintenance allowance. In spite of this it is claimed that certain small payments were made to her occasionally when she was in need of money. The prosecution admit the genuineness of two of the account books, namely, Exs. 19 and 39 which were recovered from the house of Jai Singh under a search warrant but have denied the genuineness of the other account books, Exs. A 45/1 to A 45/6 which were produced by Jai Singh in the course of his defence evidence. The main ground urged by the prosecution is that they had, before the production of these books by Jai Singh, applied for their being produced by the Pleader of Jai Singh who had been ordered by the Magistrate to produce them but did not comply with the order. There is nothing to show that the books were in the custody of the Pleader when this order was made. The more proper course for the prosecution would have been to summon the books from Jai Singh or from some person who had them in his custody. When we questioned the learned Government Advocate, he was unable to say whether the entire books were forgeries or only certain entires had been interpolated in them. We are unable to see anything suspicious in these books. They are big volumes of bound books similar to Exs. 19 and 21 One of these books contains entries in the handwriting of Mata Din who had been in the jail lock-up since his arrest in August 1930. If these books had been

forged it was more likely that they should have tried to make out that the *guzara* had been regularly paid all along. We are therefore inclined to hold that *Musammat* Deo Kumari received her *guzara* in full up to June 1925 as shown by the account books.

Court Witness No. 1 Kanhaiya Lal a practising Pleader at Hardoi was examined by the learned Additional Sessions Judge as a Court witness. His evidence shows that Jai Singh executed in his favour one pro-note (A43) for Rs. 4,800 on the 11th August 1924 and another pro-note for Rs. 2,500 on the 20th of October 1924. The consideration for the first pro-note included a sum of Rs. 2,800 due from Narbir Singh under a pro-note Ex. A42 executed by him on the 16th of July 1922. The other pro-note of Rs. 2,500 was entirely in lieu of a debt which had been borrowed by Narbir Singh on the 6th of September 1922. He also stated that both these pro-notes were paid up by Jai Singh before Deo Kumari's murder. There had been some litigation between Jai Singh and Kanhaiya Lal which resulted in a reference to arbitration. Jai Singh in his objections Ex. A-40 dated the 11th of August 1926 against the arbitrators' award pleaded that the cloth shop was the personal property of Narbir Singh and that *Musammat* Deo Kumari was under the compromise liable for the debts of the firm. A 47 and A-48 are copies of a judgment and decree of the Subordinate Judge of Cawnpore showing that a Cawnpore firm obtained a decree for over Rs. 1,500 on account of the price of cloth purchased by Narbir Singh In this case also Jai Singh pleaded that he could not be held liable for the debts of the shop and that Deo Kumari was liable for them. The learned Government-Advocate placed great reliance upon Kanhaiya Lal's statement that Narbir Singh never purchased any cloth from him and has strongly contended that the debts borrowed by Narbir Singh from Kanhaiya Lal were not in respect of the cloth shop. It is not possible in this case to arrive at any definite finding as to how the money borrowed by Narbir Singh was applied by him but in the absence of any evidence of Narbir Singh having had any other necessity for borrowing the amount, it is by no means unlikely that the debts were incurred in connection with the cloth business Be the matter as it may, the fact remains that as far back as 1925 and 1926, Jai Singh pleaded that these debts incurred by Narbir Singh were in respect of the cloth business and that. *Musammat* Deo Kumari was liable for them This makes it by no means improbable that some sort of understanding was arrived at between Jai Singh and Deo Kumari about the former paying up the said debts against her maintenance allowance.

The prosecution also attempted to prove the Deo Kumari was so very hard up that she had to pawn her ornaments from time to time. The only specific instance alleged was about the pawning of certain gold *mohurs* by Deo Kumari through one Barkao *Dhoby* to one Rewa Sah. The latter was examined as a Court witness. He also produced his account book The entry in the account book and the statement of C. W. No. 2 Rewa Sah do not bear out the case of the prosecution. There is no mention of *Musammat* Deo Kumari in the entry in the account book which only shows that a *mohur* with stones and *Kunda* of Barkao *Dhoby* was pledged to Rewa Sah for Rs. 100. In his deposition in Court Rewa Sah stated that he had seen Barkao *Dhoby* putting on gold *mohurs* usually which he pawned to him. The evidence of other witnesses is of a vague and general character on which we are unable to place any reliance. It is not denied that she was in possession of 200 *bighas* as *sir*. Prosecution Witness No. 27 Makhan stated that Deo Kumari was possessed of 8 buffaloes, 8 she-buffaloes and 8 cows and calves P. W. No. 36 Pearey, approver, also stated that a few days before the murder he and Sofley redeemed gold *charas* of Deo Kumari from a *Bania*. Thus even according to the prosecution evidence, it can hardly be said that Deo Kumari was very hard up at the time of her murder. Our reading, therefore, of the situation is that probably some differences had arisen between Jai Singh and Deo Kumari as regards the standing crops and grain which Jai Singh had promised to give her under the compromise. It is possible that there might have been some differences in regard to the payment of maintenance also. Such differences are by no means uncommon. We have no reason to suppose that the differences in the present case were so acute or of such a grave character as to constitute a motive for Jai Singh putting Deo Kumari to death. The most that can be said on this point is that the result of Deo Kumari and her daughter being killed was to absolve Jai Singh of the liability for payment of maintenance allowance and for the

expenses of the marriage of Deo Kumari's daughter. It also entitled him to get possession of her *sir* lands and other property possessed by her. We do not think that the fact of the advantages just mentioned having accrued to Jai Singh from the commission of the crime can be regarded as any proof of his having committed it. In this connection it might be pointed out that according to the approver's evidence the culprits after committing the murder, piled up everything including valuable clothes on the corpses and set fire to the house. Nurul Hasan, the Sub-Inspector, deposed that valuable clothes which were destroyed by the fire were worth about Rs. 4,000 or Rs. 5,000 The extent of the valuable jewellery destroyed will appear from the fact that over half a seer of molten gold was taken out of the debris. It is difficult to believe that Jai Singh, if he committed the crime, would have so mercilessly destroyed valuable property, the securing of which is supposed to be one of his motives for the commission of the crime.

As regards the subsequent conduct of Jai Singh the learned Government-Advocate relied upon the fact deposed of by P. W. No. 18 Jiwan, P. W. No. 27 Makhan and P. W. No 28 Lekha that when they asked Jai Singh to get the fire extinguished he said that he would not take any steps to extinguish it as long as the Sub-Inspector did not arrive. However, after some time when he found the fire to be increasing he did put on ten or twelve men to extinguish it. The Sub-Inspector found these men extinguishing the fire when he reached the place. The explanation given by Jai Singh in his statement is that he at first abstained from taking steps to get the fire extinguished before the arrival of the Sub-Inspector as the crime was very serious. It seems to us that the position of Jai Singh in this matter was not free from difficulty. If he had got the fire extinguished he might have been accused of making an intrusion on the scene of occurrence which had the effect of destroying possible clues as to the perpetrators of the offence. On the other hand when he tried to maintain the *status qua* until the arrival of the Sub-Inspector, he is charged with the intention of getting the corpses burnt beyond recognition so as to remove all traces of the crime. We do not think it would be possible to draw any inference of guilt from his conduct in this matter. Reference was also made to the statement of the Police Superintendent P. W. No 37 who stated that he did not get any assistance from Jai Singh to unravel the mystery and that he did not offer any reward for the arrest of Pearey. He did not state any particular assistance which Jai Singh was in a position to give and was withheld by him. We wonder what assistance he could give when he himself was suspected by the Police for complicity in the crime. In answer to this the defence has drawn our attention to an appliction, Ex. A-23, made by Jai Singh in the course of proceedings under s. 110 of the Code of Criminal Procedure in which he made certain complaints against the District Police and asked that the investigation of the case may be entrusted to the C. I D.,

"so that the real facts may be ascertained and the real culprits may be punished for their misdeeds."

As regards the reward, though Jai Singh did not make any official announcement of it, yet it appears that he had privately offered a reward of Rs. 500 for the arrest of Pearey. Sofley P. W. No. 11 deposes that when he got Pearey arrested he sent a wire to the Collector of Hardoi and another to Jai Singh informing them about his arresting Pearey. He further stated that he sent the wire to Jai Singh as he had promised a reward to the person who arrested Pearey. So the evidence of subsequent conduct also seems to us altogther inconclusive.

The arguments on behalf of the prosecution on the question of motive and subsequent conduct relate to matters which are only subsidiary to the main question. We have given reasons for our inability to attach much importance to them. In our opinion it would be altogether unsafe to draw any inference as to the guilt of the appellants from the circumstances discussed above.

Lastly the defence has placed strong reliance upon the evidence of D. W. No. 3 Iqbal Bahadur, D. W. No. 4 Bakht Bahadur, D. W. No. 8 Balbhadur Singh and D. W. No. 9 Surendrapal Singh who depose to the presence of Jai Singh at Mohiuddinpur on the night of the occurrence, and his leaving Mohiuddinpur for Raigaon early in the morning of the 21st. This *alibi* evidence does gain some strength from the fact that it is admitted for the prosecution that Jai Singh did leave his village to join a marriage on the 15th of May 1928. The only difference between the case for the prosecution and for the defence is that according to the prosecution, Jai Singh returned on the 19th whereas according to the defence

he returned only on 21st morning. We do not consider it worth while to pursue this matter further because of the conclusion reached by us that the prosecution has failed to bring the guilt home to the appellants.

The learned Counsel for the defence also addressed lengthy arguments to us directed to show that the offence was more likely to have been committed by Bijai Bahadur Singh's servants and the Chachrapur people. He has no doubt pointed out some suspicious circumstances against these people but mere suspicions are not enough. We must leave the matter at that. It would not be proper for us to express any opinion against the conduct of these people behind their back.

The case for the prosecution rests upon the evidence of the approver. As there is no reliable corroboration of his statement, identifying the accused with the crime, the appeal must succeed on this ground.

We accordingly allow the appeal, set aside the convictions of the three appellants, Jai Singh, Anandi Din and Mata Din and direct that they be set at liberty at once.

A. *Appeal allowed.*

OUDH CHIEF COURT.

Civil Miscellaneous Application No. 314 of 1931.

September 2, 1931.

RAZA AND SMITH, JJ.

MESSRS. ASGHAR ALI-MOHAMMAD ALI—APPLICANTS

versus

THE COMMISSIONER OF INCOME-TAX, U. P.—OPPOSITE PARTY.

Income Tax Act (XI of 1922), s. 66 (2)—Question of law—Exclusion of certain items from sales income—Point considered by Income Tax Authorities—Rate charged reasonable—Interference.

The assessees claimed that certain sums covering postage, railway freight and packing charges amounting to Rs. 31,305 should have been left out of account as in respect of such sums no profits accrued to them. These items simply represented money paid out by them on behalf of their clients and afterwards recovered from the latter. This point was brought to the notice of the Assistant Commissioner of Income Tax and the Commissioner of Income Tax and was considered by them. From what these officers stated it appeared that the flat rates which were applied for purposes of calculation of profits were framed on the understanding that the items mentioned above were to be included in the total sales income, otherwise a higher rate would have been charged:

Held, that under the circumstances of the case no question of law arose. [p. 332, col. 1.]

Application filed on behalf of the above named firm applicants under s. 66 (6) of Act XI of 1922, dated the 23rd May, 1931.

Mr. *Mohammad Ayub*, for the Applicants.

Mr. *H. K. Ghose*, Government Advocate, for the Opposite Party.

Judgment.—This is an application purporting to be under s. 66 sub-s. 6 of the Indian Income-Tax Act (No. XI of 1922), in reality it falls under sub s. 3 of that section.

The application is by Messrs. Asghar Ali Mohammad Ali, who appear to have a large business in Lucknow for the sale of scents, tobacco and oil. They were assessed to income-tax for the past year by an order of the Income-tax Officer, dated the 16th of December last, and they went in appeal against the assessment under s. 30 sub-s. 1 of the Act to the Assistant Commissioner of Income-tax at Cawnpore, who on the 26th of February last, made a small reduction in the amount to be assessed. Being still not satisfied, the applicants went under s. 66 sub-s. 2 to the Commissioner of Income-tax, who said that he was unable to discover that any question of law arose out of the grounds taken by the applicants, and accordingly rejected their application for the statement of a case to this Court.

We have heard the learned Counsel for the applicants at some length. The only point which he has pressed before us is that in the statement of total sales, which appears in the order of the Income-tax Officer, dated the 16th of December last, three items are included, namely—

(1) Packing charges	...	6,134
(2) Postage	...	25,037
(3) Railway freight	...	134

These items total the considerable sum of Rs. 31,305. The applicants' case is that this sum should have been left out of account, as in respect of it no profit accrued to the applicants, and it may be regarded as merely representing money paid out by them on behalf of their clients and afterwards recovered from the latter.

We might have been inclined to think that this amount ought, as an arithmetical matter, to be excluded from the total amount of the sales income, and we might have been inclined to take the view that its inclusion in that total amount might be said to raise a question of law. It is clear, however, both from the order of the Assistant Commissioner of Income-tax,

and from order of the Commissioner of Income-tax that this point was brought to their notice and was considered by them. From what they say, it is clear that the flat rates which were applied for the purposes of calculation of profits were framed on the understanding that the items under the above three heads were to be included in the total sales income. Had they been excluded, it is clear from the orders of those two officers, that higher rates would have been applied for the purpose of calculating the profits unless the applicants were able to show from their books that lower rates were charged by them. In that connection we may point out that the Income-tax Officer states at the beginning of his order:—

"As usual, no profit and loss account has been prepared, and stocks have not been valued."

In these circumstances, we do not think that any question of law really arises, and we think that any method of computation employed as regards the applicants' assessment was reasonable and that no case whatever has been made out for any interference by us.

The result is that the application is dismissed. Under s. 66 sub-s. 6 of the Income Tax Act, we direct the applicants to pay a sum of Rs. 150 as costs.

R L. *Application dismissed.*

OUDH CHIEF COURT.

Second Civil Appeal No. 6 of 1931.

November 5, 1931.

WAZIR HASAN, C. J. AND KISCH, J.

HASHMAT ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Lala GOBARDHAN DASS AND OTHERS—DEFENDANTS—RESPONDENTS

Mortgage—Mortgage-deed providing for payment of interest to mortgagee from pocket of mortgagor till redemption from prior mortgagee—Interest, whether charge on property—Mortgagee entitled to mutation costs—Costs of possession, whether included.

Where a mortgage-deed provides that till redemption is made from the prior mortgagee and until the subsequent mortgagee does not take possession the mortgagor shall pay interest to him from his own pocket six monthly, the liability of the mortgagor to pay interest is personal and no charge on the mortgaged property is created so long as the property is not redeemed from the prior mortgagee and consequently possession is not delivered to the subsequent mortgagee. The charge becomes operative from the date when the mortgagor redeems the mortgaged property from the hands of the prior mortgagee but does not deliver possession of the same to the mortgagor. In other words the charge accrues from the time when the subsequent mortgagee becomes entitled to enter into possession.

When according to the mortgage-deed the mortgagee is entitled to the costs of the mutation proceedings, such costs must be decreed to include the costs of obtaining possession by aid of the Court previous to the mutation of names.

Appeal against an order of the Additional District Judge, Lucknow, dated the 10th October, 1930.

Mr. *Ghulam Hasan*, for the Appellants.

Messrs. *Ali Zaheer*, *Lakshman Prasad Srivastava* and *Radha Krishna Srivastava*, for the Respondents.

Judgment.—These are connected appeals by the plaintiffs from the decree of the Additional District Judge of Lucknow of even date, 10th October, 1930, and they arise out of a suit for redemption of a mortgage.

The questions involved in these appeals are only two.

(1) Is the mortgagee defendant entitled to costs of a suit which he had to bring against the mortgagors for possession of the mortgaged property and (2) is the interest due to the mortgagee for the period that he was out of possession a charge on the mortgaged property. The lower Appellate Court has answered both these questions in favour of the mortgagee defendant.

We agree with the lower Appellate Court on both points excepti n one respect. On the second question, there is no doubt that according to the nature of the mortgage, which is usufructuary, and the language of para 10 of the deed of mortgage the entire nterest which the mortgagee was to realize out of the profits of the mortgaged property was a charge on that property, but in para. 9 it is provided "that till redemption is made from the prior mortgagee until the present mortgagee does not get possession we, the mortgagors, shall pay interest to him from our own pockets six monthly." Our construction of this paragraph is that during the time that the property was not redeemed from the hands of the prior mortgagee and possession consequently not delivered to the present mortgagee the liability for interest was personal and not a charge on the mortgaged property. The charge became operative from the date when the mortgagors redeemed the mortgaged property from the hands of the prior mortgagee but they did not deliver possession of the same to the present mortgagee, that is to say, the

charge accrued from the time when the present mortgagee was entitled to enter into possession. It follows that the mortgagee's claim for interest between the date of the mortgage, that is the 30th of July, 1890, and the date of obtaining possession from the hands of the prior mortgagee that is the 28th January, 1892, is not tenable and must be disallowed.

On the first question, it is argued that according to para. 7 of the deed of mortgage the mortgagee is entitled only to the costs of the mutation proceedings. We agree with the learned Additional District Judge that the proper construction of that paragraph providing for costs of the mutation proceedings is that such costs also included the costs of obtaining possession by aid of the Court previous to the mutation of names.

We, therefore, dismiss Appeal No. 7 of 1931 altogether with costs and allow Appeal No. 6 of 1931 by striking out the interest allowed in favour of the mortgagee for the period from the 30th July, 1890, to the 28th of January, 1892 The order of costs of the lower Appellate Court will hold good but costs in this Court will be awarded to the appellants in proportion to their success and they will pay the costs of the respondent in proportion to their failure

R L. *Appeal dismissed.*

OUDH CHIEF COURT.

Second Civil Appeal No. 261 of 1930.
October 28, 1931.

WAZIR HASAN, C. J. AND KISCH, J.

AMAR NATH SINGH—PLAINTIFF—APPELLANT

versus

HAR PRASAD SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), ss. 4 (1), 52—Policy of Act—Relinquishment by tenant without surrender of possession—Ejectment of tenant, suit for—Transfer of Property Act (IV of 1882), s. 6 (i)—Transfer—Relinquishment by tenant of agricultural holding, whether transfer—Validity.

A relinquishment in writing without surrender of possession on the part of a tenant does not constitute a sufficient right in the landlord to recover possession of the plots in question by means of a suit in ejectment. *Bibi Saidunnisa* v. *Faiyaz Hasan* (1), *Nand Ram* v. *Chhedi Lal* (2), *Mandai* v. *Sajjad Ali* (3) and *Sristi* v. *Ramdeo Rai* (4), followed, *Binda Prasad* v. *Rajindra Prasad* (5), distinguished. [p. 334, col. 1.]

The policy of the Oudh Rent Act is to keep the relationship of landlord and tenant subsisting in spite of either or both of them and it can be terminated only in the manner provided by the Act. [*ibid.*]

The combined effect of ss. 4 (1) and 52, Oudh Rent Act, is that an effectual ejectment of a tenant can only take place when the procedure with reference thereto as prescribed by the Act has been adopted and this will be so in spite of any agreement between the landlord and the tenant. [p. 334, col. 2.]

A transfer by way of relinquishment by a tenant is prohibited by s. 6 (*i*), Transfer of Property Act. [p. 335, col. 1.]

The interest of a tenant in the land is no more and no less than a possessory interest and if the possession is not delivered it is difficult to characterise such a transfer as a transfer of that interest. [*ibid.*]

Appeal against the judgment of the Subordinate Judge, Partabgarh dated the 17th May, 1930, upholding that of the Munsif, Kunda, at Partabgarh, dated the 24th March, 1930.

Mr. *Radha Krishna Srivastava*, for the Appellant.

Mr. *Ali Zaheer*, for the Respondents.

Judgment—This is the plaintiff's appeal from the decree of the Subordinate Judge of Partabgarh dated the 17th of May, 1930, affirming the decree of the Munsif of Kunda dated the 24th of March, 1930.

The appeal was in the first instance posted for hearing before our learned brother B N. Srivastava, J. He thought that it involved an important question of law which should be decided by a Bench of two Judges. He accordingly made reference to such a Bench under the provisions of s. 14 (2) of the Oudh Courts Act, 1925.

The plaintiff's case is that the plots of land Nos. 507, 548, 581 and 576, measuring in area 4 *bighas* 11 *biswas* and 10 *biswansis*, situate in the village of Kathbar Parwezpur, *Pargana* Patti, in the District of Partabgarh, were held of him by the defendants in the right of statutory tenants; that under a registered deed of relinquishment dated the 21st of October 1924 the defendants relinquished their tenancy rights in the plots in suit in favour of the plaintiff; that on such relinquishment the plaintiff entered into the possession of the plots and that in spite of the relinquishment and the delivery of possession the defendants continued in actual cultivation of the plots of land. Hence this suit with the relief of possession in respect of those plots. It is not necessary for the purpose of this appeal to state in detail the line of defence adopted by the defendants.

The lower Appellate Court has found that the deed of relinquishment of the 21st of October 1924 was executed by the defendants and it has further found that the defendants never surrendered possession of

the plots in suit in spite of the deed. The Court held that the relinquishment was ineffectual in law if there was no surrender of possession accompanying it and as there was no such surrender in the present case the plaintiff's suit failed.

In second appeal the only point for decision is as to whether the view of the law taken by the lower Appellate Court, that relinquishment in writing without surrender of possession on the part of a tenant does not constitute a sufficient right in the landlord to recover possession of the plots in question by means of a suit in ejectment, is correct.

So far as the decisions of the late Court of the Judicial Commissioner and of the Chief Court are concerned they all seem to have gone one way in holding that a relinquishment by a tenant without surrender of possession is ineffectual—See *Bibi Saidunnisa* v. *Faiyaz Hasan* (1); *Nand Ram* v. *Cheddi Lal* (2) and *Mandai* v. *Sajjad Ali* (3). There is also decision of the Board of Revenue, *Sristi* v. *Ramdeo Rai* (4), which tends in the same direction. In a case decided by Mr. (afterwards Sir Edward) Chamier, *Binda Prasad* v. *Rajindra Prasad* (5), there is a *dictum* that a tenant may relinquish his tenancy in favour of the landlord "in any manner and at any time by agreement with him." Mr. Radha Krishen, Counsel for the plaintiff, cites this *dictum* as an authority in support of the view that a bare agreement between the landord and the tenant suffices to effectuate a valid relinquishment of tenancy.

We are of opinion that that *dictum* has not this effect. In that case no question arose of the nature which has arisen in the present case and it was found as a matter of fact that the tenant had surrendered possession of his agricultural holding.

It appears to us that it cannot be doubted that the policy of the Oudh Rent Act 1886, is to keep the relationship of landlord and tenant subsisting in spite of either or both of them and that it can be terminated only in the manner provided by that Act. Section 4 (1) of the Act is as follows:—

"Nothing in any contract made between a landlord and a tenant before or after the passing of this Act shall entitle a landlord to eject a tenant or enhance his rent otherwise than in accordance with the provisions of this Act as amended by the Oudh Rent (Amendment) Act, 1921."

Section 52 is as follows:—

"No tenant shall be ejected otherwise than in accordance with the provisions of this Act."

These two sections clearly indicate that an effectual ejectment of a tenant can only take place when the procedure with reference thereto as prescribed by the Act has been adopted and this will be so in spite of any agreement between the landlord and the tenant to the contrary. Then the Act proceeds to provide remedies both to the tenant and to the landlord for determining the tenancy. Under s. 20

"a tenant shall continue liable for the rent of his holding unless on or before the fifteenth day of March in any year he gives to the landlord or to the recognised agent of the landlord notice of his desire to relinquish the land and relinquishes it accordingly."

This is the mode of relief granted to the tenant in case he desires to relinquish his holding. It may be emphasized that the section lays down two requisites for such a result to ensue: (1.) That the tenant shall give a notice in writing of his desire to relinquish and (2) that he relinquishes it accordingly. It follows that mere expression of the desire to relinquish is not enough even in working out the procedure of relinquishment under the Act. Corresponding to this relief provided in favour of the tenant s. 53 gives the landlord right to eject a tenant by notice or by suit as the case may be. If such a notice is served the tenant may either contest it by instituting a suit or may not contest it at all. In the latter case under the provisions of s. 59 his tenancy of the land in respect of which the notice has been served shall cease and s. 60 enables a landlord in cases falling under the preceding section to obtain the assistance of Court to eject a tenant. All the procedure which a landlord may adopt for the purposes of obtaining the ejectment of a tenant is summed up in cl. (4) of s. 108, which provides for a suit by a landlord for the ejectment of a tenant.

It was argued by Mr. Radha Krishen that a relinquishment by a tenant of his agricultural holding is a transfer of his interest in the land and may be enforced under the ordinary procedure of law. There are two answers to this argument. One is that such a transfer is prohibited by s.

(1) 69 Ind. Cas. 97; 9 O. L. J. 319; 4 U. P. L. R. (O.) 76; A. I. R. 1923 Oudh 1.
(2) 105 Ind. Cas. 466; 4 O. W. N. 955; A I. R. 1927 Oudh 512.
(3) 124 Ind. Cas. 366; 6 O. W. N. 1094; 13 R. D. 865; A. I. R. 1930 Oudh 69; Ind. Rul. (1930) Oudh 222.
(4) 4 R. D. 303
(5) 10 O. C. 285.

6 (*i*) of the Transfer of Property Act. This was so held by a Bench of the late Court of the Judicial Commissioner in *Jang Bahadur* v. *Rae Raja* (6), and we think if we may say so, rightly. The second answer is that the interest of a tenant in the land is no more and no less than a possessory interest and if possession is not delivered it is difficult to characterise such a transfer as a transfer of that interest. We are therefore of opinion that the decision of the Court below is correct

The appeal fails and is dismissed with costs.

K. L. *Appeal dismissed.*

(6) 7 O. C. 265.

OUDH CHIEF COURT.

Execution of Decree Appeal No. 14 of 1931.

October 1, 1931.

RAZA AND BISHESHWAR NATH Srivastava, JJ.

Thakurain SUKHRAJ KUER AND ANOTHER—OBJECTORS—APPELLANTS

versus

Raja HARNAM SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 60 (c), O. XXI, r. 54—'Agriculturist', meaning of—Exemption when available—Proclamation of order—Proclamation not by beat of drum but only by loud voice, legality of.

There is sufficient compliance with the provisions of O. XXI, r. 54, C. P. C., where owing to resistance offered on behalf of the judgment-debtor and holding out of threat to use force if the order is proclaimed by beat of drum, the process server does not make the proclamation by beat of drum and proclaims the order in a loud voice at the place adjacent to the property in dispute. [p. 335, col. 2.]

The term 'agriculturist' is used in s. 60 (c), Civil Procedure Code, to denote a person making his living by tilling the soil, in other words, whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his hands. It includes a small holder of the land who tills the soil but not a large landed proprietor even though his sole income is derived from land. [*ibid.*]

The property of the agriculturist to be exempt under s. 60 (c) must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land. [p. 336, col. 1]

Application for revision from an order of the Sub-Judge, Bahraich

Messrs. *Ghulam Hasan* and *Iftikhar Husain*, for the Appellants.

Mr. *Hyder Husein*, for the Respondent.

Judgment.—This is a judgment-debtors' appeal from an order dismissing the objections filed by them in an execution case.

The facts of the case are sufficiently set out in the judgment of the learned Subordinate Judge and they need not be repeated in this judgment The appellants' learned Counsel has pressed the appeal upon two grounds only:—

(1) The judgment-debtors' property was not attached in accordance with the provisions of O XXI, r. 54 of the Code of Civil Procedure as the order was not proclaimed by beat of drum.

(2) The property in dispute belongs to the judgment-debtors as agriculturists and so it is not liable to attachment and sale.

We think there is no substance in this appeal. It is true that the order was not proclaimed by beat of drum but the judgment debtors themselves are responsible for this as resistance was offered on their behalf and threat was held out to use force, if the order were proclaimed by beat of drum. When the process-servers could not thus get the order proclaimed by beat of drum they proclaimed it by loud voice. "Under O. XXI, r. 54 the order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode". We think the fact that the order was proclaimed in a loud voice at the place adjacent to the property in dispute must in the circumstances of this case, be regarded as sufficient compliance with the provisions of O. XXI, r. 54 Code of Civil Procedure. The learned Subordinate Judge has examined the evidence on this point carefully. We think he came to a correct conclusion upon the evidence and his finding should be accepted.

The next question is whether the property in dispute is not liable to attachment and sale under s. 60 (*c*) of the Code of Civil Procedure.

The learned Subordinate Judge has found that the judgment-debtors (objectors) are not really agriculturists by profession and do not occupy the building in dispute in that capacity. As pointed out in the case of *Muthuvenkatarama Reddiar* v. *The Official Receiver of South Arcot* (1).

"The term is used 'agriculturist' in s. 60 (c) of the Code to denote a person making his living by tilling the soil, in other words once whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his lands. It includes a small holder of the land who tills the soil; but not a large landed proprietor even though his sole income is derived from land. The property

(1) 92 Ind. Cas. 398; 49 M. 227; 50 M. L. J. 90; A. I. R. 1926 Mad. 350.

of an agriculturist to be exempt under cl. (c) of s. 60 of the Code must be shown to have been occupied by him as such for purposes of agriculture that is in order to enable the owner or occupier to cultivate the land."

We agree with the view taken in that case. The result is that the appeal fails and must be dismissed.

Hence we dismiss the appeal with costs.

R. L. *Appeal dismissed*

OUDH CHIEF COURT.

Privy Council Appeal No. 16 of 1931.
Civil Miscellaneous Application No. 537 of 1931.
November 26, 1931.

WAZIR HASAN, C. J. AND RAZA, J.

Sir HUKUM CHAND KASLIWAL AND ANOTHER—APPELLANTS

versus

Messrs RADHA KISSEN-MOTI LAL CHAMARIA AND OTHERS—RESPONDENTS

Civil Procedure Code (Act V of 1908), O. XLV, r. 7 (1)—Time for giving security, extension of—Power of High Court.

The Chief Court has no jurisdiction to extend the time fixed for giving security under cl. (b) of sub-r. (1) of r. 7, O. XLV, Civil Procedure Code. *Ashiq Ali* v. *Arjumun-unnissa* (2), *Ram Dhan* v. *Prag Narain* (3), *Kachi Reddi* v. *Saki Reddi* (4), *J. N. Surty* v. *T. S. Chettyar Firm* (5), and *Sri Kamala Kanta Singh* v. *Bindhumukhi Dassi* (6) relied on *Nilkanth Balwant Natu* v. *Shri Satchitanand Vidya Narsinha Bharat* (1), dissented from.

Mr. *S. C. Das*, for the Applicant.

Messrs. *H. K. Ghosh* and *K. P. Misra*, for Opposite Party.

Judgment.—In these cases certificates for leave to appeal to His Majesty in Council from a decree of this Court were granted on the 15th of September 1931. Both the periods of time prescribed by r. 7 of O. XLV of the Code of Civil Procedure 1908 have expired but the security required by cl. (1) of sub-r. (1) has not been furnished by the applicants. The applications before us have been made with a prayer that time may be extended to furnish the required security. The question which has arisen for decision is as to whether the Court has power to extend the time. In support of the applicants' contention reliance is placed on a Full Bench decision of the High Court at Bombay in *Nilkanth Balwant Natu* v. *Shri Satchitanand Vidya Narsinha Bharat* (1). The decision in that case is contrary to the uniform practice of this Court. The point was expressly decided so far back as 1922 by the late Court of the Judicial Commissioner of Oudh in *Ashiq Ali* v. *Arjumun-unnissa* (2), and the interpretation placed on r. 7 in that case has been accepted as correct and acted upon by the Chief Court also. The latest decision of our Court was given in the case of *Tirbhawan Dutt* v. *Someshwar Dutt* (Privy Council Appeal No. 1 of 1931, decided on the 26th of March 1931). The appellant who failed to obtain an extension of time in the case just now mentioned afterwards made an application before their Lordships of the Judicial Committee for special leave to appeal. The leave was granted but in granting the leave their Lordships of the Judicial Committee did not indicate that the interpretation which this Court had placed on the language of r. 7 (1), of O. XLV of the Code of Civil Procedure was incorrect. Indeed the whole of our order is quoted in the order in Council dated the 23rd day of July 1931.

The view which we now take and have taken on previous occasions is supported by the decisions of High Courts at Allahabad, *Ram Dhan* v. *Prag Narain* (3), at Madras *Kachi Reddi* v. *Saki Reddi* (4), at Rangoon *J. N. Surty* v. *T. S. Chettyar Firm* (5), and at Patna *Sri Kamala Kanta Singh* v. *Bindhumukhi Dassi* (6). Except the Bombay case to which reference has already been made, there is no reported case of any other High Court, so far as we are aware, in support of the interpretation sought to be placed by the applicants in these cases. Accordingly we hold that we have no jurisdiction to extend the time for giving security and dismiss these applications with costs. The certificates granted to these applicants will be cancelled.

N. K. & A. *Application dismissed.*

(1) 101 Ind. Cas. 555 51 Bom 430; 29 Bom. L. R. 352; A. I. R. 1927 Bom. 217.

(2) 70 Ind. Cas 937; 25 O. C. 254.

(3) 65 Ind. Cas. 249; 44 All. 216; 20 A. L. J. 13; A. I. R. 1922 All. 43.

(4) 74 Ind. Cas. 703 A. I. R. 1924 Mad. 44; 18 L. W. 29; (1923) M. W. N. 510.

(5) A. I. R. 1926 Rang. 265.

(6) 123 Ind. Cas. 769; Ind Rul. (1930) Pat. 369; A. I. R. 1929 Pat. 431.

MADRAS HIGH COURT.

Civil Revision Petition No. 207 of 1931.
August 19, 1931.
CURGENVEN, J.

ALWAR AIYANGAR—PLAINTIFF—PETITIONER
versus
SUBRAMANIA DIKSHATHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, rr. 7, 8—Garnishee proceedings—Attachment of debt—Investigation into its existence—Procedure.

When a Court has attached a debt either before judgment or in execution of a decree it is not open to the Court to determine whether the debt is actually due or not. After attachment only two courses are open to it, either to sell the debt or to appoint a receiver for its realisation. *Chidambara Patter* v. *Ramasamy Patter* (1), distinguished. *Ma Saw Yin* v. *Hockto* (2) and *Maharaja of Benares* v. *Patraj Kunwar* (3), followed.

Petition under s 25 of Act IX of 1887, praying the High Court to revise the judgment and order of the Court of the District Munsif of Tenkasi, dated the 25th of August, 1930, and made in I. A. No. 137 of 1930, in S C. S. No. 509 of 1930.

Mr. *K. V. Sesha Ayyangar*, for the Petitioner.

Mr. *S. Nagaraja Ayyar*, for the Respondents.

Judgment.—The question which arises in this case is whether a Court attaching a debt either before judgment or in execution can enquire into the truth or the existence of the debt. The attachment in the present instance was made before judgment on an application filed on the same day as the plaint. But I cannot find that it makes any difference whether such an attachment was made before judgment or in execution of the decree and it appears to me that rr. 7 and 8 of O. XXXVIII, Civil Procedure Code, show that the Court has the same powers in the one case as in the other. There is no authority arising in this Court upon this point. The Full Bench decision in *Chidambara Patter* v. *Ramasamy Patter* (1) related to a disputed title to a debt, which it was held could be investigated under the old section of the Code now corresponding to O. XXI, r. 58 This decision does not deal with the question of investigating the actual existence of the debt itself. There are however two cases upon this point decided by other High Courts: *Ma Saw Yin* v. *Hockto* (2) and *Maharaja of Benares* v. *Patraj Kunwar* (3). Both the Rangoon and the Allahabad High Courts have held that it is not for the Court to determine whether the debt is actually due or not. It has to attach the alleged debt and thereafter there are only two courses open to it, either to sell the debt or to appoint a Receiver to realise it. In this state of the case law I propose to follow these decisions and to hold that there is no provision of law in force at present according to which the Court can investigate the existence of an alleged debt which it attaches. I am informed that the Allahabad and Rangoon High Courts have now framed rules relating to garnishee proceedings such as have been framed on the Original Side of this High Court but we have no such rules for the other Courts of this Presidency.

I was in some doubt whether I should interfere in the circumstances of the present case but it seems to me that the Court has clearly exercised a jurisdiction which it did not possess and that the decree-holder is entitled to have matters restored to the position in which they stood before the petition was dismissed on the 25th August, 1930.

I accordingly allow the petition, set aside the District Munsif's order and direct him to proceed with the application according to law. The petitioner will get his costs in this Court.

N. S &R. L *Petition allowed.*

(1) 27 M. 67; 13 M. L. J. 467 (F. B.)
(2) 97 Ind. Cas. 247, 4 R. 100; A. I. R. 1926 Rang. 175.
(3) 28 A. 262; A. W. N. (1905) 277.

MADRAS HIGH COURT.

Civil Revision Petition No. 839 of 1928.
August 4, 1931.
CURGENVEN, J.

CHANGAT CHATHU NAMBIAR—DEFENDANT—PETITIONER
versus
CHANGAT ODAYOTH KUNHIRAMAN NAMBIAR—PLAINTIFF—RESPONDENT.

Mortgage—Mortgagee bound to pay particular sum as revenue—Enhancement of revenue—Liability of mortgagee.

Where according to the terms of the mortgage-deed the mortgagee is to pay the mortgagor "at the rate of Rs. 6 being the proportionate" Government Revenue for the land and the assessment is enhanced subsequently, the burden of enhancement, in the absence of a contract to the contrary, falls on the mortgagee inasmuch as the bond defines clearly what the Rs. 6 signifies. *Abid Hussain Khan* v. *Kaniz Fatima* (1), followed, *Vasteva Holla* v. *Mohabala Rao* (2), *Krishnier* v. *Arappuli Iyer* (3) and *Panigatan Kanaran* v. *Raman Nair* (4), referred to, *Mati Lal* v. *Darjeeling*

Municipality (5) and *Kunchu Menon* v. *Narayanan Ezhutessan* (6), distinguished. [p. 338, col. 1.]

Petition under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Cannanore, dated the 6th of January, 1928, and passed in S. C. S. No. 1204 of 1927.

Messrs. *O. T. G. Nambiar* and *A. Achuthan Nambiar*, for the Petitioner.

Messrs. *N. Govindan* and *K. Kuttikrishna Menon*, for the Respondent.

Judgment—I think on the merits that the learned District Munsif has come to a right decision. He has bound that the defendant as mortgagee is liable on the terms of the document to pay the enhanced assessment. Several cases originating in this Court have been cited with regard to the effect of such provisions in mortgage documents, but I do not think I need go further than the Privy Council decision in *Abid Hussain Khan* v. *Kaniz Fatima* (1) which makes it clear that in the absence of a contract to the contrary it is the mortgagee who is liable to pay any enhanced assessment. This case is noticed by Phillips, J., in *Vasteva Holla* v. *Mahabala Rao* (2) together with two earlier cases, *Krishnier* v. *Arappuli Iyer* (3) and *Panigatan Kanaran* v. *Raman Nair* (4) which were in a somewhat contrary sense. That being so, we must read the provisions of the mortgage bond in the light of the general liability which the law would cast upon the mortgagee. The bond states that the mortgagee will pay the mortgagor "at the rate of Rs. 6 being the proportionate Government revenue for the land". Inasmuch as it defines specifically what the Rs. 6 is to signify it is distinguishable from the two cases: *Mati Lal* v. *Darjeeling Municipality* 18 Ind. Cas 844] (5) and *Kunchu Menon* v. *Narayanan Ezhutessan* (6) which recited only a fixed sum. It may very well be taken, therefore, to mean that the mortgagee was to pay the proportionate Government Revenue for the land, which at that time was Rs. 6. However that may be, as I have said, I think the mortgagee must bear the burden of the doubt occasioned by any ambiguity in the mortgage document and I cannot therefore say that the learned District Munsif has come to a wrong conclusion that he and not the mortgagor is liable for this enhancement.

It is then urged that the decision in a previous suit O. S. No. 791 of 1916 renders the matter *res judicata*. It is true that the Court in that suit found, when the plaintiff sued the defendant for some earlier amounts, that the latter was liable for the assessment only at the old rates. The District Munsif has declined to hold the matter *res judicata* on several grounds, the only one which need be noticed being that the subject matter is not the same, the claim in the present suit arising subsequent in point of time to that in the prior one. For the respondent *Broken Hill Proprietary Co.* v. *Broken Hill Municipal Council* (7), a Privy Council decision originating in Australia and relating to the valuation of a mine in successive years for purposes of taxation has been cited. But I am not clear that that can fairly be regarded as a parallel case. While in that case the only provision common to the series of operations was a provision of law, here we have a document which has to be construed equally in the earlier case and in the later. On the other hand, I cannot find in the case relied on by the petitioner, *Bader Bee* v. *Habib Merican Noordin* (8) any such principle enunciated as can be applied to the circumstances of this case. I should in any event be indisposed to disturb the finding of the learned District Munsif upon this ground, because it seems clear that the earlier decision is based upon an erroneous view of the law and, therefore, to substitute it for the present one is hardly the function of a Court sitting in revision. For these reasons I decline to interfere with the decree and dismiss the Civil Revision Petition with costs.

N. S. & R. L. *Petition dismissed.*

(1) 80 Ind. Cas. 1019, 46 A. 269; 19 L. W. 703; A. I. R. 1924 P. C. 102, 10 O & A. L. R. 281; 22 A. L. J. 284; 34 M. L. T. 78; 27 O. C. 72; 11 O. L. J. 427; (1924) M. W. N. 657; 29 C. W. N. 214; 51 I A 157; L. R. 5 A. (P. C.) 212; 1 O. W. N. 33 (P. C.)

(2) 91 Ind. Cas 943; A. I. R. 1926 Mad. 405.

(3) 14 M. L. J. 488.

(4) 17 M. L. J. 517.

(5) 18 Ind. Cas. 844; 17 C. L. J. 167.

(6) 25 Ind. Cas. 641; 16 M. L. T. 317.

(7) (1926) A. C. 94.

(8) (1909) A. C. 615; 78 L. J. P. C. 161; 101 L. T. 161.

MADRAS HIGH COURT.

Second Civil Appeal No. 334 of 1927.

August 18, 1931

WALLER AND KRISHNAN PANDALAI, JJ.

SIVASAMI ODAYAR—DEFENDANT—APPELLANT

versus

C. R. SUBRAMANIA AIYAR—PLAINTIFF—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 52—Application to immovable property—'Receiver'

include s ad interim *Receiver—Application for stay of sale of insolvent's property in execution of decree—Duty of Court to stay sale - Sale effected—Official Receiver's rights*

Section 52, Provincial Insolvency Act, as now amended contemplates the presentation of an application not as it used to be after adjudication but at an earlier stage that is to say after an insolvency petition has been admitted At that stage the only Receiver that can be in existence for the purpose of applying is an *interim* Receiver. *Mahasukh* v. *Valibhai* (2), referred to and *Subramania Aiyar* v. *The Official Receiver, Tanjore* (1), dissented from [p 339, col 2.]

Section 52 applies to all kinds of property under attachment by a Court. *Haranchandra Chakravarti* v. *Jay Chand* (3), followed. [*ibid.*]

Where an insolvent's property is attached in execution of a decree before he applies for insolvency, and on his insolvency application being admitted the *ad interim* receiver applies for stay of sale, the executing Court should stay the sale and direct the delivery of possession to the Receiver. If the sale takes place in spite of Receiver application for its stay, he is not bound to recognise the title of the auction-purchaser. [p. 340, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in A. Ss. Nos. 47 and 55 of 1926, preferred against that of the Court of the District Munsif, Kumbakonam, in O. S No. 373 of 1922.

Messrs. *T. M. Krishnaswamy Ayyar* and *C. A. Seshagiri Sastri*, for the Appellants.

Mr *B. Sitarama Rao* for Messrs. *K. R. Rangaswami Ayyangar* and *S. Rangaraja Ayyangar*, for the Respondent

Judgment.—The appellant in this case is a person who took a lease of an insolvent's land from an Official Receiver. The respondent purchased the land in execution of a decree passed against the insolvent and his sons and he sued to recover the value of the crops removed from it by the appellant. The facts and dates are these. The land was attached in execution and proclaimed for sale, the sale being fixed for 30th September, 1920. On 23rd the insolvent applied to be adjudicated and on 28th the Official Receiver was appointed *interim* Receiver. Two days later he moved the Court under s 52 of the Provincial Insolvency Act to adjourn the sale. He did not, in terms, ask for possession of the land to be delivered to him, but, as he wanted the sale to be adjourned so that he himself might sell, such a request on his part may be implied. The Court refused the adjournment and the sale was conducted. On 23rd October the Receiver asked the Court not to confirm the sale, but his prayer was again refused. On 15th December the insolvent was adjudicated and the Official Receiver proceeded to lease his land to the appellant, after which the respondent obtained symbolical delivery from the Court. The Official Receiver subsequently applied to have the sale set aside. His application was rejected by the executing Court, but was allowed by the District Judge, whose order was, however, set aside by the High Court in a decision which is reported as *Subramania Aiyar* v. *The Official Receiver, Tanjore* (1). The Court held that the Receiver referred to in s. 52 of the Provincial Insolvency Act was the Receiver appointed after adjudication and that no application under that section on the part of an *interim* Receiver would lie. With great respect, we must express our dissent from this view. Section 52, as now amended, contemplates the presentation of an application, not as it used to do after adjudication, but at an earlier stage—that is to say, after an insolvency petition has been admitted. At that stage, the only Receiver that can be in existence for the purpose of applying is an *interim* Receiver. In a case reported as *Mahasukh* v. *Valibhai* (2), an application had been presented under s. 52 by an *interim* Receiver and no one seems even to have argued that it was not maintainable for the reason that no *interim* Receiver could apply. The truth is that s 52, in its present form, is entirely out of place under the heading "Effect of insolvency (in other words, of adjudication) on antecedent transactions". Before amendment, it came properly under that heading. Now it is concerned with applications presented at an earlier stage. Mr. Sitarama Rao seeks to support the High Court's order on another ground that s 52 does not apply to immovable property, which cannot be said to be "in the possession of the Court". Were the matter *res integra*, we should be inclined to accept his argument In India land is attached not by seizure, but by means of a prohibitory order and it is difficult to understand how, while it remains in the physical possession of the judgment-debtor or of a third party, it can be said also to be in the possession of the Court. There is, however, plenty of authority—for example, *Haranchandra Chakravarthi* v. *Jay Chand* (3), for the view that the section applies to all kinds of property under attachment by a Court and we do not propose to dissent from it. The result, then, is that, on the application of the *interim* Receiver, the executing Court should at

(1) 93 Ind. Cas. 877; 50 M. L. J. 665; 23 L. W. 300; A. I. R. 1926 Mad. 432.

(2) 109 Ind Cas. 153; 30 Bom. L. R. 455; A. I. R. 1928 Bom. 177.

(3) 123 Ind Cas. 737; 57 C. 122; A. I. R. 1929 Cal 524; Ind Rul. (1931) Cal. 369.

once have stayed the sale and directed delivery of possession to him, the section being peremptory in its terms. The sale, has, however, been confirmed by a Bench of this Court and, even if it could be set aside, no one is asking for it to be set aside. But it is important to define the true legal position, which has some bearing on the appellant's plea of *bona fides*. It is not disputed that he paid rent to the Official Receiver or that he deposited part of it in Court under O XXI, r. 46. Under the circumstances, we do not consider that he should be asked to pay twice over. His payments to the Official Receiver seem to have been made *bona fide* and to be valid under s. 50 of the Transfer of Property Act. The Official Receiver was quite justified in declining to recognise the title of the auction-purchaser under a sale that should not have taken place or been confirmed by a Court, which was required peremptorily by the Statute to stay its hand and to transfer the attached property to the Receiver. As regards the deposit under O. XXI, r. 46, the law allowed it and it can hardly be described as *mala fide*. The final argument is that the Receiver was not entitled to possession of the sons' shares and the plea of *bona fides* could not be sustained in regard to them. As to that, the law at that time was not settled and there was some doubt whether the sons' shares also did not vest in the Receiver. Apart from that, it is clear that the auction-purchaser himself was not entitled to anything but symbolical possession. If he has a legal grievance at all, it is against the Official Receiver, who has received payment from his lessee.

We allow the second appeal and dismiss the suit with costs throughout.

N. S. & R. L. *Appeal allowed.*

MADRAS HIGH COURT.

Second Civil Appeal No. 1957 of 1927.
March 16, 1931.

RAMESAM, J.

APPASAMI PILLAI—DEFENDANT—APPELLANT

versus

RAMU TEVAR—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), s. 32—Recital in deed of gift respecting prior gift, admissibility of—Trust—Trusteeship conferred on certain persons and his heirs—Trust not accepted by trustee—Effect on heirs—Trustee taking attitude adverse to trust, effect of.

A recital in a deed of gift by a widow that the gift had been already made by her deceased husband and that she is simply executing a formal document to give effect to that gift in consonance with the oral direction of the deceased is admissible in evidence as evidence in respect of gift by the deceased [p 341, col. 1.]

Even where a trusteeship is conferred upon a person his sons and grandsons, the estate does not descend on sons and grandsons of such a person where he has not accepted the trust in his life. [p. 342, col. 2.]

Where the heirs of a trustee take up an attitude adverse to the trust and support the adverse claim of the opposed party, they cannot be deemed to have accepted the trust [*ibid.*]

Appeal against a decree of the District Court of West Tanjore at Tanjore, in A. S. No. 88 of 1926, preferred against that of the Court of the Subordinate Judge, Tanjore, in O. S. No. 1 of 1924.

The Advocate General and Mr. *Ramamurti Ayyar*, for the Appellant.

Mr. *A. V. Viswanatha Sastri*, for the Respondent.

Judgment.—This second appeal arises out of a suit by one Ramu Tevar to recover certain properties of which he had been appointed trustee by their owner Nilambal Achi who endowed them for *puja* and other purposes of Sri Sundaramurthi Swami. Nilambal Achi died on the 28th of May, 1923. The plaintiff alleges that he was managing the properties on behalf of Nilambal Achi during her life-time and continued to be in possession after her death. He leased them to the 3rd defendant on the 9th of June, 1923. Defendants Nos. 1 and 2 prevented the 3rd defendant from obtaining possession. They claimed to be reversioners to the estate of Nilambal Achi's father Appa Pillai, after Nilambal Achi's death. But the 2nd defendant sold his share of the property to the 1st defendant and has no further interest in this suit. The 1st defendant contended that on Appa Pillai's death his two widows, Thayyamuthu Achi and Kamalathachi, succeeded to his estate, that after their death the estate devolved upon their daughters, Nilambal Achi and Palanivelu Achi, and after the death of Palanivelu Achi, Nilambal Achi became the sole owner and that on her death on the 28th of May, 1923, defendants Nos. 1 and 2 the reversioners, became entitled to the property. The plaintiff meets this case by relying upon a gift of the suit property by Appa Pillai to Nilambal Achi at the time of her marriage. Both the lower Courts have decreed the plaintiff's suit. The 1st defendant appeals.

The first point, therefore, that arises in this second appeal is whether the gift to

Nilambal Achi by Appa Pillai was true. One important evidence of this gift is Ex. M-2 which is a deed executed by Thayyamuthu Achi on the 20th of September, 1879, in which she recites the gift by her husband and herself to Nilambal Achi as *stridhanam* at the time of the marriage and purports to execute a formal conveyance in pursuance of the oral directions of her husband. The learned Advocate-General who appears for the appellant contends that the recitals in Ex. M-2 are not admissible in evidence. He relies on the decisions in *Brij Lal* v. *Indar Kunwar* (1), *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (2) and *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhuri* (3). These are all decisions of the Privy Council and it is laid down in these cases that where a widow effects an alienation for alleged necessity, recitals of existence of such necessity in the document itself are not evidence of the existence of the necessity. In *Brij Lal* v. *Indar Kunwar* (1), it is laid down :—

"Recitals in mortgages or deeds of sale with regard to the existence of necessity for the alienation have never been treated as evidence by *themselves* of the fact. And it has been repeatedly pointed out by this Board that to substantiate the allegation there must be some evidence *aliunde*."

The use of the words "by themselves" shows that the recitals are not inadmissible in evidence and the effect of the observation is merely that without other evidence they are not enough to prove the necessity. The judgment of the Privy Council makes no reference to s. 32 of the Indian Evidence Act. From the report of the case in *Brij Lal* v. *Indar Kunwar* (1), it appears that Sir E. Richards K. C, the learned Counsel for the appellant, relied on s. 32 of the Indian Evidence Act, but none of the reports shows that there was any admission in the mortgage deed or sale deed which would be strictly covered by s. 32 of the Evidence Act. In *Hari Kishen Bhagat* v. *Kashi Pershad Singh* (2) it is observed:

"To be valid as against the reversioners, or to affect their reversionary rights, a charge created by a Hindu widow or an alienation effected by her can be supported only by proof *aliunde* that such debt was contracted or such alienation was made for valid and legal necessity etc."

No reference was made to s. 32 of the Evidence Act either in the argument or in the judgment. It must be assumed that the recitals in the document concerned in that case were not covered by s. 32. The same remark applies to the decision in *Banga Chandra Dhur Biswas* v. *Jagat Kishore Acharjya Chowdhury* (3) and to *Marimuthu Pillai* v. *Velu Pillai* (4). The decision in *Ramachandrayya* v. *Janakiramayya* (5) relates to an alienation by a guardian on behalf of a minor and does not help us in this case. But apart from all the above remarks the present case is not one of an alienation for necessity. Exhibit M-2 is more in the nature of an admission of a preceding gift rather than a case of a new alienation. I doubt if the principle of the above cases applies to a case like the one before me. In my opinion the recitals in Ex M-2 are admissible in evidence. *Vide* also *Sita Ram Singh* v. *Khub Lal Singh* (6). There is also other evidence in the case from which a gift by Appa Pillai to his daughter can be inferred, for example Ex. U seems to furnish strong evidence in support of the plaintiff's case. The main part of the document is simply the report of the Revenue Inspector. To the report a statement made before the Revenue Inspector by the present 1st defendant is appended. Though this statement makes reference to the transfer by Neelambal Achi of her lands to Sri Sundaramurthi Swami, no dispute was raised as to her title to the lands or her capacity to grant them to the deity. The only claim made in that statement is that he was her heir after her death in respect of the trusteeship. It is open to the Court to infer from this document that he never meant to question her title. When it is remembered that Thayyamuthu Achi was the step-mother of Neelambal Achi and not her mother and thus there is no suspicion of collusion, it is open to the Court to infer that the gift by Appa Pillai to Neelambal Achi was proved. I am, therefore, bound in second

(1) 23 Ind. Cas. 715; 36 A. 187 at p. 193; 26 M. L. J. 442; 18 C. W. N. 649; 12 A. L. J. 495; 19 C. L. J. 469; (1914) M. W. N. 405; 15 M. L. T. 395; 16 Bom. L. R. 352; 1 L. W 794 (P. C.)

(2) 27 Ind. Cas. 674; 42 I. A 64; 42 C 876; 2 L. W. 219; 17 M. L. T. 115; 19 C. W N. 370; 13 A. L J. 223; 21 C. L. J. 225; 28 M. L. J. 565; 17 Bom. L. R. 426; (1915) M W. N. 511 (P. C)

(3) 36 Ind. Cas. 420; 43 I. A. 249; 44 C. 186; 4 L. W. 458; 20 M. L. T. 335, 31 M L. J. 563; (1916) 2 M. W. N. 236; 8 Bom. L R. 868, 24 C L. J. 487; 1 P. L. W 1; 21 C. W. N. 225; 10 Bur. L. T. 177 (P. C.)

(4) 32 Ind. Cas. 908.

(5) 26 Ind. Cas. 66; (1914) M. W. N. 874; 1 L. W. 805.

(6) 94 Ind. Cas. 13: 5 Pat. 168; A. I. R. 1928 Pat. 255; 7 P. L. T. 573.

appeal to accept the finding of the Courts below in this case that the gift to Neelambal at the time of her marriage was true.

The next question that arises in the case is whether even then the plaintiff is entitled to maintain the suit. Both the lower Courts find that the plaintiff was appointed trustee by Neelambal Achi, but it is contended for the appellant that this appointment is invalid: Neelambal Achi had previously executed a deed of settlement, Ex. A, dated 23rd November. 1899, under which she appointed one Kandaswami Thevar, her cousin and his sons and grandsons and so on for generations to continue to conduct the said charities after her life-time for ever, and it is contended that having appointed Kandawami Thevar she had not, thereafter, power to appoint another trustee Kandaswami Thevar died in 1914 during her life-time and probably because he showed no inclination to undertake the trust, Neelambal appointed the plaintiff as trustee in 1913 and though the appointment of the plaintiff might have been invalid and useless in the event of Kandaswami Thevar surviving Neelambal Achi and accepting the trust, I do not see why the appointment should be held to be invalid in the events that happened, namely, Kandaswami having predeceased Neelambal Achi and his two widows not accepting the trust. In the first place I doubt whether the words "sons, grandsons and so on for generations" in Ex. A should be construed as words of limitation and not as words of purchase. It is true that if an estate is granted to a person and his sons and grandsons for generations these words merely indicate the nature of the estate taken by the grantee, namely, an absolute estate. One may also assume that this rule applies even to trusteeship; but in the present case the document does not say that the trusteeship is conferred upon Kandaswami Thevar, his sons and grandsons and so on for generations but it simply says that the said *dharmas* ought to be conducted after her life-time and Kandaswami Thevar and his sons and grandsons and so on for generations should continue to conduct for ever the said charities. Even assuming that this sentence can be regarded as a sentence converting trusteeship to Kandaswami Thevar absolutely, seeing that Kandaswami has not accepted the trusteeship during the life-time of Neelambal Achi, though the trusteeship was to take effect only after her death and seeing that he did not survive Neelambal so as to have an opportunity of accepting it after her death, it seems to me that the trusteeship never vested in him at all and did not descend upon his heirs. The learned Advocate-General contended that even if Kandaswami Thevar did not accept the trusteeship during the life-time of Neelambal Achi it was open to his heirs to accept it after Neelambal's death, because he contends that the estate conferred by the document which is not a will but a deed of settlement is a vested estate in the trusteeship after Neelambal's death, that is a vested remainder in the trusteeship. This might have been so if Kandaswami had accepted the trusteeship during Neelambal's life-time, *Krishna Pillai* v. *Arunachala Chettiar* (7), but as he never accepted it I think the estate conferred by the settlement deed remained only a contingent estate and when he died there was nothing to be transmitted to his heirs. No authority has been cited on either side in support of the respective contentions on this part of the case and the matter is one of first impression and I hold that in such a case no estate descended upon the heirs. On this view the plaintiff is a validly appointed trustee, even though he was appointed without waiting for Kandaswami's refusal. But even assuming that the above view is incorrect and that some estate descended to the heirs of Kandaswami we have to see the conduct of Kandaswami's heirs. Kandaswami left two widows and these are defendants Nos 4 and 5 in the case. The 4th defendant is a sister of the 2nd defendant and half-sister of the 1st defendant. They filed a written statement which shows that they were not anxious to have the trusteeship and that they were anxious to support defendants Nos. 1 and 2. Their statement in para 6 of the written statement shows, that their attitude is adverse to the trust. The mere fact that they proceed to state further, "If the Court holds that Neelambal Achi was legally entitled to endow the said properties for charities, we are prepared to manage the same" cannot conceal the fact that they were really in collusion with the 1st defendant who was acting adversely to the trust, and their primary contention being that Neelambal Achi had no power to endow the suit property for charities they must be taken not to have accepted the trust and their willingness to manage the trust on the happening of some contingency cannot be regarded as an

(7) 18 M. L. J. 304.

acceptance. On this ground also, the appointment of the plaintiff as trustee becomes operative. But even if I am incorrect in the view I have taken about the construction of the written statement, still it is now clear that the plainttff is the only trustee who is willing to act because after the decree of the lower Appellate Court the 5th defendant never filed an appeal to the High Court. The 4th defendant filed S. A. No. 1233 of 1927. She died and the appeal abated. So far as the 5th defendant is concerned, taking her written statement, with her subsequent conduct in not appealing, one must infer that she is not anxious to be a trustee. Once the finding that there is a trust is reached, it is the idol that is really entitled to the suit properties. Who exactly should be the trustee representing the idol is really a different matter. Any difficulty in deciding that question ought not to prejudice the rights of the idol. It has been held in several cases that a *de facto* trustee can maintain a suit to recover trust properties. See *Mahomed Ibrahim* v. *Sundaram Chetti* (8), *Benarsi* v. *Altaf Hussain* 63 Ind. Cas. 171(9), *Kasi Chetty* v. *Srimathu Deva Sikamany Nataraja Dikshiter* (10) and *Moideen Bibi Ammal* v *Rathnavelu Mudaliar* (11). It is true that in the decision in *Kasi Chetty* v. *Srimathu Deva Sikamany Nataraja Dikshiter* (10) the plaintiff was in possession of the property in suit and it was held that he was entitled to maintain a suit to eject a tenant. But it is not clear from the other cases that the prior possession in the *de facto* trustee was an essential element in upholding his right to maintain the suit. It is clear from the cases mentioned above that the conclusion arrived at in those cases was not based upon the well-known principle that a person without title but who had possession can maintain a suit to recover possession from a trespasser who does not claim under leave and license of the lawful owner but on a different principle, namely, that a *de facto* manager of a trust should be allowed to maintain a suit which is for the benefit of the trust inspite of some defect in his title as trustee. This of course does not mean that any person can call himself a trustee and maintain a suit to recover trust properties from trespassers. It is not that a *de facto* trustee is like a next friend of a minor, but in the present case the plaintiff is a person appointed trustee by Neelambal Achi. He entered on the duties of the trustee He leased out suit properties to the 3rd defendant. It is by reason of *bona fide* acts of this kind that he should be regarded as the *de facto* trustee and I think as such *de facto* trustee he is entitled to maintain the suit whether he actually had prior possession or not. But even if it were otherwise the right to possession in Neelambal Achi certainly passed to him for it is now found that he is the reversioner to Neelambal's estate. That would be enough to enable him to maintain the suit.

For all these reasons the second appeal fails and is dismissed with costs.

N. S. & R. L. *Appeal dismissed.*

(8) 96 Ind. Cas. 823; A. I. R. 1926 Mad. 1066.
(9) 63 Ind. Cas. 173.
(10) 16 Ind. Cas. 622; (1913) M. W. N. 181.
(11) 98 Ind. Cas. 812; 51 M. L. J. 598; (1926) M. W. N. 943; A. I. R. 1927 Mad. 69.

MADRAS HIGH COURT.

Second Civil Appeal No. 773 of 1930.
August 28, 1931.

CORBETT, J.

ALAPATI VENKATRAMAYYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALAPATI NAGAMMA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882 as amended by Act XXVII of 1926), s. 3—Attestation—Person who cannot sign and person signing on behalf of executant, whether competent to attest—Sub-Registrar, when attestor—Gift—Acceptance, presumption of.

Under the Transfer of Property Act as amended by Act XXVII of 1926 a person who cannot sign his name is not qualified to attest a document. As the amendment is retrospective in effect the rule applies even to documents executed before 1926 and it is not open to the Court to refuse to act upon it merely because illiterate persons were formerly accepted as capable of attesting. [p. 344, cols. 1 & 2]

A person who signs on behalf of the executant of a document cannot also sign as an attestor of it. *Sristidhar Ghose* v. *Rakshakali Dasi* (3) and *Radhakrishna Mudaliar* v. *Subraya Mudaliar* (4), referred to. [p. 345, col. 1.]

The Sub-Registrar who has signed the document cannot be accepted as an attestor in the absence of evidence to show that he signed in the presence of the executant. *Radha Mohun Dutta* v *Naripendra Nath Nandy* (5) and *Ramanathan Chetty* v. *Delhi Batcha Tevar* (6), relied on. [*ibid*]

Where a gift is made by a mother to minor children living with her unless the contrary is proved the acceptance of the gift should be inferred and the mere circumstance that the mother retained the custody of the deed and kept the house in her name in the Municipal accounts and paid the taxes does not show that she did not intend the gift to be acted upon. [p. 345, col. 2.]

Appeal against a decree of the District Court, Guntur, in A. S No. 265 of 1928 preferred against that of the Court of the District Munsif, Guntur, in O. S. No. 364 of 1924.

Mr. *B. T. M. Raghavachari*, for the Appellants.

Mr. *V. Pattabhirama Sastri*, for the Respondent.

Judgment—The suit out of which this second appeal arises was to recover possession of a house under a gift deed executed by the mother (2nd defendant) of the plaintiff's late husband, Subbayya, jointly to Subbayya and herself. The claim was resisted upon various grounds, the first with which I propose to deal being the question of attestation of the deed. It purports to have been attested by five persons, two being signatories and three marksmen. If the plaintiff fails to establish two valid attestations amongst these, there are the further contentions that the writer of the document and the Sub-Registrar who registered it may be held to rank as attestors.

Of the two signatories one has not been traced and there is no evidence which would allow the Court to conclude that he validly attested the document. The other has been examined as P. W. No. 7 and although he himself has stated in evidence that he did not see the executant sign, the learned District Judge has accepted the evidence of P. Ws. Nos. 9 and 10 who state that he attested the document. This assertion was not made the subject of cross-examination and I think that it must carry with it the implication that it was a valid attestation within the terms of the definition added to s 3 of the Transfer of Property Act by Act XXVII of 1926.

We turn then to the attestations by the three persons unable to sign their own names. On the same evidence, that of P. Ws. Nos. 9 and 10, the learned District Judge has found that the attestation of one of them, P. W. No. 8, is valid, but this attestation has been attacked upon the general ground that as the law now stands a person who cannot sign his name is not qualified to attest a document. Before the law was amended as stated above, there can be no doubt that a marksman could be accepted as an attestor. For purposes of non-testamentary documents there was no definition of "attest" and under s. 3 (52) of the General Clauses Act, it was permissible to hold that "sign" included "mark." I think however that the effect of Act XXVII of 1926 in introducing a definition has altered the law in this respect. It is true that there is no case law directly in point but the definition is in precisely similar terms to that contained in the Succession Act as applying to the execution of wills. It is reasonable, therefore, to hold that unless the contrary appears from the context in which each definition is to be found, words construed in a certain sense in the one must be construed in the same sense in the other. It has been held both in *D. Fernandez* v. *R Alves* (1) and in *Nitye Gopal Sircar* v. *Nagendra Nath Mitter Mozumdar* (2) that the direction contained in s. 50 (3) of the Indian Succession Act, 1865 (now s. 63 (*c*) of the present Succession Act) as to the signature of witnesses attesting a will is not satisfied by the witnesses affixing their marks. In the latter case it is pointed out that the Legislature while speaking of the action of the testator, uses expressions "shall sign or affix his mark" "signature or mark". In speaking of the witnesses the section does not use any alternative expression but simply says "the witnesses must sign". "That being the case", the learned Judges say, "we cannot help thinking that the Legislature advisedly drew a distinction between the action of the testator and that of the witnesses as regards the mode of their respective signatures." This construction of the language used has no reference to the fact that the document in question is a will and I cannot find any ground in this circumstance to distinguish these cases. It will be apparent that the reasoning used is derived purely from the wording of the definition, which is the same in both cases; and since I cannot suppose that the Legislature was unaware of these decisions when it extended the definition to the attestation of non-testamentary documents, I can only infer that the same construction was intended in the one case as in the other. Certainly insistence upon the attestation of such documents by persons who can sign their names would not lead to more hardship or inconvenience than in the case of wills which often have to be executed at very short notice. There is an undoubted hardship in applying the principle to such a case as the present, where the document was executed as far back as 1912, long before the law was amended. But inasmuch as that amendment has expressly been made retrospective in effect it is not open to me to refuse to act upon it merely because illiterate persons were formerly accepted as capable of attesting.

I must hold accordingly that none of the

(1) 3 B. 382.
(2) 111 C. 429.

three so called attestations by marksmen is valid.

We come then to the writer. Two objections have been raised to accepting him as an attestor. In the first place it is said not to have been shown that he intended to attest the execution. I should have been prepared to overrule this objection, because he signed after the attestors and the evidence I think allows the presumption that he signed in the presence of the executant. But the other objection appears to me fatal. The executant of the gift-deed was herself unable to sign her name and it is clear from the evidence and from an examination of the document that her name was affixed to it by the writer himself. It has been held both in *Sristidhar Ghose* v. *Rakshakali Dasi* (3) and in a case of this Court, *Radhakrishna Mudaliar* v. *Subraya Mudaliar* (4), that a person who signs on behalf of the executant of a document cannot also sign as an attestor of it. The former case related to a mortgage-bond and the latter to a will but there seems to be no difference in principle. The document must have been attested by "two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument or has seen some other person sign the instrument in the presence and by the direction of the executant," which means that it must be attested by two persons other than the person who signed the instrument in the presence and by the direction of the executant. We have accordingly to exclude the writer upon this ground.

There remains the Sub-Registrar. Thelearned District Munsif was inclined to exclude him because he does not necessarily sign in the presence of the executant, as the rule requires, and no proof was adduced that he in fact did so sign. In the absence of a decision of this Court he felt himself bound however to follow *Radha Mohun Dutta* v. *Nripendra Nath Nandy* (5). There is now a case in point decided by this Court in *Ramanathan Chetti* v. *Delhi Batcha Tevar* (6). It was there held by the learned Chief Justice and myself that proof must be adduced that this term in the requirement was complied with. There being no evidence upon this point I must hold that the Sub-Registrar also cannot be accepted as an attestor.

The result accordingly is that only one person can be declared to have validly attested the document, which being a gift deed must therefore fail for lack of due attestation. This conclusion no doubt involves some hardship to the plaintiff but unless my application of the law as it stands at present is at fault I do not see how a different decision can be arrived at.

The gift deed has been further attacked on the ground that the gift made was not accepted by the donees. It was made to a husband and wife while they were minors by the husbands' mother. The plaintiff has indeed contended that they were of age at the time, but this has been found against, although I do not think that the finding should bar the plea of acceptance if it may reasonably be inferred from the facts. The subject-matter was a house in which the parties continued to live with the husband's parents until the husband died some 11 years latter. Under these circumstances it its difficult to see by whom, if not by the parents, acceptance could have been made at the time of the gift. The issue throws the burden of disproving acceptance upon the defendants and I think that in such a case as this the English rule should be followed that unless the contrary is proved acceptance of the gift should be inferred. The mere circumstance that the mother retained custody of the deed and kept the house in her name in theMunicipal accounts and paid the taxes does not show that she did not intend the gift to be acted upon. I do not agree that it was onerous in character. All that the donees had to do was to live together as husband and wife, with a provision for divestment should either fail to do this. No case has been cited to me in which it has been held that a gift made in such circumstances is invalid for failure to prove acceptance. The circumstances in *Hariram Serowjee* v. *Madan Gopal Bagla* (7) were quite different, the only evidence of an intention to make a gift being furnished by certain entries in an account. No doubt [66 Ind. Cas 480] *Debi Singh* v. *Bansidhar* (8) and *Dhanna Mal* v. *Parmeshari Das* (9) cited to me on behalf of the plaintiff, raise the question rather of the completion of the gift by the donor than of its

(3) 63 Ind. Cas. 507; 49 C. 438; 26 C. W. N. 264; A. I. R. 1922 Cal. 168.

(4) 34 Ind. Cas. 849; 40 M. 550; 4 L. W. 255; 31 M. L. J. 357.

(5) 105 Ind. Cas. 422; A. I. R. 1928 Cal. 154; 47 C. L. J. 118.

(6) 131 Ind. Cas. 840; 33 L. W. 727; 60 M. L. J. 302 A. I. R. 1931 Mad. 335; Ind. Rul. (1931) Mad. 600.

(7) 114 Ind. Cas. 565; 30 L. W. 835; A. I. R. 1929 P. C. 77; 49 C. L. J. 335; 33 C. W. N. 493; 31 Bom. L. R. 710; (1929) A. L. J. 406; (1929) M. W. N. 422 (P. C.).

(8) 66 I. C. 480; A. I. R. 1922 All. 44.

(9) 111 Ind. Cas. 251; A. I. R. 1928 Lah. 9.

acceptance by the donee. But in 41 Ind. Cas. 389 *Muhammad Abdul Nayeem* v. *Jhonti Mohton* (10) an inference of acceptance was drawn from the circumstances of the case, which I think it would be equally reasonable to draw here. I am not therefore, disposed to interfere with the findings of the lower Court upon this issue.

The only other point is that the learned District Judge while finding that the plaintiff had not been guilty of immorality during her husband's life-time has not recorded a finding on the question whether she lived separately from him. It appears to me from the terms of Issue No. 4 that these two questions were aspects of the same matter and that the finding with regard to the plaintiff's chastity covers the other point.

In view of my finding on the question of attestation I must allow the second appeal and set aside the decrees of the lower Courts so far as they relate to this property. The decree will stand as regards the payment of Rs. 7-2-0 In the circumstances the parties will pay their own costs throughout.

N. S. & A. *Appeal allowed.*

(10) 41 I. C. 389.

MADRAS HIGH COURT.
FULL BENCH.

Civil Revision Petition No 880 of 1930.

September 2, 1931.

MADHAVAN NAIR, JACKSON AND COURGENVEN, JJ

MUNICIPAL COUNCIL, CONJEEVARAM —DEFENDANT—PETITIONER

versus

KACHI MUNUSAMI MUDALIAR— PLAINTIFF—RESPONDENT.

Madras District Municipalities Act (V of 1920), s. 80—Profession tax, levying of—Notification specifying rate, necessity of.

A Municipality has no jurisdiction to levy profession tax under s. 80, District Municipalities Act unless a notification specifying the rate at which the tax will be levied has been published before levying it.

Petition praying the High Court to revise the judgment and decree of the Court of the District Munsif, Conjeevaram, dated the 16th December, 1929, and passed in S. C. S. No. 558 of 1929.

Mr *V. S. Narasimhachar* for Mr. *P. Venkatramana Rao*, for the Petitioner.

Messrs. *S. Panchapakesa Sastri* and *K. R. Krishnaswamy Ayyar*, for the Respondent.

Judgment.—In this case we are of opinion that the Municipality had no jurisdiction to levy the tax in question since the notification contemplated by s. 80 of the District Municipalities Act has not been published by the Municipality. Under this section a notification specifying the rate at which the tax will be levied will have to be published before levying the tax. In the notification, Ex. II, in this case no specific rate leviable is mentioned. On the other hand it calls for objections. We therefore agree with the lower Court in holding that Ex II cannot be treated as the final notification contemplated by s. 80.

As the Municipality had no jurisdiction to levy the tax, the other question raised with reference to the correctness of the decision in *Madura* etc, *Devasthanams* v. *Madura Municipal Council* (1) does not arise for consideration.

The Civil Revision Petition is dismissed with costs.

N. S & R L. *Petition dismissed.*

(1) 110 Ind. Cas 89; 51 M. 301; 27 L. W. 834; 54 M L. J. 625; A. I. R. 1928 Mad. 569.

MADRAS HIGH COURT.

Civil Miscellaneous Petition No. 3962 of 1931.

October 20, 1931.

COURGENVEN, J.

N. GOVINDARAJULU NAYUDU— PETITIONER

versus

THE IMPERIAL BANK OF INDIA, VELLORE—RESPONDENT.

Injunction—Equitable jurisdiction of High Court—Civil Procedure Code, whether exhaustive—Appeal from order refusing to set aside ex parte decree—Power to issue injunction restraining execution pending appeal- Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 2.

The High Court has power to grant an injunction to restrain a person from executing an *ex parte* decree pending the disposal of an appeal preferred to the High Court from order refusing to set aside that *ex parte* decree. *Periakaruppan Chettiar* v. *Ramasami Chettiar* (6), followed. *Kumar Ganga Singh* v. *Pirthichand Lal* (5), *Mungle Chand* v. *Gopal Ram* (8) and *Singaravelu Mudali* v. *Balasubramania Mudali* (9), relied on. *Bhagwat Rajkoer* v. *Sheo Golam Sahu* (1), *Varadacharyulu* v. *Narasimhacharyulu* (2), *Ayyaperumal Nadar* v. *Muthuswami Pillai* (3), and *Ellerman Lines, Ltd.* v. *Read* (4) referred to [p. 347, col. 1.]

The High Courts, over and above the powers which they enjoy under the Civil Procedure Code, possess an equitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases and there is nothing in the Civil Procedure Code, that deprives the High Courts of that power. [p. 347, col. 2.]

Petition praying that in the circumstances stated in the affidavit filed there-

with the High Court will be pleased to issue an injunction restraining the respondent herein from executing the decree in O. S. No. 84 of 1930 on the file of the Court of the Subordinate Judge, Vellore, pending A. A O. No. 283 of 1931, preferred to the High Court against an order of the Court of the Subordinate Judge, Vellore, dated the 14th July, 1931, and made in I. A No. 262 of 1931 in the said O. S. No. 84 of 1930.

Messrs. *V. C. Gopalaratnam* and *K. Subramanyam*, for the Petitioner.

Messrs. *T. D. Srinivasachariar* and *C. Vaidyanatha Rao*, for the Respondent.

Order.—This application was filed for the stay of further proceedings in pursuance of an *ex parte* decree passed in O. S. No 84 of 1930 on the file of the Sub-Court of Vellore pending disposal of an appeal against an order refusing to set that *ex parte* decree aside. When the stay application came up for the issue of *ex parte* orders, I understand that it was held by the learned Judge who disposed of it, following *Bhagwat Rajkœr* v. *Sheo Golam Sahu* (1) and some cases of this Court, that this Court has no power in proceedings of this nature to stay execution of a decree under O. XLI, r. 5. Accordingly the application was converted into one for an injunction to restrain the respondent from executing the decree, and the question has been raised before me whether an application of this kind will lie. So far as a Court which is restricted to the terms of the Code of Civil Procedure is concerned, it has been held by Phillips, J, in *Varadacharyulu* v. *Narasimhacharyulu* (2), which I had occasion to follow in *Ayyaperumal Nadar* v *Muthuswami Pillai* (3), that if an injunction cannot be passed under the provisions of O XXXIX, r. 1 or 2, it is not permissible to seek power under s. 151 of the Code in order to justify such an order. It has, however, been argued now that a High Court is not restricted to the terms of the Code, but possesses an equitable power, otherwise derived, to control the proceedings in other Courts There can be no doubt that in England a power of this character exists and a discussion of the nature of it will be found in *Ellerman Lines, Ltd.* v. *Read* (4). In that case the question arose as to whether a British subject could be restrained from enforcing a foreign judgment in execution, and the Court of Appeal answered the question in the affirmative, the principle upon which the matter was decided being clearly explained in the judgment of Atkin, L. J, namely, that the Court in granting injunctions does not seek to assume jurisdiction over the foreign Court or arrogate to itself some superiority which entitles it to dictate to the foreign Court or that it seeks to criticise the foreign Court or its procedure; "the English Court has regard to the personal attitude of the person who has obtained the foreign judgment. If the English Court finds that a person subject to its jurisdiction has committed a breach of covenant, or has acted in breach of some fiduciary duty or has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations, it will restrain him, not by issuing an edict to the foreign Court, but by saying that he is in conscience bound not to enforce that judgment." I do not propose to go so far, as the learned Judges who decided *Kumar Ganga Singh* v. *Pirthichand Lal* (5) and who appear to have based their decision as to the power of a Court (not necessarily a High Court) to issue an injunction in certain circumstances purely upon English precedents and without any reference to the terms of the Code of Civil Procedure. But there is authority for the view that the High Courts, over and above the powers which they enjoy under that Code, possess an equitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases. This is the basis of the decision in *Periakaruppan Chettiar* v. *Ramasami Chettiar* (6) where Ramesam and Devadoss, JJ., held that the Chartered High Courts have such a power, following *Rash Behary Dey* v. *Bhowani Churn Bhose* (7) and *Mungle Chand* v. *Gopal Ram* (8). In the former of these two decisions Woodroffe, J., who certainly is a high authority on questions of procedure, gave it as his

(1) 31 C. 1081.

(2) 92 Ind. Cas. 615; 23 L. W. 85; (1925) M. W. N. 886; A. I R. 1926 Mad. 258.

(3) 102 Ind. Cas. 700; 26 L. W. 899; 38 M. L. T. 358; A. I. R. 1927 Mad. 687.

(4) (1928) 2 K. B. 144; 97 L J. K. B 366; 138 L. T. 625; 33 Com. Cas. 219; 17 Asp. M.L. C. 421; 44 T L. R. 285; 30 Ll. L. Rep. 77

(5) 69 Ind. Cas. 891; 1 Pat. 356; A. I, R. 1922 Pat. 34; 4 P L. T. 10.

(6) 109 Ind. Cas. 281; 27 L. W. 418; A. I. R. 1928 Mad. 491.

(7) 34 Cal. 97.

(8) 34 Cal. 101.

opinion that a High Court had and has, independently of the Civil Procedure Code, power to make an order of the nature sought and he answered in the negative the question whether there was anything in the Civil Procedure Code, which took away that power. That case was decided under the Code, but I do not think that there is anything either in s. 151 or any other provision of the new Code which would deprive a High Court of powers derived independently of it. Another case *Singaravelu Mudali* v. *Balasubramania Mudali* (9), decided by Ramesam, J., has been cited to me as an authority in favour of the existence of the power, but I observe that he was able to bring the injunction within the terms of r. 2 of O. XXXIX so that the remaining observations in the learned Judge's judgment are, I think, merely *obiter*, though, as I understand them, he was of opinion that a power exists a part from the terms of that rule. It appears to me however that *Periakaruppan Chettiar* v. *Ramaswami Chettiar* (6), is sufficient authority for the general proposition that this Court is not bound by the terms of the Code in issuing injunctions in appropriate cases. It appears to me that a case of the present description is eminently appropriate for the exercise of such a power. We have two proceedings going on at the same time, one the execution of the decree and the other a proceeding which may eventuate in the decree being set aside. It is quite clear that these two proceedings, if allowed to go on independently, may lead to incompatible and perhaps unfortunate consequences. I think accordingly that, in general, there is justification for a Court exercising the power to restrain the holder of the decree against which such proceedings are pending from exercising it.

On the merits I have perused the order of the learned Subordinate Judge refusing to set aside the decree and it appears to me, without in any way expressing any definite opinion, that the appeal has some prospects of success. The decree is a large one for a sum of Rs. 12,000 and it is admitted that about Rs. 9,000 has been paid. The petitioner admits that he asks for a stay not because he distrusts the stability of the decree-holder but because he finds difficulty under the existing economic conditions in raising the balance. I think in the circumstances that there are sufficient grounds for granting his request on the basis of his furnishing security and I accordingly order that an injunction do issue to the decree-holder not to execute the decree until the disposal of the Civil Miscellaneous Appeal provided that the judgment-debtor gives security within six weeks from the date of the receipt of this order to the satisfaction of the Subordinate Judge of North Arcot for the outstanding amount of the decree and that he further undertakes to pay interest at the rate of 8 per cent. in the event of the money being found due, for the period during which the injunction is in force. Failing compliance with these directions the injunction will terminate and the petition will stand dismissed with costs.

N. S. & A. *Order accordingly.*

(9) 97 Ind. Cas. 938; 24 L. W. 421; (1926) M. W. N. 708; A. I. R. 1926 Mad. 1126.

MADRAS HIGH COURT.

Criminal Revision Case No. 329 of 1931
(Criminal Revision Petition No. 297 of 1931.

November 20, 1931.

WALLER AND KRISHNAN PANDALAI, JJ.

PANDMANABHANI RAMANAMMA *alia* BULLEMMA—COMPLAINANT—PETITIONERS

versus

GOLUSU APPALANARASAYYA—ACCUSED—RESPONDENT.

Evidence Act (I of 1872), ss. 40 to 43—Complaint and suit for damages for defamation—Conflicting decisions—Judgment of one Court, whether admissible as evidence in the other—Civil and Criminal proceedings on same matter—Procedure.

The petitioner charged the respondent with having defamed him and the latter was convicted. Thereupon the petitioner brought a suit for damages for defamation against the respondent but the Civil Court dismissed the suit. The High Court ordered a re-trial setting aside the conviction, and the question arose whether a copy of the judgment of the Civil Court was admissible in the criminal proceedings:

Held, that the matter was governed by ss. 40 to 43, Evidence Act, and the judgment was not admissible under any of those sections; it was a judgment *in personam* and not *in rem* and was not conclusive proof, in the subsequent judicial proceedings of anything material. [p. 349, col. 2; p. 350, col. 2]

Where a civil suit and a criminal complaint raise the same issues between the same parties the judgment of neither Court is binding on the other and each must decide the case on the evidence before it. The risk of conflict is one that is inherent in the division of causes into criminal and civil. *Gnanasigamani Nadar* v. *Vedamuthu Nadar* (2). relied on, *P. S Velayutham Chetti, In re*, (3). commented upon, *Markur, In re*, (1), not followed. [p. 350, col. 1];

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying

the High Court to revise an order of acquittal dated the 25th February 1931 and made in Criminal Appeal No. 2 of 1931 on the file of the Court of Session of the Vizagapatam Division preferred against an Order of the Court of the Huzur Sheristadar, First Class Magistrate, Vizagapatam, in C. C. No. 1 of 1930.

Mr. *V. Krishnamachariar*, for the Petitioner.

The Public Prosecutor, for the Crown.

Order.—This case has had a somewhat remarkable history. The petitioner charged the respondent, his wife and others with the offences of robbery and defamation. Ultimately the respondent alone was convicted of the latter offence and his conviction was upheld by the Sessions Judge in appeal. The petitioner then filed a suit for damages for defamation against the respondent and another person. A copy of the judgment confirming the conviction was produced, but the District Munsif held, quite rightly, that he was not bound to follow it and that he had to arrive at a decision independently on the evidence before him. In the result, he dismissed the suit. The next thing that happened was that this Court, in revision, set aside the conviction and ordered a retrial. The case was retried and ended again in the conviction of the respondent The latter tried to get admitted in evidence a copy of the judgment of the Civil Court, but the Magistrate rejected it, being of opinion that it was irrelevant for the purpose of the trial. An appeal was again preferred, which was on this occasion successful. The Sessions Judge set aside the conviction, holding that the Munsif's judgment was not merely relevant, but also conclusive proof of the respondent's innocence. To the material sections of the Evidence Act, which lay down the law as to the admissibility of judgments, he made no reference. It would be interesting to know how he would have dealt with the matter, if the judgment had been one awarding damages against the respondent. We venture to doubt whether he would have gone so far as to hold that it was conclusive proof of the respondent's guilt and that the Magistrate should at once have convicted him on it, without any further evidence. And yet, if a judgment one way might be conclusive proof of the respondent's innocence, it is not apparent why a judgment the other way, should not be conclusive proof of his guilt.

What the Sessions Judge relied on was a judgment of the Bombay High Court, reported as *Markur, In re* (1). Markur was prosecuted for breach of trust in regard to certain sums of money. He had already been sued civilly for the recovery of those sums, but the suit had been dismissed. A copy of the Civil Court's judgment was produced before the Magistrate, who declined to admit it in evidence, holding, with reference to ss. 40 to 43 of the Evidence Act, that it was irrelevant and inadmissible The matter was taken up to the High Court, which decided, without any reference to those sections, that the judgment should have been admitted. The Judges did not actually say, in so many words, that it was conclusive proof of Markur's innocence; indeed, Heaton, J., conceded that it could not be used to prove or disprove the facts in dispute in the case. But it is impossible not to agree in the Sessions Judge's observation that the whole tenor of their argument indicates that, in their opinion, it ought to have been treated as conclusive proof and that, on it, Markur should, at once, have been discharged by the Magistrate. If, however, it was not to be used to prove or disprove the charge, it is difficult to see on what ground that Magistrate could have acted on it, as if it were conclusive. With great respect, we cannot follow this decision. The matter, it seems to us, is governed by ss. 40 to 43 of the Evidence Act and, if a judgment is not admissible under any of those sections, it must be left out of consideration altogether. The judgment in question was not one to which s. 40 applied for it was not a bar to the prosecution. Nor was it a judgment *in rem* under s. 41. It did not relate to a matter of a Public nature as required by s. 42. Nor was its existence a fact in issue in the prosecution or relevant under any other section of the Act—s 43. Heaton, J., put his decision on a quite different ground —the ground of public policy. "We cannot" he said "have Criminal Courts trying over again matters which have been thoroughly dealt with and finally decided by a Civil Court of competent jurisdiction." It is not easy to see how such a rule is to be enforced, unless the judgment of the Civil Court is, in law, a bar to or conclusive against the prosecution. And what of cases in which the Criminal Court has decided the controversy first and convicted? Can we not have the Civil Court trying over again a matter which has been decided by a Court of competent jurisdiction and

(1) 33 Ind. Cas. 633; 41 B. 1; 18 Bom. L. R. 185, 17 Cr. L. J. 153.

coming to a different conclusion? The truth is that although the civil suit and the prosecution may be based on exactly the same cause of action the parties are, strictly speaking, not the same, the burden of proof is differently placed and different considerations may come in. The result may therefore be a conflict in decision For instance, *A* is tried for murdering *B*, but acquitted, because a confessional statement by him is, in a criminal trial, inadmissible in evidence. *C*, *B's* widow, sues him for damages for the murder and gets a decree, the confessional statement being admissible in a civil suit. In the matter of defamation, again, there is a good deal of difference between a suit for damages and a criminal prosecution. The prosecution is governed by the provisions of the Indian Penal Code, the suit by the English Law of slander and libel A defence which is open to the accused in the prosecution is not open to him as the defendant in the suit. The question of special damage may arise in the suit, but cannot arise in the prosecution.

It has often been said in this Court that, where a civil suit and a criminal complaint have been filed, which raise the same issues between the same parties, the hearing of the complaint should be stayed until the suit has been decided. And this has been put on the ground that it will avoid a possible conflict in decision. Our brother Jackson has pointed out in a judgment, in which we entirely concur, *Gnanasigamani Nadar* v. *Vedamuthu Nadar* (2), that the risk of such a conflict is one that is inherent in the division of causes into criminal and civil. The judgment of neither Court is binding on the other and each must decide the cause on the evidence before it. If they arrive at different conclusions, it is regrettable, but unavoidable. The ruling in *Markur, In re* (1), was relied on in another case in this Court in 72 Ind. Cas. 172, *P. S. Velayutham Chetty, In re* (3). The head-note states that the Bombay ruling was followed. The fact however, remains that Krishnan, J., disposed of the Criminal Revision Petition on the merits and not on the decision in the civil proceeding. What he said was that, if he accepted the civil judgment as the basis of his judgment in the criminal case, he would have to find that the conviction was wrong. What he refrained from saying was that it could be accepted as the basis of his judgment. The head-note, therefore, seems to be inaccurate. If he had been satisfied that the Bombay ruling was unimpeachably correct he could and would have allowed the revision petition without considering the evidence in the criminal case.

It is not, we think, necessary to refer to any other rulings. We are satisfied that the judgment relied on by the Sessions Judge was not admissible in evidence under any of the relevant sections of the Evidence Act. It is a judgment *in personam* and not *in rem* and is not conclusive proof, in the subsequent judicial proceeding, of anything material. The order of the Sessions Judge must be set aside. He will dispose of the Criminal Appeal on its merits.

N. S. & A. *Order set aside.*

(2) 99 Ind. Cas. 853; 25 L. W. 52; 52 M. L. J. 80 (1927) M. W. N 54; 38 M. L. T. 80; 28 Cr. L J. 181; A. I. R. 1927 Mad. 308.

(3) 72 Ind. Cas. 172; 24 Cr. L. J. 332; A. I. R 1924 Mad. 516.

MADRAS HIGH COURT.

Second Civil Appeal No. 1927 of 1926
and
Civil Appeal No. 145 of 1928.
September 21, 1931.

VENKATASUBBA RAO AND PAKENHAM WALSH, JJ.

MUNDAKATH MATHU—DEFENDANT APPELLANT

versus

CHALORA ILLATH VISHNU NAMBUDRIPAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malabar Law—Alienation—Family karar—*Alienation by* karnavan *in excess of powers—Amount utilised for benefit of family—Alienee's right to refund of consideration—Contract Act (IX of 1872), ss. 64, 65—Principle of restitution—Civil Procedure Code (Act V of 1908), O. XXXII, r 7—Minor—Compromise without sanction—Validity.*

The *karanavan* of a Nambudiri *illom* executed a *kanom* in respect of the *illom* properties. It was found that the amount was borrowed to meet the expenses of the marriage expenses of a female member of the *illom* and that the sum was in fact utilised in connection with such expenses. A suit was instituted by a junior member to set aside the *kanom* on the ground that there was a *karar* to which the *karanavan* (who was then a junior member) was a party under which no debts could be incurred except with the consent of all the adult members of the *illom* for the time being:

Held, that, granting that the transaction as a *kanom* was not binding on the *illom*, as the money had been utilised for the benefit of the *illom* and every member of the *illom* including the plaintiff had the benefit of that money, the *kanom* could be set aside only on the condition that the *illom* or its *karanavan* for the time being should pay the *kanomdar* the amount borrowed from him with interest. [p. 352, col. 1.]

The principle on which ss. 64 and 65, Contract Act, rest is not confined to cases expressly included in either of the sections. [p. 351, col. 2.]

Where a case in which a minor party is interested is compromised without the sanction of the Court the decree is a nullity so far as the minor is concerned. [*ibid.*]

S. A. No. 1927 of 1926.

Second Civil Appeal against the decree of the District Court, North Malabar, in A. S. No. 138 of 1925, preferred against the decree of the Court of the District Munsif, Quilandy, in O. S. No. 344 of 1923.

Appeal No 145 of 1928.

Second Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in O. S. No. 8 of 1926 (O. S. No. 20 of 1925, District Court North Malabar).

Mr. *K. P. Ramakrishna Ayyar*, for the Appellant.

Mr. *C. A. Krishna Variar*, for the Respondent.

S. A. No. 1927 of 1926.

Judgment.—The first question we have to decide is, whether this Second Appeal has been compromised as alleged by Vishnu Nambudri, the 1st respondent. The suit relates to a Nambudri Illom. Its *karnavan* was one Sankaran Nambudri, the 2nd respondent. Vishnu, abovenamed, is the cousin of that Sankaran. Vishnu filed the suit out of which this second appeal arises, namely O. S. No. 344 of 1923 on the file of the District Munsif's Court, Quilandy. That suit was filed on the 5th of July 1923. Vishnu, the plaintiff, impeached in that suit a certain alienation made by the *karnavan* Sankaran in favour of the defendants Nos. 9 and 10. The 9th defendant is the appellant before us. The alienation took the form of a *kanom* dated 7th December, 1922. The District Munsif dismissed the suit holding that the transaction was binding on the *tarwad*. His judgment was delivered on the 17th of December 1924. From that, an appeal was taken on the District Judge who set aside the Munsif's judgment on 16th March, 1926. This second appeal was presented on the 6th of September 1926. We must now advert to another suit, namely, O. S. No. 8 of 1926, filed in the Sub-Court at Tellicherry on 18th August 1925. That was filed by one of the sons of Sankaran, for removing the latter from the office of *karnavan* and for setting aside certain various alienations. The scope of that suit was therefore much wider than that filed by Vishnu in the Munsif's Court. But it must be observed that in the Sub-Court suit, there was a prayer to set aside the alienation which formed the subject of the suit in the Munsif's Court. In the Sub-Court various charges were made against the *karnavan* Sankaran and charge Q related to the alienation in question. At this stage, we must mention that the 9th and the 10th defendants in the Munsif's Court suit, were the 21st and the 22nd defendants in the Sub Court suit. The 15th defendant in that suit was their brother and the 14th was their mother. In the light of these remarks, the following paragraph in the Subordinate Judge's judgment becomes intelligible.

Charge Q.—The alienation complained of under this charge has been decided against the alienees, *viz*, defendants Nos. 14 and 15 (*vide* Ex. S). They were about to prefer an appeal against that decision when a compromise was effected whereby charge *E* was conceded in their favour and they in turn gave up the idea of preferring the appeal. Thus the alienation under the charge "must be held to be invalid."

The judgment in which this passage occurs was delivered on 23rd March, 1927. The decision that is referred to in that passage, is that of the Appellate Court already referred to, dated 16th March, 1926, in the Munsif's Court suit "Defendants Nos. 14 and 15" in this extract is a mistake for defendants Nos. 21 and 22. That they were about to prefer an appeal is also a mistake, for the appeal had by then been presented on 6th September, 1926, as stated above. The reason for the Judge having made the observations in the above extract, is to be found in the following statement filed by the plaintiff in that suit on 28th January, 1927.

"The question of the validity of the transactions referred to in charges *E* and *R* is not pressed for the plaintiff except in so far as they have a bearing on the *karnavastanom* of the 1st defendant. As against the alienees these charges are not pressed."

In this statement, there is not a word said about charge *Q:* nor is there any reference to defendants Nos. 21 and 22. It is said that charge *E*, referring to the alienation in favour of the defendants Nos. 14 and 15, was not pressed because it was agreed, that the alienation in favour of defendants Nos. 21 and 22 forming the subject of charge *Q*, was to be treated as set aside. We have nothing to do with this, but what is clear is, that there is no trace of a compromise to which defendants Nos. 21 and 22 were parties. Apart from this, the 22nd defendant was a minor, and as it is common ground that the so-called compromise was not sanctioned on her behalf by the Court, it is a nullity so far as she is concerned.

The fact that the compromise (granting there was one) affected the interests of the minor defendant, was not brought to the notice of the Court and it cannot, therefore, be said that there was a judicial determination, that the so-called compromise was beneficial to the minor's interests. We must therefore negative the contention that there was a compromise and allow the second appeal to proceed.

Coming then to the merits, the question that has to be decided is whether the alienation in favour of the 9th and the 10th defendants is binding on the *tarwad* or not. The *kanom* in their favour was executed on 7th December, 1922, the consideration being Rs. 700. There is a concurrent finding that that amount was borrowed to meet the expenses of the marriage of one Devaki, a female member of the Illom and that the sum was in fact utilised in connection with the marriage expenses as well as the jewels and dowry which of necessity had to be given. It is also found that the marriage of Devaki could not have been postponed and that there was thus justifiable necessity for the loan. But the District Judge who set aside the alienation relied upon a *karar* in this Illom which had been executed in the year 1905. To that *karar*, all the then members of the Illom were parties including Sankaran, the present *karnavan*; he was, at the time a junior member of the Illom. That *karar* contains a clause, that no debts shall be incurred except with the consent of all the adult members for the time being and that if any charges are created without the concurrence of all such members, they shall not be valid. It is on this clause of the *karar* that the plaintiff relies. He did not join in executing the *kanom* in question though all the other adult members for the time being were parties to it. There was ill-feeling between him and the *karnvan* and he chose to live separately. There is a finding that the *kanomdars* took the *kanom* with notice of this restriction. The learned District Judge, following *Rama Vadhayar* v. *Krishnan Nair* (1) has held, that in such circumstances the *kanom* is not binding on the Illom. The appellant's Counsel says that he is prepared to argue that although Sankaran as a junior member was a party to the *karar*, he ceased on his becoming *karnvan*, to be bound by its provisions. It is unnecessary to deal with this argument, for granting that the transaction as a *kanom* is not binding on the Illom, the question is, whether the alienees are not under s. 64 of the Indian Contract Act entitled to be restored the sum they paid; for the appellant's learned Counsel does not insist that the transaction should be upheld as a *kanom*, but says that his client is content to have the relief under s. 64. In this case, the money raised was utilised for the benefit of the Illom; in other words, every member of that Illom including the plaintiff had the benefit of that money. Granting that the *karnavan* acted in excess of his powers in borrowing the sum of which, on the findings, every member had the benefit, can the transaction be set aside unconditionally? The principle on which ss. 64 and 65 rest is not confined to cases expressly included in either of them and is thus stated in *Clough* v. *London and North Western Railway Co.* (2).

"No man can at once treat the contract as avoided by him, so as to resume the property which he parted with under it, and at the same time keep the money or other advantages which he has obtained under it." (See: Pollock and Mulla's Contract Act commentaries under s. 64).

This rule is applied as a rule of equity and good conscience. Even in *Rama Vadhyar* v. *Krishnan Nair* (1). on which the District Judge relies, there is a *dictum* recognising this principle.

It is common ground that the property did not pass into the possession of defendants Nos. 9 and 10 in pursuance of the *kanom*. The result is, that the *kanom* is set aside, on the condition, that the Illom or its *karnavan* for the time being shall pay the defendants Nos. 9 and 10 in six months from this date Rs. 683 with interest thereon at 6 per cent. per annum from the 7th December, 1924. If the payment is not so made, the suit shall stand dismissed and there will be a declaration that the *kanom* is binding on the whole Illom.

As regards the costs, we make the following order. The appellant shall have her costs in the first Court and in the lower Appellate Court, but in this Court each side shall bear its own costs.

APPEAL No. 145 OF 1928.

Judgment—The judgment which we have just delivered in S. A. No. 1927 of 1926 disposes of this appeal also. In accordance with that judgment, the decree of the lower Court, so far as it relates to the alienation, the subject of charge Q, is set aside. The Court-fee paid on the Memorandum of Appeal shall be refunded to the appellant; otherwise, we make no order as to costs.

N. S. & A. *Appeals allowed*

(1) 93 Ind. Cas. 20; 23 L. W. 186; A. I. R. 1926 Mad. 398.

(2) (1871) 7 Exch. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.

ALLAHABAD HIGH COURT.

Execution Second Civil Appeal No. 1928 of 1929.

March 19, 1931.

SULAIMAN AND NIAMAT ULLAH, JJ.

SHEO TAHAL RAM—DECREE-HOLDER—APPELLANT

versus

BINAEK SHUKUL—JUDGMENT-DEBTOR—RESPONDENT

Civil Procedure Code (Act V of 1908), ss. 11, 13, 44—Foreign judgment—Non-resident foreigner—Validity—Execution in British India—Objection for want of jurisdiction—Maintainability—Scope of s. 44—Submission, what constitutes—Part payment and asking for time, whether operate as submission, res judicata *or estoppel*—Res judicata—*Execution proceedings—Estoppel—Nature of plea—Essential conditions—Ignorance of law as explanation for late objection.*

A decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has in no way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except in the country of the forum by which it was pronounced. [p. 354, col. 2; p. 355, col. 1.]

Where a decree passed by a Court in a Native State against a British subject who did not reside in that State, is sought to be executed in British India, it is open to the defendant to object to its execution on the ground that the decree, being one against an absent foreigner who had not submitted to the jurisdiction of the Court, is a nullity. [p. 354, col, 1.]

Section 44, Civil Procedure Code, merely lays down the method of procedure for the execution of decrees passed by Courts in certain Native States as to which there is a Notification by the Governor-General in Council. There is nothing in the section which compels the British Indian Court to execute a decree transferred to it by a Native State Court even if it is satisfied that the decree was passed without jurisdiction. *Veera Raghava Ayyar* v. *Muga Sait* (1), *Panchkari Majumdar* v. *Giridharimal Moheshri* (2) and *Gur Dayal Singh* v. *Raja of Faridkot* (3), relied on. [p. 354, cols. 1 & 2.]

The submission to the jurisdiction must be to the foreign Court itself and probably before the judgment is pronounced; for if there was no such submission, the judgment is a nullity. But appearance in the British Court may amount to waiver independently of this rule. [p. 355, cols. 1 & 2.]

Where such a decree was sought to be executed in British India and the moveable properties of the debtor were attached and the latter paid a certain sum of money and took time:

Held, (*i*) that the mere fact that the amount was deposited in part payment of the decree or that time was taken for the payment of the balance would not amount to an adjudication of the rights of the parties by the Court so as to operate as *res judicata* against the judgment-debtor in all subsequent proceedings, even though they arise out of a fresh transfer of the execution and relate to an entirely different set of properties. [p. 355, col 2.]

(*ii*), that the judgment-debtor was not estopped as the decree-holder had not in any way been prejudiced by any representation of the judgment-debtor [p. 356, col. 1.]

Although ignorance of law is no excuse it may explain why an objection was not raised at an early stage. [*ibid.*]

Section 11, Civil Procedure Code, does not in terms apply to execution proceedings as they are not proceedings in a separate suit. The principle underlying that section has no doubt been applied to execution proceedings, but the principle of constructive *res judicata* has not been applied unless the point was expressly raised and decided or must be deemed to have been decided by necessary implication. [p. 355, col 2.]

The plea of estoppel ordinarily rests on a question of fact, namely, whether the persons sought to be estopped intentionally caused or permitted another person to believe a thing to be true and to act upon such belief and in general the person pleading estoppel has to establish that in consequence of the representation or conduct of the person against whom estoppel is pleaded he was induced to act in a particular manner. [p. 357, col. 2.]

Execution Second Appeal from a decision of the Subordinate Judge, Mirzaour, dated the 18th July, 1929.

Mr. *Ambika Prasad*, for the Appellant.

Mr *A P Bagchi*, for the Respondent.

Sulaiman, J.—This is a decree-holder's appeal arising out of execution proceedings consequent upon the transfer of a decree by a Court of a Native State. The decree holder brought a suit in the Bhadohi Court within the Benares State against three defendants including Binaek Shukul the present respondent and his deceased father Persidh Narain. The summonses were served personally, but they did not appear to contest the claim. The plaintiff led some evidence and the suit was decreed on the merits on the 27th of July, 1916. The other execution records are not before us and the whole history of the execution for this long period is not quite clear. Certain facts, however, have been definitely found by the Court below and they are as follows:—The objector although served personally did not choose to appear in the Court of the Native State, the decree was passed on the merits, the decree-holder executed his decree within British India several times; apparently in 1926 the decree was transferred to the Mirzapur Court for execution, the decree holder got certain moveable properties of the judgment-debtor attached, the judgment debtor appeared in the Mirzapur Court, deposited Rs 100 in part payment and asked for three months more time so that he might pay the whole decretal amount, apparently time was given to him, though it is not clear whether the decree holder had expressly consented to this arrangement; but it is perfectly clear that up to that time the judgment-

debtor raised no objection as to want of jurisdiction; apparently execution was re-transferred to Benares.

On an application of the decree-holder the execution of the decree was transferred to the Mirzapur Court a second time. After the receipt of the record the decree-holder applied on the 13th of November, 1928, for the execution of the decree by the attachment and sale of fresh property. On the 11th of December, 1928, the judgment-debtor objected that the Bhadohi Court had no jurisdiction to pass the decree against him when he was not a resident of the Native State and that the said decree is not capable of execution.

The first Court distinctly found that the decree of the foreign Court was pronounced against an absent foreigner and was, therefore, an absolute nullity unless it could be shown that the defendant had in any way submitted to the jurisdiction of the said Court. In the grounds of appeal before the lower Appellate Court the decree-holder did not question the finding that the decree was against an absent defendant but urged other pleas. The lower Appellate Court has agreed with the view of the trial Court and affirmed its decree.

It seems to me that it is open to a judgment debtor against whom a decree has been passed by a Native State Court to object to its validity on the ground of want of jurisdiction, in the Court to which the execution has been transferred. If the decree passed is without jurisdiction and therefore, a nullity he can certainly claim that he is not bound by it. It is not incumbent upon him to go to the Court of the Native State and ask that Court to review its order. By doing so he may be said in one sense to subject himself to the jurisdiction of that Court and bind himself by an adverse order, in case it is passed. His remedy obviously is to object to the execution in the Court to which the decree has been tranferred and which is now executing it.

Section 44, Civil Procedure Code merely lays down the method of procedure for the execution of decrees passed by Courts in certain Native States as to which there is a Notification by the Governor-General in Council. It does not make a decree of such Court for all purposes a decree by a Court in British India. All that it provides is that the decree 'may' be executed as if it were a decree by such Court. There is nothing in the section which compels the British Indian Court to execute a decree transferred to it by a Native State Court even it if is satisfied that the decree was passed without jurisdiction. I am clearly of opinion that it has ample discretion to refuse to execute the decree.

It is doubtful whether the omission of the words 'or the jurisdiction of the Court' from the section corresponding to the present O. XXI, r. 7 necessarily implies that the Court to which the decree has been transferred cannot question the validity of the decree on the ground of want of jurisdiction. In any case such a contention cannot be urged with regard to a decree of a Native State Court, which is a foreign Court, transferred under s. 44, Civil Procedure Code.

The point is covered by the authority of the Madras and Calcutta High Courts in *Veera Raghava Ayyar* v. *Muga Sait* (1) and *Panchkari Majumdar* v. *Giridharimal Moheshri* (2). I fully agree with the opinions expressed therein on this point.

There can also be no doubt that s. 44 does not override s. 13, Civil Procedure Code. It only confers authority to execute a decree which is in any other way a valid and enforceable decree. In a suit on a foreign judgment objection as to the conclusiveness of the judgment can be raised on the ground mentioned in s. 13, Civil Procedure Code. If the decree is not binding on the judgment-debtor on any of those grounds it seems to me that the execution Court is entitled to take the fact into consideration.

It is now well settled by the pronouncement of their Lordships of the Privy Council in the case of *Gur Dayal Singh* v. *Raja of Faridkot* (3), that the jurisdiction of a foreign Court is territorial and attaches upon all persons either permanently or temporarily resident within the territory while they are within it, but it does not follow them after they have withdrawn from it and that even territorial legislation cannot give jurisdiction to a foreign Court against persons not owning allegiance to the legislating authority. To quote the words of their Lordships:

"In a personal action to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has in no way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and

(1) 26 Ind. Cas 287; 39 M. 24; 16 M. L. T. 479; 27 M. L. J. 535; 1 L. W. 887; (1915) M. W. N. 162 (P. B.)

(2) 89 Ind. Cas. 347; 41 C. L. J. 508; A. I. R. 1925 Cal. 955.

(3) 22 C. 222 at p 238; 21 I. A. 171; 4 R. & J. 267; 6 Sar. 503; 112 P. R. 1894 (P. C.)

it must be regarded as a mere nullity by the Courts of every nation, except in the country of the forum by which it was pronounced."

It is not disputed that the defendants were not residents of Bhadohi and were not in the Native State when the suit was instituted. It follows that the Bhadohi Court had no jurisdiction to pass a decree against the defendants. Both the Courts below have found this point in favour of the judgment-debtor, and that finding is not challenged in the grounds of appeal.

The rule regarding jurisdiction in actions *in personam* has been clearly stated by Dicey in his Conflict of Laws, Chap. XIII, as follows:—

"In an action *in personam* in respect of any cause of action, the Courts of a foreign country have jurisdiction in the following cases:—

Case 1. Where at the time of the commencement of the action the defendant was resident (or present) in such country, so as to have the benefit,and be under the protection, of the laws thereof.

Case 2. Where the defendant is, at the time of the judgment in the action, a subject of the sovereign of such country.

Case 3. Where the party objecting to the jurisdiction of the Courts of such country has by his own conduct, submitted to such jurisdiction, *i. e.* has precluded himself from objecting thereto.—

(*a*) by appearing as plaintiff in the action, or (*b*) by voluntarily appearing as defendant in such action without protest, or (*c*) by having expressly or implicitly contracted to submit to the jurisdiction of such Court."

The rule is stated in the same way in Halsbury's Laws of England Vol. VI—Conflict of Laws—Part X.

The present case does not come under the first two heads. The only question for consideration is whether the defendant by his own conduct submitted to such jurisdiction and has, therefore, precluded himself from objecting.

While the suit was pending in the Bhadohi Court the defendant-respondent, in spite of personal service on him, did not appear. The mere fact that he allowed the suit to be heard *ex parte* and decreed against him would not amount to his submitting to the jurisdiction of theBhadohi Court. Nor do I think that his subsequent conduct in depositing Rs. 100 in the Mirzapur Court some years afterwards and asking for further time would be any evidence to show that he had submitted to the jurisdiction of the Bhadohi Court before the decree was passed. I cannot give to his subsequent conduct such a retrospective significance.

As the rule has been stated by Dicey it would seem that the submission to the jurisdiction must be to the foreign Court itself and probably before the judgment is pronounced; for if there was no such submission the judgment is a nullity. The illustrations given by Dicey of submission to jurisdiction by voluntarily appearing as defendant in such action without protest all relate to appearance in the foreign Court itself.

I have accordingly grave doubts as to whether any appearance in a Court in British India to which the execution has been transferred can amount to a submission to the jurisdiction of the foreign Court within the meaning of the rule cited above. But of course there may possibly be a waiver amounting to an estoppel independently of that rule.

There is no doubt that when on the previous occasion the decree was transferred to the Mirzpur Court and his moveable properties were attached, the judgment-debtor appeared before the Mirzapur Court, deposited Rs. 100 and took three months' time On that occasion he did not object to the validity of the decree.

The learned Advocate for the decree-holder contends that his omission to do so brings in the operation of the principles of both *res judicata* and estoppel. As to *res judicata* I am clearly of opinion that there is no such bar. Section 11, Civil Procedure Code does not in terms apply to execution proceedings as they are not in a separate suit. The principle underlying that section has no doubt been applied to execution proceedings, but the principle of constructive *res judicata* has not been applied unless the point was expressly raised and decided or must be deemed to have been decided by necessary implication. If any property had been sold and the sale had been confirmed by an order of the Court, one might have said that there was a decision on the question of the validity of the decree by necessary implication. But the mere fact that Rs. 100 were deposited in part payment of the decree or that three months' time was taken for the payment of the balance would not amount to an adjudication of the rights of the parties by the Court so as to operate as *res judicata* against the judgment-debtor in all subsequent proceedings, even though they arise out of a fresh transfer of the execution and relate to an entirely different set of properties. I accordingly overrule this plea.

The next question is as to estoppel. Had there been anything on the record to show that the extension of time was a result of an agreement between the decree-

holder and the judgment-debtor, I might possibly have been inclined to hold that such an agreement was for consideration and was binding on the parties. The record, however, does not show any compromise with the decree-holder. In order to amount to an equitable estoppel, it must be shown that there was some representation made by the judgment-debtor which was acted upon by the decree-holder and by which his position has been compromised. If the decree-holder has not been prejudiced in any way the judgment-debtor cannot be estopped from raising the question of jurisdiction which goes to the very root of the matter.

The decree was of the year 1916. A fresh suit in a British Indian Court was already barred by time. Even a suit on the basis of the foreign judgment had become barred after the lapse of six years. If the payment of Rs. 100 on the 24th of August, 1926, gave a fresh start for the limitation then the decree-holder's remedy had not become barred by time when the judgment-debtor on the 11th of December, 1928, took the objection that there was want of jurisdiction. It is, therefore, obvious that the decree-holder did not suffer in any way by the fact that Rs. 100 were paid to him and the execution was postponed for three months. The decree being a nullity he was lucky in getting even this amount.

The plea that the decree passed against the objector was passed without jurisdiction is open to him under s. 44 of the Indian Evidence Act and can be raised at any stage of the proceedings unless there is a bar of *res judicata* or any rule of equitable estoppel against him. Mere delay in raising it cannot itself be a fatal objection when a fresh execution is sought and fresh properties are attempted to be seized and an additional amount by way of interest also is claimed. Although the ignorance of law is no excuse, yet it may explain the reason why the objection is taken at a belated stage. I am, therefore, of opinion that there is nothing to prevent the judgment-debtor from raising the objection much less is there anything to prevent the Courts below from going into that matter *suo motu* and refusing to execute the decree. I would accordingly dismiss the appeal

Niamat Ullah, J.—The facts of the case are fully stated in the judgment of my learned colleague, and I do not consider it necessary to recapitulate them. It is sufficient to say that the decree in question was passed by a Court in the Benares State as far back as the 27th July, 1916, and several attempts were made to execute it by obtaining transfer certificates to the Courts in Mirzapur and Benares. On one occasion, in 1926, Rs. 100, part of the decretal amount, was paid by one of the judgment-debtors and time was obtained for payment of the rest. It does not appear quite clearly from the record as to whether the present objector made the payment. The Court of first instance mentions the fact as if it were he who did it, and so does the lower Appellate Court. It should, therefore, be accepted for the purpose of this case that the objector satisfied the decree in part some time in 1926. Subsequently, in 1928, when execution was taken out he took objection to attachment of his property on the ground that he was a British Indian subject residing in the Mirzapur District and the Court in the Benares State which had passed the decree had no jurisdiction to pass it. It should be mentioned that the suit which resulted in the aforesaid decree was based on a claim in *personam* against the defendant.

I agree with my learned colleague for the reasons given by him that the objection is not barred by *res judicata*.

The most important question is whether the decree sought to be executed was passed by a Court which had no jurisdiction. Section 14 of the Code of Civil Procedure provides that the Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record. Such presumption, however, can be displaced by proving want of jurisdiction. It was not disputed in the Courts below that the defendants were residents of the Mirzapur District. There is no suggestion, much less evidence, that they resided temporarily in the Benares State at the time the suit was brought. Therefore, the presumption raised by s. 14 is *prima facie* rebutted, and as held by their Lordships of the Privy Council in *Gur Dayal Singh* v. *Raja of Faridkot* (3), the decree passed by the foreign Court should be considered to be a nullity, having been passed by a Court having no jurisdiction. In the leading judgment delivered by my learned colleague, copious reference has been made to the law bearing on the subject. It is clear that even a judgment of a foreign Court will be considered to be binding if the defendant submitted to the jurisdiction

of such Court. What amounts to a submission to the jurisdiction of a foreign Court is a question of some nicety in many cases. Where in answer to a summons issued by a foreign Court the defendant appears and contests the suit, without raising any question as to jurisdiction, there is no doubt that he submits to the jurisdiction of that Court. Again, where he so appears and repudiates the jurisdiction of a Court without entering into his defence, it is clear that he does not submit to the jurisdiction of that Court. Between these two extremes is the case where on receipt of the summons he puts in no appearance and an *ex parte* decree, otherwise open to no objection, is passed against him. His conduct in such circumstances is accountable on two hypotheses: He might have refrained from putting in an appearance because he was sanguine that the decree, if passed, would be ineffective for want of jurisdiction of the Court passing it; or he might have submitted to the jurisdiction of the Court in the belief that the plaintiff's claim was a just one, and he did not object to the decree being passed by the foreign Court. I find nothing in law which makes it necessary that the submission to jurisdiction can only be by some overt act in Court. If his attitude as regards the jurisdiction of the Court in which a suit is brought against him can be established by evidence to have been one of submission to the jurisdiction of the Court, the decree will be binding. Subsequent payment towards part satisfaction of the decree is, in my opinion, an important circumstance from which submission on his part to the jurisdiction of the Court may be inferred. Much, however, will depend on the circumstances under which the payment of the decretal amount is made. In each case it is a piece of evidence entitled to more or less weight. I should not be understood as implying that payment of decretal amount in part is itself a submission and acts retrospectively.

If the decree when passed was a nullity for want of jurisdiction in the Court which passed it no subsequent act of the defendant can make it otherwise. Subsequent conduct of the defendant may, however, be an indication of his intention to submit to the jurisdiction of the Court at the time when the suit was pending. As already stated, it is only a piece of evidence bearing on the question whether the defendant submitted to the jurisdiction of a foreign Court. The lower Appellate Court has categorically stated facts which it found established by evidence. The fact that the objector paid Rs. 100 in 1926 is one of them. The learned Subordinate Judge thereafter recorded a clear finding that the objector did not submit to the jurisdiction of the Court. This, in my opinion, is a finding of fact in arriving at which no error of law can be attributed to him. I would content myself with deciding that part of the case on that finding.

Another question which requires consideration is whether the objector having once made payment was estopped from questioning the jurisdiction of the Court which passed the decree. No such question was raised in either of the two Courts below. The plea of estoppel ordinarily rests on a question of fact, namely, whether the persons sought to be estopped "intentionally caused or permitted another person to believe a thing to be true and to act upon such belief." In general the person pleading estoppel has to establish that in consequence of the representation or conduct of the person against whom estoppel is pleaded he was induced to act in a particular manner. In the absence of any plea and the evidence of the decree-holder it is not permissible to disallow the objection taken by the judgment-debtor to the jurisdiction of the Court passing the decree.

With the foregoing observations I concur with my learned colleague in dismissing the appeal.

By the Court.—The appeal is dismissed with costs.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.
FULL BENCH

Civil Revision No. 162 of 1930.

July 10, 1931.

SULAIMAN, KT., ACTG. C. J., MUKERJI AND BOYS, JJ.

BHAGWATI PANDE—DEFENDANT—APPLICANT

versus

BADRI PANDE AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s. 35—Civil Procedure Code (Act V of 1908), s. 24—Transfer of Munsif having Small Cause powers—Successor without small cause powers—Order by District Judge for trial of Small Cause by successor as regular suit—Decree, whether appealable—Existence of Subordinate Court with Small Cause powers in same local area, effect of—Civil Procedure Code, s. 24, scope and effect of.

While a small cause suit was pending before a Munsif who had small cause powers he was transferred and succeeded by a gentleman who was not invested with the powers of a Judge, Small Cause Court, at the date. The Additional District Judge thereupon made the following order: "The Small Cause Court cases pending in the Court of the Munsif of Basti will be tried by the present incumbent of the office as regular suits, as he has not got the Small Cause Court powers. The attention of the said learned Munsif be drawn to s. 35, Small Cause Courts Act, and these cases should be dealt with as provided by the Small Cause Courts Act." In pursuance of this order or direction, the successor took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs, and the defendant filed an appeal which was rejected on the ground that no appeal lay.

Held, (*i*) that the order of the Additional District Judge was not an order of transfer within the meaning of s. 24, Civil Procedure Code, but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in s. 35 to the effect that the successor of the Judge, Small Cause Court, should try the suit. [p. 362, cols 1 & 2]

(*ii*) that the Munsif had no jurisdiction to try the case under s. 35 and his decree was appealable.

Held, further, when an officer who has no Small Cause Court jurisdiction hears a case which was pending before his predecessor-in-office who had Small Cause Court jurisdiction, and makes a decree, the decree is appealable. *Chottey Lal* v. *Lakshmi Chand Magan Lal* (8), approved. *Mangal Sen* v. *Rup Chand* (1), overruled. [p. 361, col. 2]

Per *Sulaiman, Actg. C. J.*—Section 24 contemplates the transfer of a case from one existing Court to another existing Court. If, therefore, a Court of Small Causes has ceased to exist or the officer invested with Small Cause Court powers has been transferred from the district and there is no other officer possessing such powers, there would be no Court from which the District Court can under s. 24, transfer the case to an ordinary Civil Court. The contingency where no Court or officer invested with Small Cause Court powers exists is provided for in s 35, Provincial Small Cause Courts Act. [p. 362, col. 2]

Section 35, Provincial Small Cause Courts Act, is subject to the provisions of the Civil Procedure Code, and would not be applicable where there is any special provision in the Code. *Prima facie* s. 35 deals with a case where either a Court of Small Causes or a Court invested with such jurisdiction has ceased to have such jurisdiction and under this section if the Court of Small Causes has ceased to exist or the officer invested with such powers has been transferred, then the proceedings would be had in the new Court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the district any other Court or officer invested with power to try the Small Cause Court suits in that area, it is that Court or officer who would have jurisdiction to take cognizance of the suit and continue the proceeding. In such a case the successor of the officer recently transferred who himself does not possess the powers of a Small Cause Court, would not be entitled under s 35, to take it up *suo motu* and can only act if the case were transferred to him under s. 24. On the other hand if no such Court or officer remains in the district then the suit if filed would have to be filed in the ordinary civil Court and the proceeding accordingly would be cognizable by such Court. [p. 359, col. 2.]

Where a Munsif has been transferred and there is in the district a Subordinate Judge invested with the powers of a Small Cause Court for the area within the jurisdiction of the Munsif, under s. 35, Provincial Small Cause Courts Act, it would be such a Subordinate Judge who would have authority to entertain the proceeding. A new Munsif who comes to take the place of the Munsif transferred but who does not possess the Small Cause Court powers would have no jurisdiction himself to transfer the case from the Small Cause Court side of his predecessor to his own regular side. The case would go automatically to the Subordinate Judge who is invested with Small Cause Court powers. If there is such a Subordinate Judge, it would be open to the District Judge to transfer the case from the Court of the Subordinate Judge with Small Cause Court powers to that of the new Munsif without such powers. If there is no such Subordinate Judge with Small Cause Court powers the Munsif will under s. 35, Provincial Small Cause Courts Act, have to try it on the original side, and the District Judge would have no power at all to act under s. 24 so as to transfer the case to the new Munsif and make him a Court of Small Causes. He can, of course, transfer the case from the Munsif's file to any other Court, but the suit would cease to be a Small Cause Court suit. An appeal in such cases would lie to the District Judge. [p. 363, col. 1.]

Revision against an order of the Additional Sub-Judge, Basti, dated the 6th February, 1930,

On 26th March, 1931, Sulaiman Actg C. J. and Bajpai, J., made the following

Order of Reference to a Full Bench.

This case has been referred to a Division Bench by a learned Judge of this Court in view of the importance of the subject and a certain amount of conflict of opinion.

The plaintiffs instituted a suit for recovery of Rs. 182 principal and interest in the Court of the Munsif of Basti who was invested with Small Cause Court powers. After he was transferred from the District another Munsif took over charge who was not invested with such powers. There was an Additional Subordinate Judge at Basti at that time who was invested with Small Cause Court powers. The Additional District Judge on the 1st of July, 1928, directed the new Munsif to transfer all the cases pending on the Small Cause Court side of the Munsif's Court to the regular side. His order was in the following terms:—

"The Small Cause Court cases pending in the Court of the Munsif of Basti will be tried by the present incumbent of the office as regular suits as he has not got the Small Cause Court powers. The attention of the said learned Munsif b

drawn to s. 35 of the Small Cause Courts Act and these cases should be dealt with as provided by the Small Cause Courts Act."

In pursuance of this order the Munsif transferred this particular case from the Small Cause Court side to the regular side and decreed the claim. An appeal was preferred to the District Judge by the defendants, but he transferred the appeal to the Subordinate Judge for disposal. The learned Subordinate Judge declined to entertain the appeal on the ground that no appeal lay to him.

The defendants have come up in revision and urge that an appeal lay to the lower Appellate Court and it has wrongly refused to exercise jurisdiction. If the appeal did lie then undoubtedly it would be a fit case for interference under s. 115, Civil Procedure Code.

A large number of cases of this High Court leaving aside cases of the other High Courts have been cited before us. It must be conceded that there is to some extent a conflict of opinion on the true interpretation of s 35 of the Provincial Small Cause Courts Act and s. 24, Civil Procedure Code. In the case of *Mangal Sen* v. *Rup Chand* (1) the learned Judge seemed inclined to think no matter whether s. 35 of the Provincial Small Cause Courts Act applied or s. 24, Civil Procedure Code applied, there would be no appeal from the decree. This case was dissented from in the case of *Sarju Prasad* v. *Mahadeo Pande* (2), but appears to have been followed in the case of *Sukha* v. *Reghunath Das* (3).

Although the facts of each case are somewhat different it may be broadly stated that in the cases of *Sarju Prasad* v. *Mahadeo Pande* (2), *Zamir ul-Hasan Khan* v. *Imdad Ali Khan* (4), *Allah Bakhsh* v. *Karim Bakhsh* (5) and *Fakir Ullah* v. *Hikmat Ullah* (6), s. 35 of the Provincial Small Cause Courts Act was applied and it was considered that an appeal lay from the First Court's decree. On the other hand in the case of *Udho Signh* v *Mul Chand* (7), *Chhotey Lal* v. *Lakshmi Chand-Magan Lal* (8), *Sukha* v. *Reghunath Das* (3), *Chaturi Singh* v. *Rania* (9), *Ram Charan Banwari Lal* v. *Kishore Lal-Ram Sarup* (10) and *Jai Narain Misra* v. *Sarda Pershad* (11), s. 24, Civil Procedure Code was considered to be applicable and the trial Court's decree was considered to be final. Of course most of these cases are either reconcilable with or distinguishable from each other.

There is however one aspect of the question which does not appear to have been considered in these cases. No doubt ss. 4, 32 and 33 of the Provincial Small Cause Courts Act make it clear that the same officer if invested with Small Cause Court powers is to be deemed to be different Court *viz*, a Court of Small Causes and an ordinary civil Court.

Section 35 of the Provincial Small Cause Courts Act is subject to the provisions of the Code of Civil Procedure, and would not be applicable where there is any special provision in the Code. *Prima facie* s. 35 deals with a case where either a Court of Small Causes or a Court invested with such jurisdiction has ceased to have jurisdiction. It provides that any proceeding which would have been taken in the Court which has now ceased to have jurisdiction "may be had" in the Court in which if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try it. It would seem to follow that if the Court of Small Causes has ceased to exist or the Officer invested with such powers has been transferred then the proceeding would be had in the new Court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the District any other Court or Officer invested with powers to try the Small Cause Court suits in that area, it is that Court or Officer who would have jurisdiction to continue the proceeding. On the other hand, if no such Court or Officer remains in the District then the suit if filed would have to be filed in the ordinary Civil Court and the proceeding accordingly would be cognizable by such Court.

The use of the word "may" might indicate that all the cases pending in the Court of Small Causes or Officer who has ceased

(1) 13 A. 324; A. W. N. (1891) 96.
(2) 29 Ind. Cas. 996; 37 A. 450; 13 A. L. J. 639.
(3) 37 Ind. Cas. 809; 39 A. 214; 15 A. L. J. 69.
(4) 64 Ind. Cas. 573; 41 A. 59; A. I. R. 1922 All. 161; 19 A. L. J. 838
(5) 98 Ind. Cas. 512; 24 A. L. J. 968; A. I. R. 1927 All 95; 48 A. 828.
(6) 88 Ind. Cas. 661; 47 A. 925; A. I. R. 1925 All. 569; 23 A. L. J. 527; L. R. 6 A. 478 Civ.
(7) 36 Ind. Cas. 317; 14 A. L. J. 705.
(8) 34 Ind. Cas. 113; 38 A. 425; 14 A. L. J. 549.
(9) 46 Ind. Cas. 893; 40 A. 525; 16 A. L. J. 4
(10) 115 Ind Cas. 127; 50 A. 810; A. I. R. 1929 All 50; 26 A. L. J. 772.
(11) 110 Ind. Cas 493; 26 A. L. J. 839; A. I. R. 1928 All. 609.

to have jurisdiction need not automatically go over to the new Court, but that pending any order by a superior Court, a party may take any proceedings in the Court indicated by the section.

It would also seem that the new Court, unless it were a Court of Small Causes or a Court invested with such jurisdiction, would not necessarily be deemed to be a Court of Small Causes so as to make its decree non appealable under s. 27 of the Provincial Small Cause Courts Act.

Section 24, Civil Procedure Code gives power to the High Court or the District Judge to transfer a case pending in one Subordinate Court from that Court itself or to another subordinate Court and sub-s. (4) provides that a Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes. It follows that the Court to which the suit has been transferred under s. 24, being a Court of Small Causes would dispose of the suit as such and no appeal would lie from its decree.

Section 150, Civil Procedure Code also lays down that the Court to which the business is transferred shall have the same powers and shall perform the same duties as those of the Court from which the business was so transferred. Section 17 of the Bengal, N. W. P. and Assam Civil Courts Act confers jurisdiction on the Court to which the business has been transferred.

It may not necessarily follow that the Court to which such business has been transferred and which has the same powers and duties as the former Court necessesrily itself becomes a Court of Small Causes so as to make its decree final

One would be inclined to think that s. 24 contemplates the transfer of a case from one existing Court to another existing Court. But if a Court of Small Causes or an Officer invested with Small Cause Court powers does not exist in the District it would be difficult to imagine that there is any Court of Small Causes in existence from which a suit can be transferred to an ordinary Civil Court. When such a contingency arises s. 35 would empower the Court which for the time being would have entertained the suit, if freshly filed, to deal with the case. At the sametime it would also appear that if a Court of Small Causes or another Officer invested with such powers is already available in the District who can take cognizance of the suit or proceeding, then the successor of the Officer recently transferred, who himself does not possess the powers of Small Cause Court, would not be entitled under s. 35, Provincial Small Cause Courts Act to take it up *suo motu*. An order of the District Judge would be required to transfer the case to his file.

In many cases where a Munsif or Subordinate Judge has been transferred there is in the District some other Officer invested with the powers of Small Cause Court for the particular area concerned. Under s. 35 it would be such Officer who would have authority to entertain the proceeding. It would, therefore, seem to follow that in such a case the new Munsif cannot try the case by merely himself transferring it from the original side of his predecessor to his own regular side. In such cases an order by the District Judge under s. 24, Civil Procedure Code would be indispensable before the new Munsif can proceed with the suit.

The order of the District Judge quoted above, which affects numerous cases, is capable of two interpretations. If it was not an order under s. 24 then there is undoubtedly a conflict of opinion as to the legal position. Even if that interpretation be not accepted, there would be the question whether an order of his must be deemed to be an order under s. 24, Civil Procedure Code, although it expressly refers to s. 35 Provincial Small Cause Courts Act, when the latter section was not at all applicable. We think that this case raises substantial questions of law for reference to a Full Bench.

We accordingly direct that this case be laid before the Chief Justice for the constitution of a Full Bench.

[The case was heard by a Full Bench.]

Mr. *Harnandan Prasad*, for the Applicant.

Mr. *Shiva Prasad Sinha*, for the Opposite Parties.

OPINION.

Mukerji, J.—This is an application in revision by the defendant in a suit instituted in the Court of the Munsif of Basti exercising the powers of a Judge, Small Cause Court.

While the suit was pending, the Munsif exercising the powers of a Judge, Small Cause Court, namely, Mr. Shyam Behari Lal, was transferred. He was succeeded by a gentleman who was not invested with the powers of a Judge, Small Cause Court. This was Mr. Jamil Ahmad. At the date

already mentioned, namely, 16th June, 1928, the Subordinate Judge of Basti sitting at Basti was invested with the powers of a Judge, Small Cause Court, up to the pecuniary jurisdiction of Rs. 500, and his local jurisdiction extended up to Bansi.

On the transfer of Mr. Shyam Behari Lal the Additional District Judge of Gorakh pur sitting at Basti gave certain directions in respect of the cases pending in the Court of Mr. Shyam Behari Lal. So far as the Small Cause Court cases were concerned, his order was as follows :—

"The Small Cause Court cases pending in Court of the Munsif of Basti will be tried by the present incumbent of the office as regular suits as he has not got the Small Cause Court powers. The attention of the said learned Munsif be drawn to s. 35 of the Small Cause Courts Act, and these cases should be dealt with as provided by the Small Cause Courts Act."

In pursuance of this order or direction, the Munsif Mr. Jamil Ahmad, took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs and the defendant filed an appeal before the Additional District Judge at Basti. He transferred it to the Court of the Subordinate Judge at Basti, and that learned Subordinate Judge declined to entertain the appeal on the ground that no appeal lay.

The defendant has come up in revision, and several points of law have arisen out of this application.

The first question to be considered is whether the order of the Additional District Judge at Basti was an order of transfer within the meaning of s. 24 of the Civil Procedure Code. The reason for this enquiry is, that, where a Small Cause Court case is transferred from a Court exercising that jurisdiction to a Court not exercising Small Cause Court jurisdiction, the Court trying the suit is to be treated as a Small Cause Court for purposes of that suit. It follows that no appeal is maintainble. On the other hand, if s. 24 does not apply, there is a difference of opinion as to whether an appeal is maintainable from the ultimate decree that may be passed in the suit.

We have already read the order that was passed by the learned Additional District Judge, and we are of opinion, that this order was not an order of transfer within the meaning of s. 24 of the Civil Procedure Code, but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in s 35 to the effect that the successor of the Judge, Small Cause Court, should try the suit

Such being our opinion, we need not consider the fact whether the Additional District Judge at Basti had or not jurisdiction to order a transfer of a case from one Court to another. Nor is it necessary to consider whether it is possible under the law to order the transfer of a case from a Court which no longer exists to another Court. These questions do not any longer arise for determination.

The next question that we have to consider is whether the decree of the learned Munsif, Mr. Jamil Ahmad, was appealable under the law.

We have already mentioned that at the date 16th June, 1928, the Subordinate Judge of Basti was exercising jurisdiction as a Judge, Small Cause Court, up to Rs. 500. That being so, under s. 35 of the Small Cause Courts Act, the suit under consideration should have gone to the file of the said Subordinate Judge exercising Small Cause Court jurisdiction. In this view, the learned Munsif should not have tried the suit. The suit having been tried without jurisdiction, an appeal would lie, and therefore the learned Subordinate Judge was in error in holding that appeal was not competent.

The next question is whether, when an officer without possessing Small Cause Court jurisdiction hears a case which was pending before his predecessor-in-office exercising Small Cause Court jurisdiction, and makes a decree, the decree is appealable? On this point there is some difference of opinion. In this Court in *Mangal Sen* v. *Rup Chand* (1) the view was taken that the decree would be unappealable, being a decree of a Court of a Small Cause Court jurisdiction. This view was dissented from in *Chhotey Lal* v. *Lakhmi Chand Magan Lal* (8). It is necessary to consider this point, in view of the fact that the learned Munsif decided the case.

We are of opinion that the decision in *Chhotey Lal* v. *Lakshmi Chand Magan Lal* (8) laid down the better law. The fact that no appeal is permitted from a decree made by a Judge, Small Cause Court, is due to the provision of s. 27 of the Small Cause Courts Act. That rule does not apply when a case is decided by a successor of a Judge of a Court of Small Causes under s. 35 of the Act Section 35 comes after s. 27, which reads as follows:—

"Save as provided by this Act, a decree or order made under the foregoing provisions of this Act by a Court of Small Causes shall be final."

Section 27 not being applicable, and the officer actually making the decree not being invested with the powers of a Judge, Small Cause Court, we fail to see why a

finality should attach to a decree made by him. We accordingly hold that the case of *Chhotey Lal* v. *Lakhmi Chand Magan Lal* (8) lays down the better law.

We have ascertained that the present Munsif at Bansi exercises Small Cause Court jurisdiction up to the amount of Rs 100 only. The present suit, therefore, will not be cognizable by him. We have also ascertained that the jurisdiction of the Subordinate Judge at Basti exercising Small Cause Court powers has been limited to Basti *Munsifi*, and does not extend to Bansi *Munsifi*. We have now to decide where we should send the case back for retrial, for there must be retrial because the trial was by an officer who had no jurisdiction to hear the case.

Applying s. 35 of the Small Cause Courts Act, that Court should have jurisdiction to hear the case now, which would have jurisdiction to hear the suit in case it were now instituted. It should follow that the Munsif of Bansi should hear the case as a regular suit, the decree in which would be appealable.

As a matter of precaution, however, we, having set aside the order of the Subordinate Judge of Basti declining jurisdiction to hear the appeal, remand the case to the Court of the Additional District Judge at Basti. He will cause the suit to be transferred to the Court of the Munsif of Bansi or to such other Court as may have jurisdiction over the subject-matter, having regard to the principle laid down above.

We are not aware of the jurisdiction that the learned Additional District Judge at Basti has, in the matter of ordering transfers of suits and appeals. The jurisdiction that is vested under s. 24 is vested in the District Court, which, according to the definition given in the Civil Procedure Code, is the principal Court of original civil jurisdiction. There can be only one principal Court of original civil jurisdiction in a judgeship, and that must be the Court of the District Judge of Gorakhpur. If the learned Additional District Judge at Basti finds that having regard to the provisions of s. 24 he has no jurisdiction to transfer the case, he will obtain an order from the District Judge at Gorakhpur for the transfer of the case to the proper Court.

As none of the parties are to blame for what has happened, we direct that the costs here and hitherto shall abide the result.

Sulaiman, Ag. C. J.—I concur in the order proposed. Where s. 24, Civil Procedure Code, can apply, the District Court would have power to transfer a case pending in one Subordidate Court, to another Subordinate Court. If the case is transferred or withdrawn from a Court of Small Causes, then under sub s. (4) the Court to which it is transferred for trial shall, for the purposes of such suit, be deemed to be a Court of Small Causes. It follows that the Court to which the suit has been transferred under s. 24 would dispose of the suit as a Court of Small Causes, and no appeal would lie from its decree. This result would not follow where there is no transfer under s. 24 Civil Procedure Code.

Obviously s. 24 contemplates the transfer of a case from one existing Court to another existing Court. If, therefore, a Court of Small Causes has ceased to exist or the officer invested with Small Cause Court powers has been transferred from the District and there is no other officer possessing such powers, there would be no Court from which the District Court can under s. 24 Civil Procedure Code transfer the case to an ordinary Civil Court. The contingency where no Court or officer invested with Small Cause Court powers exists is provided for in s. 35 of the Provincial Small Cause Courts Act.

Section 35 of the Provincial Small Cause Courts Act is subject to the provisions of the Civil Procedure Code and would not be applicable where there is any special provision in the Code. *Prima facie* s. 35 deals with a case where either a Court of Small Causes or a Court invested with such jurisdiction has ceased to have such jurisdiction. It provides that any proceeding which would have been taken in the Court which has now ceased to have jurisdiction "may be had" in the Court in which if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try it. It follows that if the Court of Small Causes has ceased to exist or the officer invested with such powers has been transferred, then the proceeding would be had in the new Court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly, if there is in the District any other, Court or officer invested with powers to try the Small Cause Court suits in that area, it is that Court or officer who would have jurisdiction to take cognizance of the suit and continue the proceeding. In such a case the successor of the officer recently transferred, who himself does not possess-

the powers of a Small Cause Court, would not be entitled under s. 35 Provincial Small Cause Courts Act to take it up *suo motu*, and can only act if the case were transferred to him under s. 24. On the other hand, if no such Court or officer remains in the district then the suit if filed would have to be filed in the ordinary Civil Court and the proceeding accordingly would be cognizable by such Court.

In many cases where a Munsif has been transferred there is in the District a Subordinate Judge invested with the powers of a Small Cause Court for the area within the jurisdiction of the Munsif. Under s. 35 Provincial Small Cause Courts Act it would be such a Subordinate Judge who would have authority to entertain the proceedings. A new Munsif who comes to take place of the Munsif transferred but who does not possess the Small Cause Court powers would have no jurisdiction himself to transfer the case from the Small Cause Court side of his predecessor to his own regular side. The case would go automatically to the Subordinate Judge who is invested with Small Cause Court powers. If there is such a Subordinate Judge, it would be open to the District Judge to transfer the case from the Court of the Subordinate Judge with Small Cause Court powers to that of the new Munsif without such powers. If there is no such Subordinate Judge with Small Cause Court powers theMunsif will under s. 35, Provincial Small Cause Courts Act have to try it on the original side, and the District Judge would have no power at all to act under s. 24 so as to transfer the case to the Munsif and make him a Court of Small Causes. He can, of course, transfer the case from the Munsif's file to any other Court, but the suit would cease to be a Small Cause Court suit. An appeal in such cases would lie to the District Judge.

Boys, J.—I concur in the judgment of and order proposed by Mr. Justice Mukerji.

By the Court—We set aside the order of the Subordinate Judge of Basti declining jurisdiction to hear the appeal, remand the case to the Court of the Additional District Judge at Basti. He will cause the suit to be transferred to the Court of the Munsif of Basti or such other Court as may have jurisdiction over the subject matter, having regard to the principle laid down in the above judgments. If the Additional District Judge finds that he has no jurisdiction to transfer the case he will obtain an order from the District Judge at Gorakhpur for the transfer of the case to the proper Court.

We direct that the costs here and hitherto shall abide the result.

A *Case remanded.*

ALLAHABAD HIGH COURT.
FULL BENCH.

Second Civil Appeal No. 50 of 1931.
July 13, 1931.

SULAIMAN, ACTING C. J.,
MUKHERJI AND BOYS, JJ

MOHAMMAD ISHAQ KHAN AND OTHERS
PLAINTIFFS—APPELLANTS
versus
RUP NARAIN SINGH AND OTHERS
DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 76 (h), 77—Mortgagee in possession—Liability to account for profits—Contract to the contrary, effect of—S. 77, applicability of.

Where the mortgage is governed by the Transfer of Property Act, the mortgagee cannot contract himself out of the provisions of s. 76 (*h*) of the Act unless he can bring himself strictly within the exception provided by s. 77. [p. 367, col. 2.]

Section 77 cannot apply unless there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and defined portion of the principal. *Shafi-un-Nissa* v. *Fazal Rab* (1) overruled. [*ibid.*]

Second Appeal from the decision of the Subordinate Judge, Ghazipur, dated the 21st August 1928.

On 22nd June 1931 Mukerji and Allen, JJ made the following

Order of Reference to a Full Bench.

This is a plaintiffs' appeal and arises out of a suit for redemption of a mortgage dated the 17th June 1867.

The plaintiffs are the transferees of the defendants second party who were the original mortgagors. The defendants first party represent the original mortgagees.

The plaintiffs' case was that owing to an increase in the income of the property mortgaged usufructuarily, the mortgage-money has paid itself and there is a surplus of Rs. 410-5-2 in favour of the plaintiffs. They accordingly ask for possession and for the said amount of money as surplus due to them. The defence was that there was no increase in the income of the property mortgaged, on the other hand, there was a decrease in it and there was

a document of further charge and the plaintiffs could not redeem without paying the amount due on that document also. In the mortgage-deed there was a stipulation that a part of the estimated income of the property would be taken towards a part of the interest and the balance of Rs. 7 a year would be paid by the mortgagors. As to this, the plaintiffs' allegation was that the sum of Rs. 7 a year was paid up to 1290, *Fasli* and, thereafter, it was not necessary to pay this sum because the income from the property increased by more than Rs. 7 a year. The lower Appellate Court has held that it is a fact that the mortgagors paid Rs. 7 a year up to 1290 *Fasli*.

The first Court found that there was a considerable increase from time to time in the profits of the mortgaged property and that after paying the stipulated interest there was a surplus which went to liquidate the principal amount and a large amount of surplus money was left in the hands of the mortgagees amounting to Rs. 3,943. On these findings, the learned Munsif decreed the suit for possession and for recovery of the surplus amount.

Before the learned Subordinate Judge who heard the appeal, it was contended that under the terms of the mortgage the mortgagees were not bound to render an account and that the subsequent deed did amount to a deed of further charge. On both these points the learned Subordinate Judge found in favour of the defendants. The result was that he decreed the claim for redemption of the mortgage on condition of payment of the principal mortgage money and Rs. 7 a year the deficiency in the interest every year, from 1291 *Fasli* to the date fixed for payment and also on payment of the principal amount secured by the deed of further charge and the interest thereon.

The plaintiffs have come in second appeal and two points have been urged before us. The first is that the learned Judge of the Court below was wrong in holding that there could be no accounting, that the document for which a further charge is claimed creates no charge on the property and, therefore, the plaintiffs are not liable to pay the money due on it. By way of a side issue, it was contended on behalf of the respondents that the amount of Rs. 187 stated in the deed of mortgage as the total income per year, was taken by the parties as the income from the property mortgaged for all time. In reply to this it was argued on behalf of the appellants that such a stipulation would be void under the law.

The points that arise for decision in this case therefore are :—

1. Whether the parties are agreed that Rs. 187 was to be taken to be the annual income of the property for all time, irrespective of whether there was actually an increase or decrease in the income from the mortgaged property ?

2. If the parties did so agree, whether the agreement is binding on them or whether the same is void and contrary to law ?

3. Whether the plaintiffs are entitled to claim an account of the income of the property ?

4. Whether the deed dated *Jait Sudi* 15th, 1274 *Fasli* for the amount of Rs. 250 creates a charge on the property mortgaged ?

It will be noticed that if the Issue No. 3 is decided in favour of the plaintiffs, an issue will have to be sent down, as to the account, in order that the Court below may find out what was the income from the property during the years of the mortgagees' possession and whether the plaintiffs have to pay anything or whether they are entitled to any surplus?

As to the first point, as a true construction of the document in suit, we are of opinion that the parties agreed that Rs. 187 was to be taken as the total annual income of the property. The term of the mortgage was 9 years and there is nothing in the document to show that it was contemplated that there might be an increase in the income within this term of the mortgage, or even thereafter.

Points Nos. 2 and 3 go together. These are the points which are most important in this appeal. The argument on behalf of the appellants is that, except in cases covered by s. 77 of the Transfer of Property Act, a mortgagee in possession is bound to render an account and if he really acquires from the property a larger amount than was contemplated by the mortgagor at the date of the execution of the mortgage, the mortgagee cannot keep the surplus to himself on the ground that the mortgagor and he had agreed that the income from the property would be a fixed amount. It is pointed out that s. 77 contemplates the cases where the whole of the interest is to be covered by the usufructor where the usufruct covers the whole of the interest

and a defined portion of the principal amount. Section 77 does not contemplate a case in which, by agreement, the usufruct of the mortgaged property is to be taken in lieu of a part only of the entire interest due to the mortgagee.

On the other hand, s. 76 of the Transfer of Property Act lays down the liabilities of the mortgagee in possession. In the case of cls. (*c*) and (*d*) of this section, the expression "in the absence of a contract to the contrary" appears. Thus, where those clauses apply it is open to the parties to contract themselves out of those rules and in that case the mortgagee will not be bound to act in the way he would be bound, in the absence of a contract to the contrary. In the cls. (*a*), (*b*), (*e*), (*f*), (*g*), (*h*), and (*i*) the words, "in the absence of a contract to the contrary" do not appear and therefore, the liability of the mortgagee would appear to be *absolute* and he is not entitled to contract out of those liabilities. For example in the case of cl. (*a*) which lays down that a mortgagee must manage the property as a person of ordinary prudence would manage it if it were his own, a mortgagee cannot be permitted to agree with the mortgagor that he would manage the property in any way and as carelessly as he chose and that he would not account for the income of the property or would not be liable for any loss occasioned to the property of the mortgagor by the mortgagee's mismanagement. There can be no doubt that in the case of cl. (*a*) the liability of the mortgagee is absolute and he cannot contract himself out of it. Similarly, in the case of cl. (*g*) the mortgagee is required to keep clear, full and accurate accounts. This seems to be an absolute liability and the mortgagee cannot agree validly with the mortgagor that any account that he keeps, however, slipshod it may be, will have to be accepted by the mortgagor. Similarly in the case of cl. (*h*) the mortgagee is required to apply the receipts from the mortgaged property, after deducting the expenses and interest thereon, in a certain way. If his income from the property is large, it is contended on behalf of the appellants that it is not open to the mortgagee to agree with the mortgagor that he would keep anything over and above the interest due to him, for his own benefit and would not account for the same to the mortgagor.

The argument adduced on behalf of the appellants seems to have great force. The omission from s. 77 of the case in which only a part of the interest is to be paid out of the usufruct must have been intentional and not accidental. One can see the reason for it without much difficulty. Where the parties agree on a stipulated amount of interest to be paid by one party and to be received by the other, it is that amount alone to which the mortgagee is entitled and he is entitled to nothing more. The exception is where no interest is stipulated for specifically, and it is agreed that whatever be the interest and whatever be the usufruct, one will be set off against the other. There need be no accounting in such a case. But where such is not the case, there must be an accounting.

This view, which has been strongly urged on behalf of the appellants and which, as at present advised, seems to us to be the correct view, was not accepted in the case of *Shafi-un Nissa* v. *Fazal Rab* (1), by two learned Judges of this Court. That case was similar to the present one. Karamat Husain, J., remarked that a usufructuary mortgagee would be liable to render account only by an express stipulation to that effect. He further held that the case before him was covered by s. 77 of the Transfer of Property Act, though the facts did not fall within the four corners of that section. His learned colleague Knox, J, contended himself with the remark that on the stipulation contained in the deed of mortgage, he agreed with his brother Karamat Husain, J.

This case of *Shafi-un-Nissa* v. *Fazal Rab* (1) was cited in a more recent case in this Court, namely *Bihari Lal* v. *Shib Lal* (2) but it was neither approved nor disapproved. In the Patna High Court the case of *Shafi-un-Nissa* v. *Fazal Rab* (1) was cited in the case of *Kishen Lal* v. *Hira Lal* (3) decided by Das and Kulwant Sahay, JJ., and the decision on the point of law was dissented from. The judgment however, contains a *dictum* to the effect that the judgment in the Allahabad case was correct, if it was to be based merely on the interpretation of the document. No doubt this *dictum* was *obiter*, but it shows, at any rate, that the learned Judges thought that it was open to the mortgagees to contract themselves out of the liabilities laid down by the law under s. 76 (*h*) of the Transfer of Property Act. This view is controverted before us by Mr. Iqbal Ahmad, who has argued the case for the appellants.

(1) 7 Ind. Cas. 293; 7 A. L. J. 783.
(2) 82 Ind Cas. 25; 22 A. L. J. 579; A. I. R. 1924 All. 591; 46 A. 633; L. R 5 A 414 Civ.
(3) 120 Ind. Cas. 768; A. I. R. 1929 Pat. 571; 10 P. L. T. 487; Ind. Rul. (1930) Pat. 80.

Mr Kamla Kant Verma has drawn our attention on behalf of the respondents to another case decided by the Patna High Court, namely *Raghubar Narain Choudhury* v. *Mohit Narain Jha* (4) which quotes without disapproval the opinion of Karamat Hussain, J. in the case of *Shafi-un-Nissa* v. *Fazal Rab* (1) *viz.*, in the absence of a contract to that effect a mortgagee with possession is not bound to account for the usufruct of property. If that is the view which the learned Judges took in the case of *Raghubar Narain Choudhury* v. *Mohit Narain Jha* (4) there is a conflict of views among the Judges of the Patna High Court.

We are of opinion that the case in *Shafi un Nissa* v. *Fazal Rab* (1) requires reconsideration and for this purpose we refer this case to a larger Bench. The point that has to be decided by the Full Bench, such as may be constituted by the learned Chief Justice, will be as follows:—

1. Whether it is open to a mortgagee who has agreed to accept the whole of the usufruct of the mortgaged property in lieu of a portion of the interest due to him to escape the operation of s. 76 (*h*) of the Transfer of Property Act and a rendition of account of the income of the property by an agreement to that effect with the mortgagor?

2. Whether, on a true construction of s. 77 of the Transfer of Property Act, a case where the whole of the usufruct of the mortgaged property is taken in lieu of a part of the interest due on the mortgage money is covered by it?

We have read the document dated *Jait Sudi* 15th 1274 *Fasli* for the sum Rs. 250 and we are of opinion that it creates a charge in clear terms over the property mortgaged by way of conditional sale with the mortgagees. The language does not call for a detailed examination. The document itself is called a hypothecation bond and the mortgagors agree that till the amount secured by the deed is paid off, they will not transfer any of the properties by way of conditional sale. Further they agree that in case the property mortgaged by way of conditional sale, is foreclosed, the amount for which the foreclosure would take place would include the amount due on the present deed.

We direct that the case be laid before the Hon'ble the Chief Justice for constitution of a Bench to decide the two points formulated by us above.

On return of findings from the Full Bench we shall consider whether a remand of the issue indicatedabove will be necessary or not.

[The case was heard by a Full Bench.]

(4) 114 Ind. Cas. 473; 7 Pat. 44; A. I. R. 1929 Pat. 37

Mr. *Iqbal Ahmad* (for whom Mr. *Mansur Alam*), for the Appellants.

Mr *K. Varma* (for whom Mr. *Bhargava*), for the Respondents.

Opinion.—This is a plaintiffs' appeal arising out of a suit for redemption of a mortgage of the 17th of June 1867, by way of conditional sale, for a sum of Rs. 1,333-5 4 The mortgagor promised to pay interest at the rate of Re.7-6 per mensem which came to Rs. 75 per annum. These figures were expressly recited in the deed. It was further stated that the gross produce of the property was Rs. 187, out of which Rs. 108 had to be paid on account of Government Revenue and cesses, Rs. 6 3 6 on account of certain other charges, and Rs. 4-8 on account of expenses; in all Rs. 119 2-6. The mortgagee was to utilise the balance of Rs. 68 in lieu of interest, and the mortgagor promised to pay Rs. 7 from his pocket on account of deficiency in the interest. It was contemplated that the mortgage would be redeemed in about nine years' time, and there was the condition for foreclosure that if the mortgagee failed to pay the amount at the stipulated time, the mortgage would be foreclosed. It did not provide what was to happen if there was an increase or decrease in the income, nor did it expressly lay down any covenant as to the liability or otherwise of the mortgage to maintain accounts or to render them at the time of redemption. The deed was silent as to these matters.

It is an admitted fact that about 1291 *Fasli* there was a fresh settlement, and the income of the property was considerably increased. It is also an admitted fact that the mortgagors were paying Rs. 7 a year up to that year and then stopped paying any further. It is not disputed that the mortgagee did not insist on the payment of this extra amount, and on account of the default did not consider it necessary to sue for foreclosure.

The plaintiffs claimed that the mortgagee's representatives must give credit for the extra income which accrued after the mortgage; while the mortgagee's representatives disputed this and pleaded that the mortgagors' representatives were bound to make good the balance of Rs. 7 a year. The lower Appellate Court passed a decree for redemption in favour of the plaintiffs on payment of the principal sum plus Rs. 7 a year from the time when they stopped payment. The plaintiffs appealed to the High Court, and the Division Bench has

referred two questions to a Full Bench for answers.

The Division Bench interpreted the mortgage-deed in dispute as containing no contract as to what was to happen if there was an increase or decrease in the income. The learned Judges thought that the contingency that there might be an increase or decrease in the income never occurred to the parties, and they never thought about it, so they did not provide for this contingency, that is to say, it was purely a case of omission, and there was no contract against the liability of the mortgagee to account for any surplus income. We must accept this interpretation as the question of interpretation has not been referred to us.

The mortgage-deed in question was executed before the coming into force of the Transfer of Property Act, and at the time of its execution the parties were bound by the equitable principles governing mortgages and not by the strict language of any section of this enactment. Where the parties expressly agree that the entire income, whatever it be, should be set off against the whole of the interest on the amount advanced, there is, of course, no necessity for the mortgagee to keep any account. On the other hand, where the intention is that the mortgagee should get the interest at an agreed rate, the primary consideration is the payment of the mortgage-money with interest at that rate to the mortgagee, even though the income may fluctuate from year to year. It would follow on general equitable principles that where there is a fixed rate of interest there should be a liability on the mortgagee to maintain proper and regular accounts and give credit for all the receipts, and claim compensation for deficit or pay for the surplus. The liability of the mortgagee to render accounts was well recognized even before the coming into force of the Transfer of Property Act. Under s. 76 of the Act the liability of the mortgagee in possession to give credit for the receipts, after deducting the expenses and interest, in the account, is absolute. It is significant that although the words 'in the absence of a contract to the contrary', occur in cls (c) and (d), those words do not occur in the other caluses particularly in cl. (h), which requires that the receipt from the mortgaged property shall be debited against the mortgagee in reduction of the amount due to him and the surplus if any shall be paid to the mortgagor. It is therefore quite obvious that unless the case comes within the purview of s. 77 of the Act, which in express language excludes the operations of s. 76 (h), the liability of the mortgagee to give credit for the receipts in the account is absolute and the parties would not be at liberty to contract themselves out of the statutory liability.

Section 77, however, cannot apply unless there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and defined portion of the principal. On the interpretation of the mortgage-deed made by the Division Bench there was no such contract in the case before us. Section 77 therefore has no application and the mortgage does not come within the purview of the exception. He was therefore liable under s. 76 (h) to render account and give credit for the surplus income if any.

In this view of the matter it is not necessary to answer the second question. If, however, the Division Bench are of opinion that they cannot decide the appeal without an answer to that question they may refer it again to us.

Our answer to the first question is that where the mortgage is governed by the Transfer of Property Act the mortgagee cannot contract himself out of the provisions of s 76 (h) of the Act unless he can bring himself strictly within the exception provided by s. 77.

A. *Reference answered.*

ALLAHABAD HIGH COURT.

First Civil Appeal No. 25 of 1931.

December 4, 1931.

SULAIMAN, ACTING C. J. AND NIAMATULLAH, J.

PADARATH TEWARI—DEFENDANT—APPELLANT

versus

DULHIN TAPESHA KUERI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 104 (h), 151—Order directing arrest or detention in civil prison—Appeal—Order for production of lady for medical examination—Non-compliance—Arrest, legality of—Inherent powers of Court—Medical examination without consent—Assault.

Under s. 104 (h), Civil Procedure Code, an appea lies from an order directing the arrest or detention in the civil prison of any person otherwise than in execution of a decree.

An internal medical examination of a lady, if not voluntarily submitted to by her, would amount to assault and battery. [p. 369, col. 1.]

A Subordinate Judge directed defendants Nos. 1 to 3 to produce defendant No. 4 in Court for internal medical examination without ascertaining whether defendant No. 4 who was a *pardanashin* lady was willing to submit to such examination, and, on their failure to do so, directed the arrest of all the defendants and got them produced in Court under the supposed inherent powers of the Court and not professing to act on the assumption that they were in contempt : [p 369, col. 2.]

Held, that the order was entirely *ultra vires* and illegal

Dictum : 'Courts of Justice have not only to do justice but should also inspire confidence in the public mind as to their fairness'. [*ibid*.]

First Appeal against an order of the Additional Sub-Judge, Ballia, dated the 21st January, 1931.

Mr. *A. P. Pandey*, for the Appellant.

Mr. *Shiva Prasad Sinha*, for the Respondent.

Judgment.—This is an appeal from a most startling order for the arrest and detention in the civil prison of the defendants. A preliminary objection is taken that no appeal lies from the order. In our opinion this objection has no force whatsoever. Under s. 104 (*h*), Civil Procedure Code an appeal is expressly provided from an order directing the arrest or detention in the civil prison of any person otherwise than in execution of a decree. Even if there had been no provision for an appeal, we would have felt compelled to interfere in revision because there has been a gross travesty of justice in this case. Even a cursory reference to the order-sheet would show that for some reason not easily intelligible the Subordinate Judge proceeded in a very high-handed manner which would in no way do credit to any judicial officer of experience.

The most astonishing thing is that the Subordinate Judge himself was fully conscious that there were no express provisions in the Civil Procedure Code which justified the course of action which he took upon himself to pursue. In order to usurp most sweeping powers of arresting the defendants and sending them to Jail he took shelter behind the remark:

"The Civil Procedure Code is not exhaustive and it cannot be said to lay down a procedure for every emergency on account or which the power of the Court has been left unfettered to chalk out a procedure not provided for in order to do justice".

If the learned Subordinate Judge imagines that the supposed inherent power makes him the absolute master of the situation so as to enable him to pass any arbitrary orders which he thinks fit against any party to the suit, the sooner he is disillusioned of this false notion the better for him. The provisions for the issue of the warrants of arrests are to be found in the four corners of the Civil Procedure Code. There is also power to get parties arrested or punished when proper proceedings for contempt of Court have been taken in an authorised manner. But it is preposterous to suggest that a Court has power to arrest any person or to send him to Jail forthwith without any proper trial in a legal proceeding.

In a civil suit for a declaration pending before the Court below it was in issue whether the plaintiff No. 1 was the daughter of defendant No. 1 born of defendant No. 4 but there was no specific issue that the defendant No. 4 had never given birth to any child at all. On an application of the plaintiffs filed on the 5th of January 1931, unsupported by any affidavit, the Court ordered that the Vakil for the defendant No. 2 should produce her on the 16th of January 1931, "so that she may be sent to doctor for medical examination as to whether any issue was born to her." The other defendants were asked to be present so that they 'might *watch the examination* by the doctor'. The learned Subordinate Judge up to that date had no materials before him to show that the defendant No. 4 was agreeable to submit herself to medical examination. He did not even take the trouble to ascertain this before passing the order. This order was repeated on the 15th of January, and the defendants Nos. 1 and 3 were ordered to produce her in Court on the 21st of January 'so that she may be required to undergo medical examination'. The learned Subordinate Judge even now did not pause to enquire whether she was hereself willing to submit herself to medical examination. On the 21st of January the parties filed conflicting affidavits but there was yet no suggestion that the defendant No. 4 was herself willing to be internally examined. The learned Subordinate Judge concluded that the defendants Nos. 1 to 3 were responsible for her non-appearance and ordered that they 'be arrested and detained in the civil prison'. Defendant No. 3 was present in Court and he was ordered to be arrested 'at once'. No proceedings for any contempt of Court were drawn up against these defendants. Warrants for the arrest of the defendants Nos. 1 and 2 were issued on the same day and the process servers were ordered to bring

defendant No. 4 to Court. The process-servers returned the warrants un-executed as they found the house of defendants Nos. 1 and 4 locked up.

Finding that his arbitrary orders proved futile, the learned Subordinate Judge ordered a Vakil to 'go as a Commissioner, break open the door or lock, if necessary, and let the *pairokar* of the plaintiffs and defendant No. 4 bring *Musammat* Bhagjogna in his company to Court'. The order proceeded 'if the *pairokar* points her out to be in the house of any other person the Commissioner shall request the other person to let her into his custody and if that man refuses, the Commissioner shall, after due notice of keeping *purdah* enter his house and break open the door or lock if necessary in order *to take her into his custody*'. This is an instance of authority running riot. The learned Subordinate Judge should have realised that he would be making himself liable to damages for illegal arrest if a lady defendant was taken into custody and brought to Court against her will or by force.

The defendant lady was brought into Court by the Commissioner, 'after some trouble and opposition'. She was ordered 'to remain in Court pending order for medical examination'. The defendant No. 3 was ordered to be released in order to present himself before the Court 'so that the proceedings of the medical examination of the lady may take place *in his seeing*'. The other parties were also ordered to be present at the time of the medical examination of the lady. Up to the time of the passing of this order it did not strike the learned Subordinate Judge that the lady's wishes should be consulted. The poor lady appears to keep *purdah* and was brought to Court in a *palki*. The learned Subordinate Judge examined her later and noted that 'she is willing to submit herself to medical examination by a lady doctor'. As Indian *pardanashin* women are generally reluctant to undergo an internal examination, the peculiar circumstances in which she had been brought to Court and was detained there might justify the comment of the Counsel for the defendants that she must have been too frightened and nervous, and her consent was wrung out of her because of the fear under which she was placed. The Subordinate Judge should appreciate that an internal medical examination of a lady, if not voluntarily submitted to by her, would amount to assault and battery. The medical examination of the defendant lady took place at the *Zenana* Hospital. Subsequent proceedings were stayed by an order of the High Court passed on an application for transfer. When the application for transfer came up for final disposal the junior Counsel engaged stated that he had no instructions and the senior Counsel sent an illness slip praying that the case be postponed. Unfortunately for him the case was heard *ex parte* and the application was dismissed on the one-sided report of the Subordinate Judge. If all the facts had been brought to the notice of the learned Judge, he might have come to the conclusion that the learned Subordinate Judge was not in a fit judicial mood to try the civil suit.

It seems to us that the whole procedure adopted by the Subordinate Judge was illegal from beginning to end, and it is regrettable that any experienced judicial officer should stoop to adopt such a course of action. Courts of Justice have not only to do justice but should also inspire confidence in the public mind as to their fairness. Such a high-handed conduct on the part of a judicial officer is bound to bring Courts into discredit and shake the confidence of the people in the purity of the administration of justice.

The learned Subordinate Judge did not profess to act on the assumption that they were in contempt nor did he take any proper legal proceedings against them for contempt. In the circumstance he had absolutely no jurisdiction to get the defendants arrested or sent to the civil prison. His order was utterly *ultra vires* and without authority. We accordingly allow this appeal and set aside the order of the 21st of January, 1931, and direct the plaintiffs, at whose instance the order was passed, should pay the costs of the defendants in both the Courts.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1170 of 1928.
March 30, 1931.

MUKERJI AND BENNET, JJ.

Saiyed ALI MOHAMED—DEFENDANT—APPELLANT

versus

Saiyed ZAKAR ALI—PLAINTIFF—RESPONDENT.

Malicious prosecution—'Prosecution'—Dismissal of complaint without issuing process—Suit for damages,

whether lies—Defamation—Absolute privilege—Criminal complaint.

A suit for damages for malicious prosecution will not lie where no process has been issued by the Magistrate for the attendance of the person accused. *De Rozario* v. *Gulab Chand Anundjee*(1), *Golap Jan* v. *Bholanath Khetry* (2), *Sheikh Meeran Sahib* v. *Ratnavelu Mudali* (3) and *Subhag Chumar* v. *Nand Lal Sahu* (4), followed. *Bishen Prasad Narain Singh* v. *Phulman Singh* (5), *Bishen Singh* v. *Ram Bahal Roy* (6), *Gursaran Das* v. *Israr Haidar* (7), *Ahmadbhai* v. *Framji Edulji* (8) and *Imperatrix* v. *Lukshman Sakharam* (9), not followed. [p. 370, col. 1.]

In India damage to a man's fame is not sufficient for an action for malicious prosecution. [p. 370, col 2.]

A criminal complaint is absolutely privileged so far as the Civil Court is concerned and no suit for damages lies for defamation on account of statements of a defamatory character contained in a complaint made to a Magistrate. *Chunni Lal* v. *Narsingh Das* (10), followed. [p. 371, col. 1.]

Second Appeal from a decision of the First Subordinate Judge, Cawnpore, dated the 31st March, 1928.

Dr. *M. H. Faruqi*, for the Appellant.

Dr. *M. Walliullah*, for the Respondent.

Bennet, J.—This second appeal by the defendant has been referred to a Bench of two Judges by a learned single Judge because a difficult question of law is involved. The facts which have been found in the present case are that the defendants made a complaint in the Criminal Court against the plaintiff under ss. 449 and 506, Indian Penal Code and also asked for security to keep the peace to be taken under s. 107, Criminal Procedure Code. The Sub-Divisional Magistrate did not issue any summons or other process to the accused, but he called under s. 202, Criminal Procedure Code for a report from the Police, and the Sub-Inspector made an inquiry and sent a report and after receiving that report the Sub-Divisional Magistrate went to the village of the parties himself and went to the house of the accused and held an inquiry. He came to the conclusion that the complaint lodged by the defendant was false, and he dismissed this complaint under s. 203, Criminal Procedure Code. The accused then filed the present plaint. The question which has arisen in second appeal is whether a suit for damages for malicious prosecution will lie where no process has been issued by the Magistrate for the attendance of the person accused. On this point there are a number of conflicting rulings, but the weight of authority of the Courts in India is that no such suit for damages lies. This view has been taken in the following rulings :—

De Rozario v. *Gulab Chand Anundjee* (1), *Golap Jan* v. *Bholanath Khetry* (2), *Sheik Meeran Sahib* v. *Ratnavelu Mudali* (3) and *Subhag Chamar* v. *Nand Lal Sahu* (4).

On the other hand the plaintiff-respondent relied on the following rulings :—

Bishen Prasad Narain Singh v. *Phulman Singh* (5), 64 Ind. Cas. 741, *Bishen Singh* v. *Ram Bahal Roy* (6), *Gursaran Das* v. *Israr Haider* (7), *Ahmadbhai* v. *Framji Edulji* (8) and *Imperatrix* v. *Lakshman Sakaram* (9).

Now in some of the rulings on which the plaintiff relies the proposition enunciated by the plaintiff does not find full support. Thus in *Bishen Prasad Narain Singh* v. *Phulman Singh* (5), it is stated,

"The prosecution might be infructuous, if, for instance, no notice was served upon the accused. In such a contingency, the action for damages for malicious prosecution would fail, not because there was no prosecution commenced, but because there was no damage done to the plaintiff."

The view of damages taken by the Calcutta High Court in this case is that the damages should be material, that is that the plaintiff should show that he suffered damages by having to defend himself in the Criminal Courts. It is true that under English Law the case is apparently otherwise. In Halsbury's Laws of England, Vol. 19, para 1443 it is stated:

"To succeed in an action for malicious prosecution a plaintiff must prove . . . (v) that the plaintiff has suffered damage; unless, indeed, the proceedings necessarily import damage to his fame or person."

And in para. 1470 it is stated,

"To support an action for malicious prosecution or other malicious legal proceedings, one of three heads of damage must be proved, if not implied by law;

(1) Damage to a man's fame, as where the matter of which he is accused is scandalous;

(2) Damage done to the person, as where his life, limb, or liberty is endangered; or

(3) Damage to his property, as where he is put to the expense of acquitting himself of the crime with which he is charged."

Now in India it is only damage under the second and third heads which has been considered sufficient to start an action for malicious prosecution. If damage to a man's reputation was concerned sufficient to start a suit for malicious prosecution, then the position would arise that damages

(1) 6 Ind. Cas. 877; 37 C. 358.

(2) 11 Ind. Cas. 311; 38 C. 880.

(3) 21 Ind. Cas. 703; 36 M. 181; 25 M. L. J. 1.

(4) 118 Ind. Cas. 133; 8 Pat. 285; A. I. R. 1929 Pat. 271; 10 P. L. T. 415; Ind. Rul. (1929) Pat. 485.

(5) 27 Ind. Cas. 449; 19 C. W. N. 935; 20 C. L. J. 518.

(6) 64 Ind. Cas. 741.

(7) 105 Ind. Cas. 553; A. I. R. 1927, Oudh 471; 1 Luck 746; 1 Luck. Cas. 492.

(8) 26 B. 226; 5 Bom. L. R. 940.

(9) 2 B. 481.

to reputation could be the basis of a suit for malicious prosecution although such damages could not be the basis of a suit for defamation, it has been held in a Full Bench case of this High Court *Chunni Lal* v. *Narsingh Das* (10) that where a person presents a petition to a Criminal Court he is not liable in a civil suit for damages in respect of statements made therein which may be defamatory of the person complained against The Full Bench case of this High Court has laid down that there is an absolute privilege for a complaint to a Criminal Court so far as a Civil Court is concerned, and that no suit will lie for damages for defamation. It would, therefore, be contrary to the spirit of this ruling if we were to hold that such damages could form the basis of a suit for malicious prosecution. We note that in the particular ruling on which the plaintiff relies on 64 Ind. Cas. 741, *Bishen Singh* v. *Ram Bahal Roy* (6), the accused was directed by a Sub-Inspector to appear before the Magistrate and in the case to which reference has been made in *Bishen Prasad Narain Singh* v. *Phulman Singh* (5) a notice was issued to the accused and he was present at the inquiry on the criminal complaint which was under s. 107, Criminal Procedure Code, although that was apparently a preliminary inquiry and not after a notice has been issued to the accused to show cause why he should not furnish the security demanded. After considering the various rulings produced in this case we are of opinion that the criminal prosecution does not take place so far as the accused is concerned until process issues for the accused to be present, and on that view we consider that in the present case a suit for damages for malicious prosecution will not lie. We further think that in the circumstances no damage can be said to have been suffered by the plaintiff. On both these grounds we consider that the present suit of the plaintiff will fail.

Some further argument was made by the learned Counsel for the appellant to the effect that the dismissal of a complaint under s. 203, Criminal Procedure Code is not a termination of the criminal proceedings in favour of the accused, because such a complaint might be revived by the Magistrate. If this doctrine were extended, then there could be no suit for damages for malicious prosecution, for even in the case of an acquittal the acquittal could be set aside by an appeal of the Local Government under s. 417, Criminal Procedure Code. But all that is required for the plaintiff to show on this point in a suit for malicious prosecution is that the criminal proceedings terminated in favour of the plaintiff, and we consider that if the plaintiff shows that the Magistrate passed an order in his favour and the defendant fails to show that the proceedings were revived, then the plaintiff has shown all that is necessary for the suit.

In this case the question was also argued in second appeal as to whether the plaintiff would be entitled to damages for defamation on account of the defamatory statements contained in the complaint made by the defendant to the Magistrate. But the Full Bench ruling of *Chunni Lal* v. *Narsingh Das* (10) has definitely held that the criminal complaint is absolutely privileged so far as the Civil Court is concerned.

I allow this appeal and dismiss the suit of the plaintiff with costs in all Courts.

Mukerji, J.—My learned brother has discussed all the cases that have been cited before us, and I entirely agree with him that the suit must fail. I wish to add just a few words as to the principle which must underlie a suit like this.

This is a suit for "malicious prosecution." There must be a prosecution before the plaintiff can succeed. The question, therefore, arises, what is "prosecution"? Is it synonymous with "institution of a criminal proceeding" as has been held indictable under s. 211 Indian Penal Code as an offence against justice or is it something beyond institution of a criminal proceeding? A mere institution of a criminal proceeding may not affect the plaintiff at all although it may affect a Court of Justice or the mode of dispensing justice and it may be punishable under the Criminal Law. The plaintiff to succeed must show, that he has a cause of action. Now what can be his cause of action, if he was never called upon by the Court before which the complaint was filed, to appear and answer a charge, or even to appear and attend the proceedings. A complaint may be filed and the accused person may not even hear of it, although behind his back, an inquiry may be ordered under s. 202, Criminal Procedure Code and some witnesses may be examined. The plaintiff in the civil suit is not at all hurt. He may not have, as I have said, heard of the fact that a complaint had, been filed against him. Can it be said that the

(10) 45 Ind. Cas. 540; 40 A. 341; 16 A. L. J. 359.

plaintiff has a cause of action? The answer should be, in my opinion, in the negative.

A suit in the circumstances of the present case must, again, fail on the ground that no damage has occurred. Tort has been defined as "wrong independent of contract." A wrong, therefore, is essential in order that a suit based on tort may be maintained. Now if the plaintiff has not been asked to appear in the Court of Law, or if he appears as in the case of *Subhag Chamar* v. *Nand Lal Sahu* (4), of his own motion, it cannot be said that he has suffered any damage.

On principle, therefore, the suit cannot be maintained, if notice has not been issued to the plaintiff to appear and answer a criminal charge.

By the Court.—The appeal is allowed and the suit of the plaintiff is dismissed with costs in all Courts.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1003 of 1928.
February 28, 1931.

PULLAN AND NIAMAT ULLAH, JJ.

Musammat NAUNITA KUNWAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat MULLO—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Alienation—Inadequacy of price, effect of.

While it is correct to say that a transfer by a Hindu widow for legal necessity and for adequate price is binding on the reversioner it does not necessarily follow that a sale otherwise justified must under all circumstances be set aside if it can be shown that the price fetched was not adequate. Circumstances might make it absolutely necessary for the widow to sell her husband's property even for an inadequate price. Each case must depend on its own circumstances. If the necessity for the sale of the property was so great that the husband's property must be sold and if under circumstances then existing it was not possible for her to obtain the full value of the property which had to be sold and she could not get more than what is considered to be an inadequate price the sale would nevertheless be valid. [p. 373, col. 1.]

Second Appeal from a decision of the Additional Subordinate Judge, Benares, dated the 5th March, 1928.

Dr. *K. N. Katju* and Mr. *M. N. Kaul*, for the Appellants.

Mr. *Gadadhar Prasad*, for the Respondents.

Judgment.—This is a defendants' appeal arising out of a suit brought by the original plaintiff *Musammat* Mullo who died pending appeal and is now represented by her sons for recovery of possession of certain property left by her father Ganesh who has died sonless and subsequently transferred by her widow during the time she was in possession of his estate, to Mahabir Prasad who in turn transferred it to the appellant.

The property to which this appeal as argued before us, relates, consisted of a few plots in all measuring 3·70 acres. It had been leased for ten years by Ganesh to a certain *thekadar* at an annual rent of Rs. 6. The lease was to expire in 1913. On the 27th March, 1911, his widow sold it to Mahabir Prasad for Rs. 200. It has been found by the lower Appellate Court that money was urgently required for the plaintiff's marriage which could not be celebrated otherwise than by selling this property. On the 4th of December, 1911, Mahabir Prasad, who it should be mentioned resided in the city and not in the village in which the land is situate, sold it for Rs. 400 to the appellant who is one of the *zemindars* of the village in which the plots in dispute lie. It is not disputed that after the death of the widow the plaintiff became entitled to the land in suit as the daughter of Ganesh. She instituted the suit which has given rise to the present appeal on the 28th of October, 1926, impugning the sale-deed dated the 27th of March, 1911 as invalid having been made without legal necessity. In defence it was pleaded by the present appellant that aforesaid sale was valid as the plaintiff's mother was justified by legal necessity to transfer the property now in dispute for the purpose of raising funds to marry the plaintiff It has been found by the lower Appellate Court that "there was valid necessity for executing the first sale-deed" (dated 27th March, 1911) "by *Musammat* Bindo." It proceeded to consider whether the price of of Rs. 200 obtained by the plaintiff's mother under the sale-deed dated the 27th of March, 1911, was adequate. Having considered the circumstances of the case, especially the fact that Mahabir Prasad was able to sell the property eight months later for Rs. 400, it arrived at the conclusion that the sale was for inadequate consideration. It should be noted that the lower Appellate Court has not definitely found that the market value of the property in 1911 was Rs. 400 or thereabout. On that finding the lower Appellate Court set aside the sale on condition of the plaintiff paying Rs. 200 which, according to the lower Appellate Court, had been obtained by the plaintiff's mother for a necessary

purpose. The present second appeal has been preferred by the appellant.

The lower Appellate Court seems to be of opinion that a sale by a Hindu widow, otherwise justified by legal necessity, should be set aside if the price obtained by her was inadequate. We are unable to accept the broad proposition stated in these terms. While it is correct to say that a transfer by a Hindu widow for legal necessity and for an adequate price is binding on the reversioner, it does not necessarily follow that a sale otherwise justified must under all circumstances to be set aside if it can be shown that the price fetched was not adequate Circumstances might exist which make it absolutely necessary for the widow to sell her husband's property even for an inadequate price. Each case must depend upon its own circumstances. If the necessity for the sale of the property was so great that the husband's property must be sold, and if under the circumstances then existing it was not possible for her to obtain the full value of the property which had to be sold and she could not get more than what is considered to be an inadequate price, the sale would nevertheless be valid. In the case before us there is evidence that the plaintiff's mother could not secure a purchaser willing to pay more than Rs. 200. The finding of the lower Appellate Court that the plaintiff's marriage had to be celebrated and that the expenses thereof could not be defrayed except by sale of the property in dispute must be accepted. We must, therefore, take it that the plaintiff's mother was obliged by circumstances to sell the property within a limited time. She sold it at about twenty years' purchase. But for the circumstance that the vendee from her was able to sell it for double the price eight months later to a co-sharer in the village it would not have been reasonable to pronounce the opinion that the property was sold for an inadequate price. On the whole we think that there was not only legal necessity for the sale of the property but there was also legal necessity for selling it at the price at which it was sold to Mahabir Prasad.

For the foregoing reasons we are of opinion that this appeal should be allowed in part. The decree of the lower Appellate Court is set aside so far as it relates to the sale-deed dated the 27th of March. 1911, as to which the plaintiff's suit shall stand dismissed.

As parties have succeeded in part the appellant shall have three-fourths of her costs in all Courts.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Criminal Reference No. 184 of 1931.
September 3, 1931.
SULAIMAN AND NIAMAT ULLAH, JJ.
EMPEROR—REFEREE
versus
BAHADUR SINGH OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 109, 121—Forfeiture of bond—Sureties, time for proceeding against—Person found in suspicious circumstances—Forfeiture of bond.

Where a surety bond has been forfeited on account of any act of the accused person within the period for which the sureties had bound themselves, they would be liable whether the proceedings were started against them before or after the expiry of the period.

The mere fact that a person bound down under s. 109, Criminal Procedure Code, is again found in suspicious circumstances without any means of livelihood or is unable to give a satisfactory explanation of himself which may justify fresh proceedings against him under s. 109, Criminal Procedure Code, would not result in the forfeiture of first bond because that does not amount to the commission of or attempt to commit, or abetment of an offence punishable with imprisonment.

The Assistant Government Advocate, for the Crown.

Judgment.—This is a reference by the District Magistrate of Dehra Dun recommending that proceedings may be ordered against the sureties for the accused. He was proceeded against under s. 109, Criminal Procedure Code. Two persons stood sureties for him for his good behaviour. Shortly before the expiry of the period, he was again found concealing himself under suspicious circumstances in a lonely and abandoned watermill without any ostensible means of livelihood and unable to give a satisfactory account of himself. He was accordingly sent up again under s. 109, Criminal Procedure Code. The Magistrate was not able to take any action against the sureties before the expiry of the period. He expressed the opinion that he was unable to take any action against the sureties. The District Magistrate considers that there was no objection to the proceedings being taken against the sureties even though there was some delay.

So far as this last matter is concerned, we agree with the District Magistrate that if the bond was forfeited on account of any act of the accused person within the period for which the

sureties had bound themselves, they would be liable whether the proceedings were started against them before or after the expiry of the period.

We however think that in view of the provisions contained in s. 121, Criminal Procedure Code, there has been no forfeiture. A breach of the bond is committed when the accused commits or attempts to commit or abets any offence punishable with imprisonment. The mere fact that he is again found in suspicious circumstances without any means of livelihood or is unable to give a satisfactory explanation of himself, which may justify a fresh proceedings against him under s. 109, Criminal Procedure Code would not result in the forfeiture of the first bond because that does not amount to the commission of or attempt to commit or abetment of an offence punishable with imprisonment. At most, it might be a preparation for the commission of an offence but short of an attempt. We accordingly direct that the record may be returned.

R. L. *Record returned.*

ALLAHABAD HIGH COURT.

Civil Revision No. 393 of 1930.
July 17, 1931.
SULAIMAN, ACTG. C. J. AND BAJPAI, J.
RAM PHAL—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Legal Practitioners Act (XVIII of 1879), s. 36—Tout—Resolution of Bar Association based on repute—Admissibility—Evidentiary value—Revision—Powers of High Court.

If a resolution of a Bar Association declaring a person to be a tout is based on general repute the Court may attach less weight to it, but such a resolution is not legally inadmissible in evidence and can be taken into consideration by the Court.

The High Court, in the exercise of its powers of superintendence, can revise an order passed by a Subordinate Officer if the order is against natural justice.

Revision against an order of the District Magistrate, Basti, dated the 12th August, 1930.

Messrs. *P. L. Banerji* and *R. K. Malaviya*, for the Applicant.

Mr. *Sankar Saran*, for the Crown.

Judgment.—This is an application in revision from an order of the District Magistrate of Basti declaring Ram Phal applicant to be a tout.

There are precedents for the exercise of the power of superintendence by this Court when an order passed by a Subordinate Officer is against natural justice.

The learned Advocate for the applicant urges before us that there is no legal evidence whatsoever on which the District Magistrate could have legally acted. It appears that apart from certain oral evidence which has not been relied upon by the District Magistrate there were two resolutions of the Bar Associations of Mukhtars and Vakils in the following terms:—

(1) "That the meeting . . . . . is of opinion that Ram Phal stamp-vendor of the place is by general repute a tout."

(2) "It is resolved that Ram Phal stamp-vendor of Basti is a tout on the strength of general repute."

The District Magistrate had power to act upon the evidence of general repute under s. 36 of the Legal Practitioners Act, as amended. The explanation added to the section makes the passing of a resolution declaring a person to be a tout by a majority of the members present at a meeting specially convened for the purpose of an association of persons entitled to practise as legal practitioners as evidence of the general repute of such person for the purpose of that section. It cannot, therefore, be denied that if the resolution substantially is one declaring Ram Phal to be a tout then it was legally admissible as evidence of general repute, even though the basis of that resolution may be hearsay evidence. On the other hand, if there is no resolution declaring him to be a tout but there is a simple statement of fact that there was such evidence before the Association, then possibly it would not come under the explanation.

There seems to be nothing in the language of s. 36 of the explanation which would make a resolution based on general repute or hearsay evidence ineffective.

The language of the first resolution was somewhat ambiguous, but the second resolution undoubtedly shows that the members recorded their conclusion and declared that Ram Phal was a tout although they also indicated that their conclusion was based on the strength of general repute. We think that the words 'on the strength of general repute' merely indicate the basis of the resolution declaring him to be a tout and does not destroy its effectiveness.

If a resolution is based on general repute the Court may attach less weight to it, but

it cannot be said that such a resolution is legally inadmissible in evidence and cannot be taken into consideration by the Court.

We are accordingly unable to interfere with the order passed in the case. The application is dismissed with costs.

A. *Application dismissed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 625 of 1929.

June 24, 1931.

MUKERJI AND ALLEN, JJ.

MADHO SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Lala KESHAB DEO—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 3—Agra Tenancy Act (III of 1926), s 81—Proceedings in Revenue Court against minor—Appointment of guardian, necessity of—Omission to appoint—Validity of proceedings.

Order XXXII, r. 3, Civil Procedure Code, applies to proceedings in Revenue Courts and it is incumbent upon a party taking proceedings against a minor under s. 81, Agra Tenancy Act, to formally make an application for appointment of a guardian for the minor. But failure to do so is only an irregularity, and the minor who is not properly represented cannot have the decree or order set aside unless he shows that he was really prejudiced by that decree or order. *Walian* v. *Banke Behary* (1), *Ram Barechhu* v. *Tarak Tewari* (2) and *Chhattar Singh* v. *Tej Singh* (3), followed. [p. 375, col. 2.]

Second Appeal from a decision of the Additional District Judge, Aligarh, dated the 24th January, 1929.

Mr. *D. P. Malaviya*, for the Appellants.

Mr. *Panna Lal*, for the Respondents.

Judgment.—This case has been referred to a Bench of two Judges on the ground that the case involves a point of some difficulty.

The facts of the case briefly are these. There were two occupancy tenants of a holding, *e.g.*, Madho Singh the defendant-appellant before us and Hoti Lal. The *zemindar* was Lala Keshab Deo. The rent of the occupancy holding being in arrear proceedings were taken by Lala Keshab Deo under s. 81 of the Agra Tenancy Act, 1926. This rule of law laid down that it was open to a land-holder to apply to the *tahsildar* for issue of a notice to his tenants for payment of arrears of rent and for his ejectment, in case of default. A notice was issued to Hoti Lal, and also to Madho Singh under the guardianship of his uncle Hoti Lal. It has been found as a fact that Hoti Lal had no interest adverse to Madho Singh. The tenants did not appear. The arrears of rent being not made good, an order for ejectment was made on 11th April, 1927, and a formal delivery of possession was effected on 29th April, 1927.

The tenants, in spite of the order of ejectment and delivery of possession stuck to the land and the land-holder Keshab Deo had to bring the suit out of which this appeal has arisen, for ejectment of the tenants in the Civil Court and for damages.

Hoti Lal has not defended the suit but Madho Singh has and his sole ground of defence is that he was not properly represented in the previous proceedings.

There can be no doubt that the Civil Procedure Code applies to the proceedings in the Revenue Court under the provision of s. 264 of the Tenancy Act and it was incumbent on Keshab Deo to formally make an application for appointment of a guardian. The irregularity is there and the question is what is the result of that irregularity?

In a series of cases starting with *Walian* v. *Banke Behari* (1) followed in *Ram Barechhu* v. *Tarak Tewari* (2) and *Chhattar Singh* v. *Tej Singh* (3). It has been held that the minor who was not properly represented in the previous litigation cannot have the decree or order made against him set aside on the sole ground of irregularity, but must show that he was really prejudiced by that order. If, in spite of the irregularity, a decree or order could be made against the minor and if the minor had no possible defence to the proceedings taken against him in which the order or decree complained of was made, he cannot challenge the order or decree complained of simply on the ground of irregularity. The reason for this rule is obvious. Order XXXII of the Civil Procedure Code contains a rule of procedure and procedure is meant only for the purpose of justice. If there has been done substantial justice to the minor's case, the mere fact that there has been some defect in the procedure cannot matter.

In this particular case before us, the minor Madho Singh takes exception to the proceedings on the ground of irregularity in the appointment of a guardian and on that ground alone. He does not say that

(1) 30 C. 1021; 30 I. A. 182; 5 Bom. L. R. 822; 7 C. W. N. 774; 8 Sar. 512 (P. C.).

(2) 33 Ind. Cas. 805; 14 A. L. J. 589.

(3) 59 Ind. Cas. 671; 18 A. L. J. 956, 2 U P. L. R. (A.) 384; 43 A. 104.

the arrears of rent had really been paid up when the proceedings were taken under s. 81 of the Tenancy Act. He does not say that if a proper guardian (other than Hoti Lal) had been appointed, the arrears of rent would have been paid off. He does not say that the arrears of rent have since been made good since the order of ejectment had been made on the 11th April, 1927. He does not even say that an offer to make good the arrears was made and was rejected. In these circumstances, we do not see how the minor can say that he has been prejudiced by the proceedings taken against him and Hoti Lal.

In the circumstances we think that the decrees of the Courts below are right and we dismiss this appeal with costs including Counsel's fees in this Court on the higher scale.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Criminal Appeal No. 381 of 1931.
August 17, 1931.
SULAIMAN, J.

SAWANTA AND ANOTHER—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal trial—Misjoinder of charges—Charges under ss. 302 and 201, Penal Code—Acquittal under s. 302 and conviction under s. 201—Legality of conviction.

Where the accused are charged together and tried for offences under ss. 302 and 201, Penal Code, and the evidence being insufficient to sustain a conviction under s. 302, are acquitted of the charge under that section but are convicted under s. 201, there is no misjoinder of charges and the conviction is legal. [p. 377, col. 1.]

Criminal Appeal against an order of the Sessions Judge, Mainpuri, dated the 21st March, 1931.

Mr. *K. D. Malaviya*, for the Appellants.

The Government Pleader, for the Crown.

Judgment—This is an appeal from a conviction under s. 201, Indian Penal Code. According to the prosecution evidence there was enmity between the deceased Zalim, who was an occupancy tenant, and Moharman and others, *zemindars*, as well as Sawanta, a partner of Zalim in the tenancy. Zalim had complained to the Deputy Collector that the *zemindar* had realised rents but had not given the receipts for them, and a case under the Tenancy Act was registered against Moharman. It is alleged that there was some settlement, and receipts were given to Sawanta by the *zemindars*, but Sawanta colluded with them and returned the receipts, and then the crops of Zalim were again attached, A report was made by Sawanta against Zalim, who was arrested and kept in the *thana* for the night, and was let off the next morning. Zalim then filed a complaint in the Court of the Sub-Divisional Magistrate against the *zemindars*, Sawanta, as well as the local Police. His allegation was a bribe had been demanded from him by the Sub-Inspector. Non-bailable warrants against the *zemindars* and Sawanta were issued by the Magistrate. Though the Sub-Inspector was in the village on 20th April, 1930, he did not arrest the accused before the 22nd. The accused were subsequently let off on bail.

Indarjit, son of Zalim, deposed that Moharman and others wanted to compromise the case and had come to his father's house, but he refused to do so; that next day when he returned, he was informed by his mother that Sawanta had taken his father to the *zemindar's* house, and when Indarjit went there he found the door closed. Zalim was not found during the day, although search was made for him. After sunset it is alleged that Narayan and Bhika were going along when they saw Sawanta and Narsinghbhan, the two appellants, carrying a heavy bundle with them. When question, Sawanta and Narsinghbhan threw down the bundle and ran away. An alarm was raised, and many people arrived on the scene, and when the bundle was opened, the dead body of Zalim was discovered in it. It had numerous marks of injuries on it. According to Indarjit, he went to Tikam Singh, the *Mukhia*, who is a relation of Moharman, and reported the matter to him, but no notice appears to have been taken by the *Mukhia*. Deojit was sent next day to the *thana* to make a report, which he did. The Police made an investigation, and the matter dragged on for a number of months and nothing was done. On 23rd August, 1930, a complaint was filed by Indarjit against Sawanta Narsinghbhan, as well as the three *zemindars*. *Musammat* Sundar, the wife of Zalim, stated that Sawanta and Narsinghbhan came on the next day and had taken her husband away with them, but he did not return. The evidence of Narayan and Bhikam was that they saw Sawanta and Narsinghbhan accused carrying a bundle on their shoulder by means of *lathis*, and when they were questioned they threw it down and ran

away. Ramalal deposes that an alarm was raised by Narayan and Bhikam that the two accused had thrown down something, and when he, along with other villagers, went to the place they discovered the dead body of Zalim. The other three accused were discharged by the Committing Magistrate, but Sawanta and Narsinghbhan were committed to the Sessions Court. The learned Judge added a charge under s. 201, Indian Penal Code. The learned Judge came to the conclusion that there was not sufficient evidence to connect the two accused with the murder of Zalim, and has accordingly acquitted them of that charge. He has found them guilty under s. 201, and has sentenced them to three years' rigorous imprisonment each.

A legal objection is taken that there was a misjoinder of charges, and the accused should not have been tried both under ss. 302 and 201, Indian Penal Code. This contention, in my opinion, has no force. When the evidence was found to be insufficient to convict the accused of the murder of Zalim and they were acquitted, the presumption is that they were not guilty of the murder at all. There was, therefore, no difficulty in the way of convicting them under s. 201, if the evidence as to their being seen with the dead body of the deceased at night were to be believed. This point is covered by the authority of *Emperor* v. *Har Piari* (1). As a matter of fact in one case their Lordships of the Privy Council upheld a conviction under s. 201, although the charge against the accused was only under s. 302, Indian Penal Code *Begu* v. *King Emperor* (2).

The evidence for the prosecution was both definite and direct. There is no doubt that Zalim was murdered. There is also no doubt that there was enmity between Zalim and Sawanta as well as Moharman. There is also no doubt that Zalim had made a complaint against the local Police. It is also clear that his dead body was found after sunset when an alarm was raised. Witnesses prove that Narayan and Bhikam at that very time announced that they had seen Sawanta and Narsinghbhan throwing the bundle on the ground. Ramlal corroborates their evidence. The learned Sessions Judge has believed it, and I see no reason why this evidence should not be believed. It is not necessary to discuss the other evidence relating to the enticing away of Zalim in the morning by Sawanta and Narsinghbhan. That evidence had relation to the charge of murder, and although there seems to be no reason to disbelieve it, it is not necessary to emphasise that circumstance.

The only point that can be said in favour of the accused is that the full story was not disclosed in the information report which was made on the morning of the 20th April, and that there are some discrepancies between the statements made by the witnesses before the Sub-Inspector and the statements made in Court. The learned Sessions Judge, however, has come to the conclusion that the conduct of the Sub-Inspector who investigated the case has been very suspicious, and hardly any value could be placed on the entries in his diary or on the First Information Report.

There is no doubt that if the investigation had been conducted with care and in a proper manner and searches made promptly the murder would not have gone unavenged The enmity between the deceased and certain persons was well known to the Police, and even in the First Information Report a suspicion had been thrown out against Sawanta and the Thakurs. Zalim had undoubtedly made a complaint against the Police and Sawanta, and there is reason to suspect that there was reluctance and hesitation on the part of the Police to proceed promptly against the persons suspected of the offence. As already mentioned, the Sub-Inspector had delayed the arrest of the Thakurs on 20th April. The Mukhia of the village also happened to be a relation of Moharman. It is improbable that if the Sub-Inspector had made a thorough investigation he would not have discovered that there was some evidence to suggest that the deceased had been taken to the house of the *zemindar* by Sawanta and Narsinghbhan. He admittedly made no efforts to search the houses of the Thakurs or to record their statements The *post mortem* report showed that the stomach of the deceased was entirely empty, which corroborated the story that he had been enticed away and murdered before he had taken his

(1) 97 Ind. Cas. 44; 49 A. 57; L. R. 7 A. 156 Cr.; 27 Cr. L. J. 1068; 24 A. L. J. 958; A. I. R. 1926 All. 737.

(2) 88 Ind. Cas. 3; 6 Lah. 226; 2 O W. N. 447; 48 M. L. J. 643; 41 C. L. J. 437; 27 Bom. L. R. 707; 3 Pat. L. R. 95 Cr.; A. I R. 1925 P. C. 130; 23 A. L. J. 636; (1925) M. W. N. 418; 26 Cr. L. J. 1059; 7 Lah. L. J. 324; 52 I. A. 191; 30 C. W. N. 581 (P. C.).

breakfast. For months the matter remained pending and nothing was done by the Police. It was only after the deceased's son filed a complaint that the case was started and properly enquired into. So the conduct of the police in this case has been rightly held by the learned Sessions Judge to be highly suspicious. In the circumstances he was perfectly justified in not placing too much reliance on the brevity of the First Information Report or the discrepancies in the statement recorded in the Police diary. In my opinion the evidence is amply sufficient to bring home to the accused their guilt under s. 201, Indian Penal Code. I accordingly dismiss the appeal.

Let a copy of this judgment be forwarded to the Inspector-General of Police for information.

The accused must surrender to the bail.

R. L. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

Miscellaneous Criminal Case No. 221 of 1931.

April 10, 1931.

YOUNG AND SEN, JJ.

Musammat KETKI KUNWAR—APPLICANT

versus

B. SHEO NARAIN JAFA,

AND OTHERS—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (b)—Offence committed not in Court but in relation to proceedings in Court—Jurisdiction to make complaint—Powers of Appellate Court—Jurisdiction of High Court apart from Criminal Procedure Code.

Section 159 (1) (*b*), Criminal Procedure Code, does not apply merely to offences committed in "such Court" but applies also to offences "committed in relation to any proceeding in any Court."

An offence committed in relation to the proceeding in the trial Court is also committed in relation to the appeal from that Court.

The High Court had jurisdiction to order prosecution for offences committed in relation to a proceeding in a subordinate Court before the enactment of Act V of 1898 and s. 195 (1) (b) does not take away this jurisdiction of the High Court.

Messrs. *Saila Nath Mukerji*, *A. Sanyal* and *N. C. Ganguli*, for the Applicant.

Messrs *Iqbal Ahmad*, *S. S. Shastry*, *K. D. Malaviya*, *Durga Charan Singh* and *P. M. L. Verma*, for the Opposite Parties.

Judgment.—Notices have been issued to Sheo Narain Jafa, a Pleader of Budaun, Ghasa Singh and Nathu Lal to show cause why a complaint should not be filed against them in a Criminal Court charging them with having committed offences under ss. 193, 120 (*b*) and 209, read with s. 109 of the Indian Penal Code. Notice was also issued to Makhan Singh to show cause why he should not be prosecuted for having committed offences punishable under ss. 120 (*b*) and 209, read with s. 109, of the Indian Penal Code.

These applications arose out of F. A. No. 147 of 1927, which was heard and decided by a Bench of this Court on the 22nd January, 1931. That Bench made very strong observations against all the four respondents. The Court found in the civil appeal that there had been a conspiracy by all of them to deprive one Manohar Singh of his property, and, in accordance with that finding avoided a deed of gift executed by Manohar Singh in favour of Nathu Lal and Makhan Singh, and also a sale-deed executed by the same parties. The Court also set aside the decree of the 12th November, 1923 in Suit No. 201 of 1923, which was a suit by Nathu Lal and Makhan Lal against Manohar Singh for a declaration that the plaintiffs were entitled to possession of the property comprised in the said sale deed. The facts arising in this case are fully set out in the judgment of this High Court in F. A. No. 147 of 1927, and it is unnecessary for us to detail fully those facts again. We have to consider whether there is a *prima facie* case established against all or any of the respondents which would make it obligatory on us to order their prosecution under s. 476, coupled with s. 195, of the Code of Criminal Procedure. Counsel appearing on behalf of Sheo Narain Jafa did not take any preliminary objection; but Counsel on behalf of the others have objected that this Court has no jurisdiction to order the prosecution of their clients. The objection is based upon s. 195 of the Code of Criminal Procedure. That section enacts that "no Court shall take cognizance, (sub cl. *b*), of any offence punishable under any of the following sections of the same Code, namely, ss. 193, 194, 195, 196, 199, 200, 205, 206, 207, 208, 209, 210, 211 and 228, when such offence is alleged to have been committed in or in relation to, any proceedings in any Court except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate." With the exception of s. 120 (*b*), the sections comprised in this notice are included in sub-cl. (*b*) of s. 195. Clause (4) also bring in the cl. (1) (*b*) the charge under s. 120 (*b*). It is clear that the alleged offences were not committed in this Court, and it is contended therefore that this Court has no jurisdiction to order the prosecution of the

respondents. It is, however, to be noted that the sub-clause does not apply merely to offences committed in "such Court", but apply also to offences "committed in relation to any proceeding in any Court". It is obvious that the offences charged under s. 209, read with s. 109, was not committed even in the trial Court. It cannot be denied that that offence was committed in relation to the proceeding in the trial Court. It is, therefore, in our opinion also clear that the offence under those sections was also committed in relation to the appeal which was heard in this Court. There is no reason to construe narrowly the words "in relation to". Equally the offence of perjury, although it was undoubtedly committed in the trial Court, must, in our view be held to have been committed in relation to the appeal in this Court. A person committing perjury in a trialCourt must be held to have intended that his perjury should not only influence the proceedings in the trial Court but also subsequent proceedings which might take place if either party to the case in the trial Court took the matter to appeal.

Further, on this point it is not denied that there was, before Act V of 1898 was passed, a jurisdiction in the High Court to order prosecutions in a matter like this. The equivalent section of Act X of 1882 undoubtedly gave jurisdiction to this Court to order prosecutions. The High Court has also directed similar prosecutions even prior to the specific enactment of Act X of 1882. There was, therefore, at the time of the passing of Act V of 1898 an existing jurisdiction in the High Court to order such prosecutions. Therefore, in construing the material section of Act V of 1898 the cardinal rule of construction as to jurisdiction must be taken into account, and that is, that no existing jurisdiction of a supreme Court can be taken away,unless the language used in the enactment which purports to take that jurisdiction away is in the clearest possible terms. There can have been no object in cutting down the jurisdiction of the High Court in such matters, and at any rate, it cannot possibly be said that s. 195 (*b*) takes away in clear terms the undoubted jurisdiction which existed in the High Court prior to the passing of that Act. We hold, therefore,that this Court has jurisdiction to make the orders.

We have very carefully and anxiously considered the case as against Sheo Narain Jafa. He is an officer of this Court, and he has been charged in clear terms by a Bench of this Court,of which one of us was a member, with conduct seriously reflecting upon him both in his capacity as a private individual an officer of this Court, and a member of the legal profession. We are of opinion that the observations not only of the Bench of this Court, but of the two lower Courts before whom this matter had come were entirely justified. His action, for example, in filing an application which he knew could not possibly succeed, unless material facts were hidden from the Court for the appointment of Manohar Singh as guardian of his infant children when those infant children had on entirely proper grounds brought an action against him for partition, was an action such as no honest lawyer could possibly have advised his client to take. The fact that in that action Mr. Sheo Narain Jafa was assisted by another practitioner of Budaun named Iqtidar Alam, does not make Mr. Jafa's conduct any the less serious. We have carefully examined all the facts of this case as regards Sheo Narain Jafa. We are satisfied that a consideration of those facts raises the very gravest suspicion against Sheo Narain Jafa of being guilty of the offences with which it is sought to charge him. But as he was not actually a party to the sale-deed itself, nor was he at any rate openly, a party to the declaratory Suit No. 201 of1923 we feel that there is not enough evidence which would justify a CriminalCourt in coming to a conclusion adverse to Sheo Narain Jafa. We, therefore, discharge the notice as regards him with respect to all these sections of the Indian Penal Code.

The matter, however, stands on a different footing with regard to the charges against the other three respondents. We do not wish to say anything in this matter to prejudice their trial in the criminal Court. We, therefore, confine ourselves to saying that, in our view, there does exist a *prima facie* case against them. We, therefore, record a finding under s. 471 (1) of the Code of Criminal Procedure that it is expedient in the interest of justice that an enquiry should be made into the said offence, and direct the Registrar of this Court to take the necessary steps for the filing of a complaint against the three respondents charging them with the offences enumerated above with regard to each. With regard to the charges relating to s. 193 of the Indian Penal Code we direct the filing of a complaint against Ghasa Singh with respect to the following two statements:—(*a*) "Makhan Singh has

purchased this property for himself." (page 180, line 5 of the paper book in F. A No. 147 of 1927). (*b*) "Babu Sheo Narain and I are not the owners of the sale in dispute." (page 185, line 46 of paper book in F. A. No. 147 of 1929). With regard to Nathu Lal we direct a complaint to be made against him for the following statements :— (*a*) "Out of the money left with me at the time of this sale I spent Rs. 1,400 in the appeal." (page 51 line 17 of paper-book in F. A. No. 147 of 1927), (*b*) "I paid the money left with me for Sundar Lal, Sheonarain, Bhopal Rai and Natra Behari Lal to them. I subsequently took a clear receipt from Manohar." (page 51, line 20 of paper-book in F. A No. 147 of 1927), (*c*) "Nathu Lal and Makhan Singh are the owners of the property." (Supplementary paper book page 44, line 3.)

The said complaints are to be sent to the District Magistrate of Budaun. Together with the complaints will be sent the original record of Suit No. 63 of 1926 the subject-matter of F. A. No. 147 of 1927, a copy of the printed paper book containing the evidence, a copy of the judgment of this Court and a copy of the notices issued to the three respondents.

With regard to costs, we allow no costs to Sheo Narain Jafa. The applicants were abundantly justified in making the application against him. The applicant will have her costs of the application against the other three respondents.

A. *Application allowed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1856 of 1928.
April 24, 1931.

MUKERJI AND BAJPAI, JJ.

Chaubey DAYA SHANKAR—
PLAINTIFF—APPELLANT
versus
THE BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY
—DEFENDANT—RESPONDENT.

Negligence—Contributory negligence—Level crossing—Gates left open—Collision of car and engine—Liability.

Where the defendant's negligence is such as invites, as it were, the plaintiff to be less circumspect, the defendant cannot put the blame on the plaintiff, if he happened to be less circumspect than he would otherwise have been.

While the plaintiff who was travelling in his motor-car at a speed of about 7 miles an hour arrived near a level crossing, the gates of which were open, a Railway-engine came and collided against the plaintiffs' car and broke it:

Held, in a suit for damages that the plaintiff was not guilty of contributory negligence and was entitled to recover damages. *Bengal Provincial Railway Co.* v. *Gopi Mohon Singh* (1), and *the Directors of North-East Railway Co.* v. *Wanless* (2), applied. [p. 381, col. 1.]

Second Appeal from the decision of the Subordinate Judge, Cawnpore, dated the 15th June 1928.

Messrs. *S. N. Verma* and *G. S. Misra*, for the Appellant.

Mr. *L. P. Zutshi*, for the Respondent.

Judgment.—This is a second appeal by one who was the plaintiff in the Court below. By this suit the plaintiff claimed against the Bombay, Baroda and Central India Railway Co. a sum of Rs. 1,300 as damages. The Court of first instance allowed a sum of Rs. 1,200 as damages, but on appeal by the Railway Company the learned Subordinate Judge who heard the appeal dismissed the suit altogether.

The allegation in which the suit was founded and the facts which have been found established by the lower Appellate Court are these. There was a fair at Bithur in the district of Cawnpore. The plaintiff was coming from the fair and was going towards Cawnpore At a short distance from the Bithur Railway Station the plaintiff had to cross the Railway line. There was a pair of gates which was open and permitted the plaintiff to cross the Railway line. As the plaintiff arrived on the rails, travelling at a moderate speed of about 7 miles an hour, a Railway engine coming from the direction of the Railway Station at Bithur collided against the plaintiff's car and broke it. On these facts, the learned Subordinate Judge held that the plaintiff was guilty of contributory negligence, inasmuch as it was the duty of the plaintiff to be circumspect and, on arriving near the gate, to look on either side and to see if any train or engine was passing.

In this Court it has been contended that the learned Subordinate Judge drew a wrong inference from the facts found and that there was no contributory negligence.

There can be no doubt that the matter is concluded by English cases and there is at least one Indian case which is against the respondent. The Indian Case is *Bengal Provincial Railway Co.* v. *Gopi Mohon Singh* (1).

There can be no doubt that where the plaintiff is guilty of contributory negligence he is not entitled to lay the whole of the blame on the negligence of the defendant and recover damages. But there is another

(1) 23 Ind. Cas. 788; 41 C. 308; 18 C. W. N. 325.

rule of law which says that where the defendant's negligence is such as invites, as it were, the plaintiff to be less circumspect, the defendant cannot put the blame on the plaintiff, if he happened to be less circumspect than he would otherwise have been. This is put very clearly in Sir Frederick Pollock's Law of Torts, 13th Edition at pp. 493 & 494. At page 493 the learned author puts the proposition like this :

"There are certain conditions under which the normal standard of a reasonable man's prudence is peculiarly difficult to apply, by reason of one party's choice of alternatives, or opportunities of judgment, being affected by the conduct of the other."

By way of illustration the learned author quotes the case of the *Directors of North-East Railway Co.* v. *Wanless* (2). The case decided is put in the following language by the author :

"A person who finds the gate of a level Railway crossing open, and is thereby misled into thinking the line safe for crossing, is not bound to minute circumspection, and if he is run over by a train, the company may be liable to him although he did use his faculties so clearly as he might have done under other circumstances."

The learned author further at page 494 puts the reason of the decision as follows :

"One might generalise the rule in some such form as this: not only a man cannot with impunity harm others by his negligence but his negligence cannot put them in a worse position with regard to the estimation of default. You shall not drive a man into a situation where there is loss or risk every way, and then say that he suffered by his own imprudence. Neither shall you complain that he did not foresee and provide against your negligence."

We are of opinion that the principle laid down in the cases decided and very clearly put by the learned author should be adopted as the basis of our decision, and we do adopt it.

In the result we allow the appeal, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance. The plaintiff will have his entire costs throughout.

A. *Appeal allowed.*

(2) (1857) 7 H. L. 12 at p. 16; 43 L. J. Q. B. 185; 30 L. T. 275; 22 W. R. 561

ALLAHABAD HIGH COURT.

First Civil Appeal No. 510 of 1928.

March 31, 1931.

MUKERJI AND BENNET, JJ.

PATESHWARI PRASAD PAL—

PLAINTIFF—APPELLANT

versus

JAI KARAN AND ANOTHER

—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation—Mortgage for speculative litigation—Validity—Success in litigation, effect of—Equities—Conditional decree.

Where money is raised by mortgage by a member of the family, even if he be the head of the family, for a speculative litigation which is to benefit the family only in the case of its success, it cannot be said that the mortgage was created for family necessity. Where the benefit to be acquired is to accrue to an individual member and not to the whole family the mortgage cannot bind the family estate. [p. 383, cols. 1 & 2.]

Where, however, a grandfather mortgaged the family estate for a speculative litigation and succeeded, and the grandson sued to set aside the mortgage and the decree obtained thereupon :

Held, that it would be highly unjust to allow the plaintiff to succeed unconditionally and to escape payment of the debt which went substantially to help his grandfather to succeed in the litigation, if, ultimately, the plaintiff succeeds to that property and a conditional decree that the mortgage-decree could not be executed until the plaintiff succeeds to the property recovered by the litigation, could be passed. [p. 383, col. 2.]

First Appeal from the decision of the Subordinate Judge, Basti, dated the 4th September 1928.

Mr. *Ram Nama Prasad*, for the Appellant

Messrs. *P. L. Banerji* and *Harnandan Prasad*, for the Respondents.

Judgment—This appeal has arisen out of a suit brought by the appellant Pateshwari Prasad Pal, minor, in the following circumstances.

One Mahadeo Prasad Pal had three brothers Banke, Harihar and Dan Bahadur. Dan Bahadur, who was a step-brother of Mahadeo Prasad Pal, succeeded to a *Taulqa* property which originally belonged to his father-in-law under a Will. Dan Bahadur died sometime in 1906. His widow was *Musammat* Sukhpal Kunwar and his daughter was *Musammat* Balraj Kunwar and *Musammat* Balraj Kunwar's son was Adya Bakhsh. Mahadeo Prasad Pal, being the eldest of the brothers, believed that he had a substantial claim to the property of Dan Bahadur. The *Taulqa* was known as that of Dandikachh. The litigation for the *Taulqa* property was a costly affair, and Mahadeo Prasad Pal had not got money. He and his brothers Harihar and Bankey raised some money and fought out a case in the Mutation Department with Adya Bakhsh who claimed the property by virtue of a Will from his maternal granfather Dan Bahadur. In the Mutation Department Adya Bakhsh was successful, then Mahadeo Prasad Pal thought of instituting a suit in the Civil Court at Partabgarh. To raise money for the litigation he executed the bond of 18th March 1911 in favour of the respondent Jai Karan's father Razawand Singh. By this document Mahadeo Prasad Pal mortgaged five properties in the District of Basti, which were

a part of his ancestral property, and one village of the *Taluqa* property to which he was laying claim. At the date of the mortgage Mahadeo Prasad Pal's son Raj Bahadur was alive and was an adult. He was not made a party to the mortgage.

A suit was actually filed by Mahadeo Prasad Pal on 17th June 1912. Apparently he required more money, and one Seth Kanhaiya Lal of Jubbulpore advanced some money as a transferee of a part of the *Taulqa* property, and he was impleaded in the suit as a co-plaintiff with Mahadeo Prasad, by virtue of an order dated 15th October, 1913.

The suit succeeded in the Court of the Subordinate Judge on 2nd May, 1914, but it was lost on an appeal by Adya Bakhsh and on an appeal by his mother *Musammat* Balraj Kunwar (there are two appeals). The learned Judicial Commissioners delivered judgment on 29th June 1917. An attempt was made by Mahadeo Prasad Pal to file an appeal before their Lordships of the Privy Council, and an application was made to the Judicial Commissioners of Lucknow for leave to file an appeal. In the meanwhile the litigants came to terms and by an agreement dated the 10th of August 1922 it was agreed between on the one hand Mahadeo Prasad Pal and Kanhaiya Lal his transferee, and Adya Bakhsh and his mother Balraj Kunwar on the other, that Adya Bakhsh should have one of the properties in the *Taluqa* estate absolutly for himself, that he should have a life estate as regards the rest and that on his death, 10 annas share in the property should be taken by Kanhaiya Lal and 6 annas by Mahadeo Prasad Pal. The agreement was placed before the learned Judicial Commissioners, and by their order dated 21st August, 1922, the agreement was recorded and was made a part of the decree.

It has happened since that Adya Bakhsh died on 16th February 1928, and Kanhaiya Lal and Mahadeo Prasad Pal have taken possession of the property over which Adya Bakhsh had only a life interest.

Now we go back to what led to the present suit.

Razawand Singh having died his son Jai Karan, the respondent No. 1 filed a suit in 1923 for the sale of the mortgaged property. To this suit Mahadeo Prasad alone was party. It was decreed *ex parte* on 29th September 1924. The decree was taken for execution to the District of Basti because as we have already stated five villages in the District of Basti were among the properties mortgaged. Thereupon the plaintiff, who is a son of Raj Bahadur and a grandson of Mahadeo Prasad, instituted the suit out of which this appeal has arisen to obtain a declaration that the properties in Basti ordered to be sold by the mortgage-decree of 1924 were not liable to be sold being an ancestral property in which the plaintiff had a share.

The defence to the suit was various. It was alleged that the property was the self-acquired property of Mahadeo Prasad Pal, and the plaintiff had no interest in it, that the plaintiff was born after the execution of the mortgage, that the mortgage had been executed for legal necessity, and the plaintiff was bound by the transaction. One of the points taken by the plaintiff was that the mortgage-deed had not been properly registered, and in answer to that the defendant No. 1 Jai Karan pleaded that there was a valid registration.

The learned Subordinate Judge held that the property was joint family property, that it was not proved that the plaintiff was alive at the date of the mortgage, that the registration of the document was good, and that there was a legal necessity for the loan. The learned Subordinate Judge, however, held that the plaintiff had been benefited by the transaction of the mortgage, inasmuch as he would succeed as an heir to his grandfather, and therefore he was bound to pay the debt which the grandfather incurred in order to acquire the property in Partabgarh. The learned Judge accordingly dismissed the suit.

In the present appeal the question of registration has not been re-agitated, nor has the question as to when the plaintiff was born. For the respondent No. 1 it has not been urged that the property in suit is the self-acquired property of Mahadeo Prasad Pal. We, therefore, take it that the property in suit is the joint family property of the plaintiff and Mahadeo Prasad Pal. It being common ground that Raj Bahadur was alive in 1914, and if it not be proved that he was a consenting party to the mortgage, the plaintiff would be entitled to impeach it. The learned Subordinate Judge made a casual remark that the mortgage-deed had been executed with the consent of Raj Bahadur. The learned Counsel for the respondent No. 1 tried to support this finding, but he could not point out that he ever had raised the plea in the Court below that the mortgage had been executed with the consent of Raj

Bahadur. It was a question of fact, and as such had to be pleadad specifically. The plaintiff had no notice of such a plea and could not adduce any evidence, Besides, the evidence on which the lower Court expressed the opinion that Raj Bahadur was a consenting party to the mortgage does not support the lower Court. The statement of witness Mangal Prasad which will be found at page 15 of the record, that the brothers of Mahadeo Prasad "opined that some *Mahajan* should be searched and a *bima* should be written to him and civil suit should be fought", does not support a finding that Raj Bahadur was a consenting party to a mortgage on the ancestral property in the District of Basti. To start with among the brothers of Mahadeo Prasad was not his son Raj Bahadur. Then the suggestion was that money should be raised on the security (*bima*) of the property sought to be acquired, and there was no suggestion that money should be raised by mortgage of ancestral and joint family property. We have looked through other portions of the statement of Mangal Prasad and are of opinion that it has not been established that Raj Bahadur was a consenting party to the mortgage. Under the circumstances it is conceded that it is established law so far as this Court is concerned that it is open to the plaintiff to question the validity of the mortgage of 1911

On the question of legal necessity it is obvious that there was none. We have already mentioned the fact that when the litigation between Mahadeo Prasad Pal and Adya Bakhsh was in the Revenue Court, Mahadeo Prasad Pal and his brothers Bankey and Harihar mortgaged their property to raise a loan to fight out the case. The mortgagee Bhagwandas Naik, brought a suit for sale and failed on the contest of the sons of one of the brothers of Mahadeo Prasad Pal. The judgment of this Court will be found reported as *Bhagwan Das Naik* v. *Mahadeo Prasad Pal* (1). Most of what was said in that judgment would apply with force to the facts of this case. This decision found the approval of the Full Bench case of *Jagat Narain* v. *Mathura Das* (2) (see remarks at page 845*). There can be no doubt, therefore that where as in this case money is raised by a member of the family even if he be the head of the family for a speculative litigation which is to benefit the family only in the case of its success, it cannot be said that the mortgage was created for family necessity. In this particular case, the benefit to be acquired as the result of this speculative litigation was to accrue not to the whole family namely Mahadeo Prasad Pal, his son and grandson but to Mahadeo Prasad individually. In the circumstances it is clear that the mortgage of 1911 was not binding on the family estate.

It has, however, been appointed that in the events that have happened a substantial property, being 6 annas of the *Taluqa* of Dandikachh, has been acquired by Mahadeo Prasad Pal, and according to the valuation of Mahadeo Prasad Pal's suit filed against Adya Bakhsh, the 6 annas property is worth nearly two lakhs of rupees. The plaintiff as the only heir-at-law of Mahadeo Prasad Pal has every chance of succeeding to the share of the *Taluqa*. In the circumstances it has been urged by the learned Counsel for the respondent No. 1 that the plaintiff is bound to pay the debt. It was only on this ground that the suit of the plaintiff appellant was dismissed by the Court below.

As against this argument it may be pointed out that the plaintiff may succeed (1) if he survives his grandfather, and (2) if the grandfather does not bequeath the property to any other person and (3) if the grandfather leaves the property unencumbered to the extent to be worth the amount due to the respondent No. 1 under the decree.

We have given all these arguments their proper weight, and have come to the conclusion that it would be highly unjust to allow the plaintiff to succeed unconditionally in this case and to escape payment of the debt which went substantially to help his grandfather to succeed in the litigation if ultimately the plaintiff succeeds to that property at Partabgarh. We accordingly have decided to grant the plaintiff only a conditional decree leaving it open to him, as it is open to his grandfather to pay up the decree at any time he likes.

In the result, we allow the appeal and grant the plaintiff the following declaration.

The decree No. 290 of 1923 dated the 29th September, 1924, passed by the learned Subordinate Judge of Partabgrah in favour of Jai Karan and against Mahadeo Prasad Pal will not be executable against the properties in the District of Basti unless and until the plaintiff succeeds to the property

(1) 71 Ind. Cas. 959; 21 A. L. J. 271; A. I. R. 1923 All. 298; 45 A. 390.

(2) 116 Ind. Cas. 484; 26 A. L. J. 841 at p. 845; A. I. R. 1928 All. 454; 50 A. 969; Ind. Rul. (1929) All. 580.

*Page of 26 A. L. J.—[Ed.]

of the *Taluqa* Dandikachh or a portion of it as an heir to or donee or legatee or transferee of his grandfather the property to which the plaintiff succeeds being equal to or more in value than the amount of the decree then due It will be open to the plaintiff to pay up the decree of the respondent No. 1 Jai Karan at any time he pleases. We may explain once more the decree which we grant. It is only in the case of the plaintiff obtaining a benefit which is equal to or exceeding in value the amount of the decree that he will be liable to pay the decretal amount due on the property mortgaged. It will be for the Court executing the mortgage-decree to decide whether the conditions laid down by us have been fulfilled or not. The plaintiff has substantially succeeded and will have his costs throughout. The temporary injunction issued against Mahadeo Prasad Pal that he is not to alienate his Partabgarh property till the disposal of the appeal is hereby dissolved. Mahadeo Prasad Pal will pay his own costs of this appeal.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Civil Revision No. 288 of 1930.
April 16, 1931.
SULAIMAN, ACTING C. J. AND BAJPAI, J.
RAM DAS AND ANOTHER—PLAINTIFFS—APPLICANTS
versus
HABIB ULLAH—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 24—Transfer of case—Application for transfer—Notice to opposite party, necessity of—Court competent to try suit, meaning of.

It is open to a District Judge to proceed *suo motu* and transfer a case from one Court to another Court of competent jurisdiction. But where he is moved for transfer by a party to the suit, he is bound to issue notice to the other party and to hear him if he desires to be heard. Failure to do so, if not without jurisdiction, is at least a material irregularity.

A Court would not be competent to try and dispose of a suit if it does not possess both pecuniary and territorial jurisdiction to entertain it. *Fatema Begum* v. *Imdad Ali* (1), followed.

Revision against an order of the District Judge, Benares, dated the 15th of May, 1930.

Mr. *Mansur Alam*, for the Applicant.

Judgment.—This is an application in revision from an order, dated the 15th of May, 1930, transferring a case from the Court of the Additional Munsif of Benares to the Court of the Munsif of Haveli. The suit was for recovery of *haq chaharum* and was not cognisable by a Court of Small Causes. It was originally filed in the Court of the City Munsif of Benares who had territorial jurisdiction to try it. The District Judge *suo motu* transferred the case to the Court of the Additional Munsif who apparently had concurrent jurisdiction. Subsequently the plaintiffs made an application to the District Judge to transfer the case from that Court to the Munsif of Haveli, because there was no Presiding Officer for the Additional *Munsifi* at the time. The learned Judge without issuing notice to the defendant ordered the transfer to the Court of the Munsif of Haveli.

Although it was open to the learned Judge to proceed *suo motu* and transfer the case from one Court to another Court competent to try it, yet when he was moved by the plaintiffs, he was bound to issue notice to the opposite party and to hear such party if it desired to be heard. The provisions of s. 24 sub-s. (1) were accordingly not complied with and the order of the learned Judge, even if not without jurisdiction, is certainly tainted with material irregularity *vide Fatema Begam* v. *Imdad Ali* (1).

It has been further contended before us that the District Judge in the exercise of his power under s. 24 can transfer a case to only such other Court as is competent to try or dispose of the suit. Section 24, sub-s. (1) sub-cl. (*b*) (*ii*) does provide that the Court to which the case is transferred should be competent to try or dispose of the same. That obviously means that, if there had been no order of transfer and the suit would have been originally filed in the Court to which it has been transferred, that Court would have been competent to try and dispose of it. It follows that a Court would not be competent to try and dispose of the suit, if it does not possess both pecuniary and terriorial jurisdiction to entertain it. This was the view expressed in a Patna case *Shaikh Jannat Husain* v. *Shaikh Gulam Kutubuddin Ahmad* (2). As the words of the Statute are in no way limited, we agree with the view expressed therein.

The learned Judge should accordingly bear this view of the matter in mind.

We allow this revision and setting aside the order of the District Judge, direct him to dispose of the plaintiffs' application after issuing notice to the defendant and hearing him.

R. L. *Order set aside.*

(1) 58 Ind. Cas. 560; 18 A. L. J. 351; 2 U.P. L. R. (A) 83.
(2) 57 Ind. Cas. 522; 5 P. L. J. 588; (1920) Pat. 274; 1 P. L. T. 637.

PRIVY COUNCIL.

Appeal from Oudh Chief Court.

October 19, 1931

LORD THANKERTON, SIR JOHN WALLIS AND SIR GEORGE LOWNDES

Nawab Mirza MOHAMMAD SADIQ ALI KHAN—APPELLANT

versus

Nawab FAKR JAHAN BEGAM AND OTHERS—RESPONDENTS.

*Oudh Estates Act (I of 1869), ss. 8, 10, 32-A—Entry of name in lists, effect of—Incorporation of acquired property to property under Act—Will—Non-compliance with provisions of Act, effect of—Muhammadan Law—Succession—Custom governing ancestral estate—Presumption regarding self-acquisitions—Rebuttal—Gift—Husband's gift to wife or by father to son—Delivery of possession, necessity of—Dower—Payments as presents to wife, whether discharge of dower—*Benami *purchase—Presumption regarding* benami *—Practice—Privy Council—Concurrent findings of fact—Costs—Interference.*

By s. 10 of the Oudh Estates Act the entry of the name of a person in the lists is conclusive evidence that he is a *talukdar* to whom the provisions of the Act apply. The effect of the inclusion of his name in the second list is a statutory declaration that the particular estate by family custom devolves upon a single heir. *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (1), followed. [p. 386, col. 1.]

Apart from the provisions of s. 32-A, Oudh Estates Act, no incorporation of other property to property held under the Act is possible whether by purchase or accretion. *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* (3), followed. [p. 388, col. 1.]

A Will by the *taluqdar* which does not comply with requirements of Oudh Estates Act is not valid in law. [p. 386, col. 1.]

In the case of a Muhammadan family if a custom governs the succession to the ancestral estate the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death and it is for the person who asserts that these properties follow a line of devolution different from that of the *taluqa* to establish it. But where a family custom in respect of succession to *taluqdari* estate is of recent origin and instances of succession to personal acquisitions by Muhammadan Law are established, such presumption is sufficiently rebutted. *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (1) and *Zarif-un-nisa* v. *Shafiq-uz-zaman Khan* (2), referred to. [p. 387, col. 2.]

In the case of a gift by a husband to his wife Muhammadan Law does not require actual vacation by the husband and actual taking of separate possession by the wife of the property gifted. A declaration made by the husband followed by the handing over of the deed are amply sufficient to establish a transfer of possession. *Shiekh Muhammad Mumtazahmad* v. *Zubaida Jan* (4), *Shaik Ibhram* v. *Sheik Suleman* (5), *Bibi Khaver Sultan* v. *Bibi Rukhia Sultan* (6) and *Humera Bibi* v. *Najm-un-nissa Bibi* (7), referred to. [p. 389, col. 2.]

In the case of a gift by a Muhammadan father to his infant child no transfer of possession is required; it is only necessary to establish a *bona fide* intention to give. *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (8), referred to. [p. 390, col. 2.]

Payments made by a Muhammadan husband to his wife during his lifetime as presents cannot be regarded as payments made towards satisfaction of dower debt. The maxim *'debitor non præsumitur donare"* has no application between husband and wife. *Iftikar-un-nissa Begum* v. *Nawab Amjad Ali Khan* (10), distinguished. [p. 390, col 1.]

Though there is no presumption of advancement in *benami* transactions in India, very little evidence of intention would be sufficient to turn the scale. Where certain property is purchased by the father in the name of his minor daughter and the deed at the time of her marriage is produced for the inspection of her father-in-law and it is represented to him that the property belongs to the girl, it must be said that there is sufficient evidence to establish an intention on the part of the father to make a gift of the property to her daughter. [p. 391, col. 1.]

It is not the practice of the Privy Council to re-open concurrent findings of fact of the Court below. [p. 387, col. 2.]

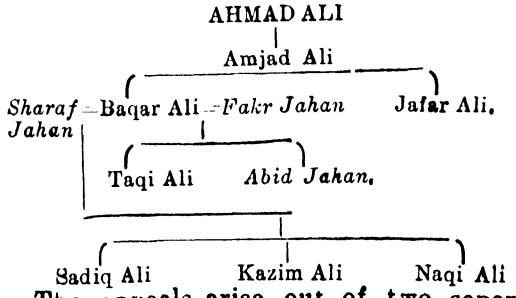
It is very rarely that the Privy Council interferes in a matter merely of costs. [p. 392, col. 1.]

Appeal from the judgments and decrees of the Chief Court of Oudh (Sir Louis Stuart, Kt., C. J. and Raza, J.)—one judgment reported in 112 Ind. Cas. 315.

Messrs *W. H. Upjohn, K. C.* and *L. Jopling*, for the Appellant.

Messrs. *L. De Gruyther, K. C., B. Dube, K. C.* and *W. Wallach*, for the Respondent.

Sir George Lowndes.—The principal question of the many, involved in these appeals is as to the right of succession to an important *taluqdari* estate in Oudh, known as Kunwa Khera. The last holder was Nawab Baqar Ali Khan, who died intestate on the 17th January, 1921. He left him surviving two widows, four sons, of whom Nawab Mirza Mohammad Sadiq Ali Khan was the eldest, and one daughter. The pedigree of the family, so far as it is necessary for the determination of the appeals, is as below, the names of females being printed in italics :—



The appeals arise out of two separate suits, the first of which was instituted by the junior widow, Fakr Jahan Begum, and her two children, Taqi Ali and Abid Jahan, who will be referred to in this judgment as the plaintiffs. They claimed their shares according to the Shiah Muhammadan Law, to which the parties are subject, in the whole estate of Baqar Ali, including the Kunwa Khera property. To this suit the other widow and her three sons, and also Jafar Ali, the brother of Baqar Ali, were joined as defend.

ants. Jafar Ali died pending the suit, and his heirs were brought on the record in his place, but took no part in the proceedings. Naqi Ali also died, *pendente lite*, and is now represented by his widow, Jaddo Begum. Neither she nor her assignee, Dilawar Ali, have appeared before the Board.

The second suit was brought by Fakr Jahan alone, claiming the sum of Rs. 50,000 as due to her for dower out of the property left by Baqar Ali. To this suit all the other parties, with the exception of Jafar Ali, were defendants

The first suit involved various questions as to Baqar Ali's estate, including the validity of a number of dispositions of property made by him during his lifetime, as to most of which there were concurrent findings of the Courts in India. There are now five appeals before the Board, which have been consolidated; four of them arise out of the first and principal suit and the remaining one out of the dower suit. The parties are ranged on different sides on the various questions involved, according to their individual interests. On the question as to the succession to the Kunwa Khera estate, with which their Lordships will first deal, Sadiq Ali, claiming as the eldest son by the right of primogeniture, is opposed by all the other parties. His claim succeeded in both the Indian Courts, but is disputed before the Board.

The estate was the subject of two *sanads*, dated respectively in 1858 and 1861, by each of which it was granted to Amjad Ali, the father of Baqar Ali, subject to descent by the rule of primogeniture. The reason for the two *sanads* is unexplained. They are to all intents in the same terms.

Upon the passing of the Oudh Estates Act, I of 1869, Amjad Ali's name was included in the first and second of the lists prepared under s. 8 of the Act. Against his name in the first list was entered the estate to Kunwa Khera. By s 10 the entry of his name in the lists is conclusive evidence that he was a *taluqdar* to whom the provisions of the Act applied; the effect of the inclusion of his name in the second list was a statutory declaration that the Kunwa Khera estate by family custom ordinarily devolved upon a single heir: *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (1). By s. 22 of the Act, upon the death of Amjad Ali intestate the estate would descend upon his eldest son, Baqar Ali, and from Baqar Ali to Sadiq Ali, and, if the section applied, the claim of the plaintiffs, so far as the estate was concerned, would necessarily fail. Amjad Ali in fact left a Will, dated the 16th March, 1874. By it he purported to provide for the division of his Sitapur property, which included at all events the greater part of Kunwa Khera, among his heirs according to Muhammadan Law The Will however, did not comply with the requirements of the Act It has been held by both Courts in India to be invalid on this account, and their finding is not disputed before the Board. It would seem to follow that the title of Sadiq Ali to the estate was *prima facie* unassailable, but it is attacked by the plaintiffs and the defendants who side with them on three grounds.

In the first place, it is contended that though Kunwa Khera appears in list No. 1 as the *taluqdari* estate of Amjad Ali, the Act did not in fact apply to it. It was said that the definition of 'estate' in the Act applies only to villages and lands named in the list attached to the *kabuliyat* executed by the *taluqdar*, and that the list in the case of Kunwa Khera was not executed by Amjad Ali, but by his slave Abdul, with whom the settlement was made on his behalf. Their Lordships think that there is no substance in this contention.

In the next place, it is contended that Baqar Ali did not take the estate under the Act, but by an independent title, and that, therefore, it devolved on his death by the ordinary Shiah Muhammadan Law. In support of their contention reliance is placed upon certain transactions which took place after Amjad Ali's death and were, no doubt, inspired by the provisions of his Will, to which reference has been made above. Amjad Ali died on the 7th March, 1875, and on different dates in April and June of the same year three deeds of compromise were executed between Baqar Ali, his brother Jafar Ali, and the other heirs of Amjad Ali, under which Baqar Ali's title to the Kunwa Khera estate was recognised, and that of Jafar Ali to another estate not concerned in these appeals, and provision was made for the other heirs. It is contended for the plaintiffs and their supporters that the effect of these compromises was that Baqar Ali took the estate by transfer from his brother and the other heirs and not by succession under

(1) 36 Ind. Cas. 299; 43 I. A. 269 at p. 280; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; 35 A. 552; (1916) 2 M. W. N. 555; 25 C. L. J. 1, 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538 (P. C.).

the Act or under the *sanads*, and that it so became in his hands property which would be divisible on his death according to the ordinary rules of Muhammadan Law. This contention has been rejected by both Courts in India, and their Lordships have no hesitation in affirming their conclusion. They think that it is impossible to regard the compromises as being in any way the root of Baqar Ali's title, which, even if the original *sanad* could be disregarded, was clearly established by the Act. The compromises were, in their Lordships' opinion, only a recognition of his right to succeed to the estate.

The only remaining contention to which reference need be made on this part of the case is based upon a supposed deed or gift of the 1st June, 1857, by which Ahmad Ali, the father of Amjad Ali, is alleged to have transferred the estate to Baqar Ali, and it is said, therefore, that when the *sanads* were subsequently granted to Amjad Ali, and his name was entered in the lists provided for by the Act, he must be taken to have held the estate merely as a trustee, and that nothing in the Act applied to it in Baqar Ali's hands. Their Lordships think it sufficient to say, in answer to this contention, that the deed of gift has not been proved. Both the lower Courts have so held, and their Lordships see no reason to differ from the conclusion to which they have come.

In the result their Lordships are satisfied that the title of Sadiq Ali to the Kunwa Khera estate has been established; that it was not divisible according to the ordinary rules of Muhammadan Law among the heirs of Baqar Ali, and that the plaintiffs' suit so far as it sought to effectuate this claim has failed.

Their Lordships now turn to the subsidiary question raised by the various contending parties, which are many and diverse. It will be convenient to take up first the questions upon which Sadiq Ali is the appellant.

His main contention is that he is entitled to succeed not only to Kunwa Khera, as a *taluqdari* estate, but to all the property left by Baqar Ali to the exclusion of the other parties to these appeals. The ground of this claim is that the family custom of primogenitary succession being established in respect of the *taluqdari* property, it must be held to govern also what is *non-taluqdari*. The contention is based upon the decision of this Board in *Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (1). In that case Mr. Ameer Ali, in delivering the judgment of the Board, draws a distinction between the position of a Hindu family governed by the law of the Mitakshara and a Muhamadan family. In the former case, he points out, self-acquired property may go in a different line of succession to ancestral property, but the Muhammadan Law allows of no such differentiation. In the case of a Muhammadan family, therefore,

> "If a custom governs the succession to the ancestral estate, the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death; and it is for the person who asserts that these properties follow a line of devolution different from that of the *taluqa* to establish it."

In the present case the Subordinate Judge by whom the suit was tried recognised the importance of this presumption, and held that it was for the plaintiffs to prove that in their family the succession to *non taluqdari* property followed the ordinary Muhammadan Law by which the family was governed. This he held that they had satisfactorily established, and the Appellate Court accepted his finding. There being thus concurrent findings on what is obviously a question of fact, the matter could not, according to the ordinary practice of the Board, be re-opened here. But it was contended by Mr. Upjohn, who appeared for Sadiq Ali, that there was no evidence to support this finding. Their Lordships are unable to accept this contention. Without going into the evidence at length it is sufficient to state that in at least two cases of succession in the family *non-taluqdari* property has been divided according to Muhamadan Law, there being no trace of any claim in either case that it was not so divisible by reason of a family custom.

It is admitted that Kwaja Safi, the paternal grandfather of Ahmad Ali, migrated from Persia to India. There is no suggestion of a custom so directly at variance with the Muhammadan Law having been introduced from Persia, and their Lordships think that it can only have originated in India, and, therefore, at a comparatively recent date. It may well, they think, have been a special custom attached only to a special grant from the ruling authority in Oudh. That there may be such a custom affecting only the principal estate of a family is recognised by the judgment of Lord Phillimore in *Zarif-*

un-Nisa v. *Shafiq uz-zaman Khan* (2), also a Muhammadan case. This view receives further confirmation from the terms of the *sanads* of 1858 and 1861. In any case, however, their Lordships think that where a family custom is, as here, of comparatively recent origin, two well-established instances of division according to the Muhammadan Law are not only material upon which the Courts in India might hold in favour of the plaintiffs upon this question, but are in themselves sufficient to rebut the presumption upon which Counsel for Sadiq Ali relies. In the opinion of their Lordships, therefore, it has been rightly held that the property left by Baqar Ali other than the Kunwa Khera estate is divisible among his heirs according to Shiah Muhammadan Law.

The next question to be considered is the claim by Sadiq Ali to a number of items as accretions to the *taluqdari* estate. They consist largely of subordinate interests in the estate which were owned by outsiders and had been bought up by Baqar Ali Both Courts in India have rejected his claim to the alleged accretions Sadiq Ali appeals against their decision and is opposed before the Board by all the other parties. Their Lordships think that the claim is clearly not maintainable. Both Courts have found that there was no intention on the part of Baqar Ali to incorporate any of these acquisitions in the *taluqdari* estate, and their Lordships would not be disposed to disagree with this finding. But the matter does not rest merely on the proof or disproof of such intention. Apart from the provisions of s. 32-A of the Act of 1869 as amended in 1910, which, it is admitted, do not apply in the present case, no incorporation of other property would be possible. This is clear on the judgment of the Board in *Rajindra Bahadur Singh* v. *Rani Raghubans Kunwar* 3), which has been rightly interpreted by the Chief Court.

Another item of immovable property which is affected by similar considerations is what is called the Kairabad House, but is really the estate office of the *taluqa*. It was not part of the Kunwa Khera estate at the dates either of the *sanads* or the statutory lists, but was purchased by Baqar Ali. Sadiq Ali claimed it as an "appurtenance" to the estate, and his claim was allowed both by the trial Judge and the Chief Court on appeal, who found that it had been so used for many years. In their Lordships' opinion, the principle affirmed in *Rajindra Bahadur's case* (3) cited above applies with as much force to this property as to the alleged accretions, and Baqar Ali, not having availed himself of the provisions of s. 32 A, could not by any form of user incorporate it in the *taluqdari* estate, or subject it to a rule of descent at variance with the Muhammadan Law. Mr. Upjohn for Sadiq Ali does not deny that the property was purchased by Baqar Ali, but, founding upon a passage in the judgment in *Rajindra Bahadur's case* (3) at pages 146 147*), contends that a *sanad* from the Government should be presumed granting the house to the *taluqdar*. Their Lordships can see no possible foundation for this contention. The house was the property of Baqar Ali and if he had desired to incorporate it in the *taluqa* he could have done so by the special procedure introduced in 1910. There was no necessity and no occasion for a *sanad*. The question of the Kaiser Bagh House in *Rajindra Bahadur's case* (3) was on a different footing altogether. It was the property of Government and had been allotted to the *taluqdar*.

Their Lordships, therefore, think that the Courts in India were wrong in allowing Sadiq Ali's claim to this property, and that it forms part of the divisible assets of Baqar Ali in which all the heirs are entitled to share.

It will be convenient here to take up another and possibly more difficult question affecting a portion of the Kairabad property known as the Mahal Serai. By a duly registered deed of gift dated the 28th February, 1916, Baqar Ali purported to make over this *serai* to his wife, Fakr Jahan. The deed recites the donor's desire to arrange for her residence at Kairabad when she wishes to live there; sets out in detail the particular portions of the property which she is to have, and continues:—

. . . "and I deliver possession over the gifted property to the aforesaid second wife of mine from this date, like myself. Now, the said wife has power to keep the gifted property in her proprietary possession, in whatsoever manner she desires and I or any heir of mine shall never have any occasion for raising any kind of objection. Now with effect from this date the gifted property has, with all the

(2) 113 Ind. Cas. 113; 5 O. W. N. 565; 55 I. A. 303 at p. 316; A. I. R. 1928 P. C. 202; 32 C. W. N. 1120; 48 C. L. J. 418; 3 Luck 372; 29 L. W. 793 (P. C.).

(3) 48 Ind. Cas. 213; 45 I. A. 134; 21 C. C. 106; 24 M. L. T. 282; 5 C. L. J. 401; 8 L. W. 570; 40 A. 470; (1918) M. W. N. 831; 28 C. L. J 456; 23 C. W. N. 101; 20 Bom. L. R. 1075 (P. C.).

*Pages of 45 I. A.—[*Ed*].

external and internal rights been transferred to the aforesaid Nawab Fakhr Jahan Begam in the capacity of an absolute proprietor like myself."

The gift is attacked by Sadiq Ali and his branch of the family upon two grounds, *viz.*, (1) that the deed was merely colourable, there being no intention on the part of Baqar Ali to transfer the property to the lady, and (2) that the gift was not completed by such a change of possession as is requisite under the Muhammadan Law to validate a gift of immovable property.

These two objections must be considered separately. The first is purely a question of fact; the second has been argued mainly as a question of law.

The trial Judge thought that the gift was fictitious, and held that nothing passed by it. The Chief Court disagreed with him, finding nothing suspicious in the transaction. It was not disputed, the learned Judges say, that after the deed was executed the lady frequently visited Kairabad and resided on the premises. They, therefore, held that she had taken possession, and that the gift was effective.

The first objection being against the tenor of the deed, the burden of proof is clearly upon those who disputed the gift. No possible reason is suggested why Baqar Ali should have desired to put a portion of this property in any one else's name except, possibly, an inherent propensity for *benami* or *ism farzi* transactions On the other hand, the reason recited in the deed that he desired to provide his favourite wife with an alternative residence at Kairabad is, to say the least of it, understandable. The portion assigned to her contained the *zenana* quarters, where she ordinarily put up when accompanying her husband on his apparently not infrequent visits to the *kothi*, and it is clear from the evidence of his other gifts to her which are now established that he had a great desire to provide for her future comfort on a generous scale. Against this all that can be said is that during his lifetime she exercised no individual acts of proprietorship over any portion of the Kairabad establishment; that in her and her husband's absence the *serai* was occupied by the servants of the estate; that such repairs as were necessary were done at Baqar Ali's expenses, and that no mutation of names was made in the Government records. In their Lordships' opinion, these facts are not sufficient to establish that the transaction was merely colourable. The deed was handed over to the donee and remained in her possession, and their Lordships have no doubt that Baqar Ali intended to make a genuine gift of the property to her.

The second objection involves some consideration of the Muhammadan Law. It is not disputed that a gift of immovable property must ordinarily be completed by a transfer of possession, and there seems to be no difference on this point between Hanafi and Shiah Law. The Chief Court thought it was clear that Fakr Jahan had taken actual possession, but it is pointed out that this was only after her husband's death. So long as Baqar Ali was alive she merely resided there with him, and no change seems to have been made in the method of their joint occupation. But in the first place the deed contains the statement, "I deliver possession of the gifted property to my said wife," and this as a declaration of fact must be regarded as binding on the heirs of the donor: see *Muhammad Mumtazahmad* v. *Zubaida Jan* (4). In the second place, the deed of gift was handed over to the donee as soon as it was registered. In the case of a gift by a husband to his wife, their Lordships do not think that Muhammadan Law requires actual vacation by the husband and an actual taking of separate possession by the wife. In their opinion, the declaration made by the husband, followed by the handing over of the deed, are amply sufficient to establish a transfer of possession. In *Ibhram* v. *Suleman* (5), West, J., laid it down as a principle for the determination of questions of this nature that "when a person is present on the premises proposed to be delivered to him a declaration of the person previously possessed puts him into possession." This statement of the law was cited and followed by Sir Lawrence Jenkins in 1905—*Khaver Sultan* v. *Rukhia Sultan* (6), a case between Shiahs, and also independently in the same year by the Allahabad Appellate Court —*Humera Bibi* v. *Najim-un nissa Bibi* (7). It has also been followed in two Madras cases, and is cited with approval in the late Mr. Ameer Ali's work on the Muhammadan Law 3rd Ed, p. 71. It is not necessary for their Lordships to decide in the present case whether this principle is of universal application between Muhammadan donors

(4) 16 I. A. 205; 11 A. 460; 5 Sar. 433.
(5) 9 B. 146.
(6) 29 B. 468; 7 Bom L. R. 443.
(7) 28 A. 147; A. W. N. (1905) 222; 2 A. L. J. 778.

and donees, but they think that as between a husband and his wife who are living together it is undoubtedly a reasonable interpretation of the requirements of the law, and they adopt it as applicable to a case before them. In their opinion, therefore, the gift of this portion of the Kairabad property by Baqar Ali to Fakr Jahan was effective, and the conclusion come to by the Chief Court was correct.

Their Lordships must now turn to the long series of cases where purchases in the names of one or other of the plaintiffs are charged as *benami*. These have been examined with great care by the trial Judge, and in nearly every case where they were disputed on appeal his findings were confirmed by the Chief Court. No adequate reasons have been suggested why these concurrent findings of fact should not be accepted by the Board in accordance with the ordinary rule, and it is, therefore, unnecessary to burden this judgment with their details. Mr. Dube, for the second plaintiff, Taqi Ali, disputes concurrent findings in 25 different instances, but his contentions amount to no more than that upon the evidence the Courts should have come to the opposite conclusion. In many cases the material documents have not been printed, and he is unable to give even the dates of the transactions which he is instructed to support.

There are, however, two cases in which the Courts in India have come to different conclusions, in addition to the case of the Mahal Serai at Khairabad, which has already been dealt with, and these require consideration.

The first concerns the village of Jiamau, which was conveyed to Fakr Jahan by a deed dated the 12th January, 1920. The purchase price of the property was Rs. 51,000 Out of this two sums of Rs. 1,000 and Rs. 600 for earnest money, and a small additional sum for stamp duty were admittedly advanced by Baqar Ali. Fakr Jahan has sworn that these sums were repaid by her and that the balance came from her own funds. The trial Judge was not prepared to accept her statement without further corroboration. The Appellate Court thought that there was no reason to disbelieve it. As the lady's evidence was taken on commission the Judges of the Chief Court were in at least as good a position to appreciate its credibility as the trial Judge, and their Lordships must naturally attach the greater weight to their estimate. They have perused the evidence in question, and see no reason to disagree with the conclusion to which the learned Chief Judge and his Indian colleague have come. It is not denied that Fakr Jahan was in possession of sufficient means to pay for the property; the purchase deed appears to have been all along in her possession and mutation was effected in her name. There is no affirmative proof that the balance of the purchase money was paid by Baqar Ali, nor does the admission as to the earnest money, even if it was not repaid, necessarily lead to this conclusion.

In their Lordships' opinion the *prima facie* title of Fakr Jahan has not been displaced by the oral evidence, and they think that the finding of the Chief Court with respect to this property should be affirmed.

The other case is that of a property known by the picturesque name of "Sher Darwaza." It was purchased on the 12th November, 1910, by Baqar Ali, but the conveyance was taken in the name of his daughter, Abid Jahan, the third plaintiff, then an infant of about five years old. The property was during her minority managed by Baqar Ali in her name, and though the income was apparently credited to a special account, and certain sums were paid out of it to her husband, it seems clear that it was in part appropriated to purposes with which Abid Jahan had no concern.

In the case of a gift by a Muhammadan father to his infant child, no transfer of possession is required, it is only necessary to establish a *bona fide* intention to give: see *Ameeroonissa Khatoon* v. *Abedoonissa Khatoon* (8).

There is no doubt that Baqar Ali did in many instances, which have been fully discussed by the trial Judge, purchase immoveable properties in the names of various members of his family without any intention, so far as the evidence adduced discloses, of benefiting the particular nominee, and the only question is whether there is sufficient in the case of the Sher Darwaza property to take it out of this category of *benami* purchases. The trial Judge thought there was not. The Chief Court came to the opposite conclusion. The deed, which was produced at the hearing by Fakr Jahan, was on the occasion of Abid's marriage in 1914 placed upon a tray and sent for the inspection of

(8) 2 I. A. 87 at p. 104; 23 W. R. 208; 15 B. L. R. 67; 3 Sar. 423; 3 Suther 87 (P. C.).

her father-in-law, and this was in the view of the learned Judges conclusive of Baqar Ali's intention.

The purchase of this property was a very natural provision by Baqar Ali for the daughter of his favourite wife, and though there may be no presumption of advancement in such cases in India, very little evidence of intention would be sufficient to turn the scale. The sending of the deed for the inspection of the lady's father-in-law, which the Chief Court held to be established was clearly a representation that the property was hers, and their Lordships agree with the learned Judges in the conclusion to which they came. They think, therefore, that the Sher Darwaza property should be excluded from the divisible estate of Baqar Ali.

An attempt has been made to press the same argument in the case of a mortgage upon certain property in Husain Ganj and Baragaon, which was taken in the name of Abid Jahan, but both the trial Judge and the Chief Court have held against the third plaintiff as to this, and their Lordships see no reason to re-examine the evidence upon which they have come to this conclusion.

The next matter over which the parties are at variance concerns a sum of about five and a half lakhs of rupees in Government Promissory Notes. This has been held by both Courts in India to belong to a charitable fund known as the Radd-i-Mazalim, which is said to mean "Atonement for Crimes of Violence." It has accordingly been treated as outside the estate. Sadiq Ali apparently claimed to be the trustee of it, and the trial Judge acceded to his claim. The Chief Court, while affirming the trust, held that the question of the trusteeship was not before them. Sadiq Ali does not contest this before the Board, but supports the trust; the other parties contend that the trust is bad under Muhammadan Law, and that the notes form part of the divisible estate.

The ground of this contention is that Government Promissory Notes, being interest-bearing securities, cannot be the subject of a dedication to God, which is an essential feature of every Muhammadan *Wakf*. On this question there has been a conflict of opinion in India The authorities were discussed in the Chief Court, and the learned Judges came to the conclusion that taking modern ideas into account, the objection was unsustainable. They, therefore, agreed with the trial Judge that the notes did not form part of Baqar Ali's estate.

The origin of the fund is uncertain. The earliest reference to it to which their Lordships' attention has been drawn is in the Will of Ahmad Ali, the grandfather of Baqar Ali, dated the 2nd September, 1857. The notes in question were directed by his Will to be applied as part of the Radd-i-Mazalim fund. It is clear on the terms of the Will that the trust had been created in the previous generation There is nothing to show of what it originally consisted, but the fund was evidently in the keeping of Ahmad Ali, and he seems to have allocated the notes in question to it either as representing its investment in his hands, or possibly only as the equivalent of a sum for which he regarded himself as accountable.

After Ahmad Ali's death a suit was instituted for the administration of his estate, to which Amjad Ali was a party. The suit eventually came up to this Board in 1867—*Nawab Umjad Ally Khan* v. *Mohundee Begum* (9). The Radd-i Mazalim fund figured in the proceedings as a "family religious and charitable fund." Trustees were appointed of it by the Court, and a scheme of management was directed, and these provisions were affirmed by the Order in Council.

Upon these facts, which have not been disputed on the present appeals, it seems difficult to see how the validity of the trust can now be questioned. It is not denied that the *Wakf* has been recognised by the members of the family for three-quarters of a century or more, and that the income of the fund has been applied, at all events in the main, consistently to charitable purposes. The notes clearly came into Baqar Ali's possession as representing the *corpus* of the fund, and even if they were an improper investment of it, as to which their Lordships express no opinion, this could not make them his property,

If the trust could be regarded, as having been created by Ahmad Ali, and as originally invalid for the reason now suggested, the fund might have been divisible among his heirs, but that is not a question which arises in the present proceedings. So far as Baqar Ali was concerned, he was bound by the result of the suit above referred to, and in his hand the notes were clearly trust property.

(9) 11 Moo I. A. 517; 19 W. R P. C. 25; 2 Suther 98; 2 Sar. 315 (P. C.).

Under the circumstances, their Lordships find it unnecessary to attempt a solution of the interesting problem of Muhammadan Law which was propounded to the Chief Court. The only material question in these appeals is whether the fund formed part of Baqar Ali's divisible estate, and for the reasons given their Lordships have no doubt that it did not.

A small question has been raised by Mr. Wallach, who appears for the first and third defendants, Sharaf Jahan and Kazim Ali, as to the order for costs made by the Chief Court. In their appeal, No. 24 of 1929, which failed, they were directed to pay the costs of "the other side," separate sets of costs being allowed to each party or group, with the result that they have had to pay the costs of Jaddo Begum, the widow of Naqi Ali, and her assignee, Dilawar Ali, who were, apparently, separately represented in the Chief Court, but have not appeared before the Board. This, it is contended, is manifestly unjust, as Naqi Ali had made a joint defence to the suit with Mr. Wallach's clients. Their Lordships think that if this was a slip, the attention of the Judges should have been called to it in India. If it was not, as appears more likely, it is manifest that this Board is not in a position to review the discretion of the Appellate Court in such a matter. It is very rarely that the Board interferes in a matter merely of costs, and there is no reason why an exception should be made in the present case.

Their Lordships have now dealt with all the matters which have been submitted for their consideration in the first suit, and it only remains for them to deal with the question of dower, which was the subject of the second suit in which Fakr Jahan is the sole plaintiff.

It is not disputed that the dower fixed on Fakr Jahan's marriage was the sum of Rs. 50,000, which she claimed from her husband's estate. The defence set up by Sadiq Ali and the other members of his branch of the family is that the debt was satisfied by payments made to her by Baqar Ali in his lifetime. It is admitted that she received sums of money from her husband which in the aggregate exceeded the Rs. 50,000, but these payments were made from time to time in varying amounts, the largest of which was only Rs. 3,000. There is no evidence that Baqar Ali allocated any of these payments to the dower debt, nor was there any attempt at the trial to show that the lady accepted them as such. She referred in her deposition to "presents" received from her husband in addition to a liberal allowance, but it does not seem to have been suggested to her in cross-examination that any of these moneys were payments on account of dower. The dower deed was produced by her at the trial, and no payments are endorsed or noted upon it. There is in reality nothing in the evidence to rebut her claim. Reliance is placed upon the maxim, "*Debitor non præsumitur donare*," but their Lordships doubt if it has any application as between husband and wife—at all events when the relations between them are such as are established in the present case. It is certain that in many cases Baqar Ali did make presents to his wife quite irrespective of her dower, and it can hardly be presumed that a man in his position would desire to discharge such an obligation by driblets.

A previous dower case in the same family is also cited in favour of the defence; *Iftikar-un nissa Begum* v. *Amjad Ali Khan* (10). Here the dower debt was held to have been discharged after the husband's death by the transfer of Government Paper of substantially the equivalent in value of the debt, but their Lordships are unable to see any resemblance between the facts of the two cases.

The trial Judge held that the debt was satisfied by the aggregate of the payments and dismissed the suit. The Chief Court took the opposite view and allowed the claim of the plaintiff. Their Lordships think that the decision of the Chief Court was clearly right.

Before closing their judgment their Lordships would desire to express their appreciation of the great care with which these cases have been tried by both Courts in India. They are also indebted to the learned Counsel who have appeared before them for their assistance in extracting the necessary material from a heavy record.

On the whole case, in their Lordships' opinion, the conclusions come to by the Chief Court were right and should be upheld, except in the matter of the Khairabad House, which was one of the subjects of Oudh Appeal, No. 20 of 1928, in the Chief Court. Their Lordships think that this question should have been decided in favour of the plaintiffs, and that the decree of the Chief Court on this appeal should be varied by declaring that the so-called Khairabad House, as apart from the *Mahal serai*, is not appurtenant to the *taluqa* of

(10) 7 Beng. L. R. 643.

Kunwa Khera, but forms part of the divisible estate of Baqar Ali. They think that in all other respects the decrees of the Chief Court in both the suits should be affirmed, and they will humbly advise His Majesty accordingly. There will be no order as to the costs of these appeals.

R. L. *Decree varied.*

PRIVY COUNCIL.

Appeal from the Rangoon High Court

July 28, 1931.

LORD TOMLIN,

LORD MACMILLAN AND SIR DINSHAH MULLA.

U PO LEIN AND ANOTHER —APPELLANTS

versus

MA HNIN HLAING—RESPONDENT.

Buddhist Law—Adoption—Keittima *child, definition of—Essentials of adoption—Proof—Practice—Privy Council—Concurrent findings of fact—Interference.*

A *keittima* child is a child adopted publicly with the intention that the child shall inherit. The existence of natural children is no bar to such an adoption. No formal ceremony is necessary to constitute adoption, but the adoption must be a matter of publicity and notoriety. It can either be proved by direct evidence of the taking as a *keittima* child on a specified occasion, or it may be inferred from a course of conduct inconsistent with any other supposition. *Ma Ywet* v. *Ma Me* (1) and *Maung Thwe* v *Maung Tun Pe* (2), referred to. [p. 394, col 1.]

The usual practice with the Privy Council is not to disturb concurrent findings of fact of the Courts below. [p. 395, col. 1.]

Messrs. *E. B. Raikes, K. C.* and *G. D. McNair*, for the Appellants.

Messrs. *L. DeGruyther, K. C Mg. Kya Gaing of Burma* and *H. Williams*, for the Respondent.

Sir Dinshah Mulla.—The sole question for the decision of their Lordships on this appeal is whether the respondent is the *keittima* daughter of U San Ywe, a Burmese Buddhist, and his wife, Daw Hnit. If she was, then she inherits Daw Hnit's estate; if not, the appellant U Po Lein, who is the brother of Daw Hnit, is entitled to succeed to it as her heir.

The litigation arose out of a petition for Letters of Administration to the estate of Daw Hnit presented by the appellant to the Court of the District Judge of Pegu on the 27th September, 1924. The respondent filed a caveat, and on the 3rd December, 1924, she made a counter petition for Letters of Administration against which a caveat was entered by the appellant. The proceedings then took the form of a suit with the respondent as plaintiff and the appellant as defendant, and the case was by consent of parties heard as a regular suit for the determination of the question of succession to the estate of Daw Hnit. The District Judge found that the adoption was not proved, and directed Letters of Administration to be granted to the appellant. On appeal the High Court at Rangoon found that the respondent had proved the adoption, and they ordered Letters of Administration to issue to the respondent. From this decree of the High Court the present appeal has been brought.

U San Ywe and Daw Hnit were residents of Yitkangyi in the Pegu District, and they were well known as the richest persons in the place. They took into their family several poor children and maintained and helped them in life. At the date of the alleged adoption they had an only son named Tun Hmyin, who died about the year 1908. U San Ywe died in 1911, and Daw Hnit on the 29th April, 1924.

The respondent's natural father was a hawker, and during the rains of 1903, while he was crossing a river with his family, the boat was capsized, and his wife and one child were drowned. The respondent, who, with her father, survived, was then about six months old, and her case is that a few weeks after this incident she was adopted by U San Ywe and Daw Hnit as their *keittima* daughter, and was brought up by them and lived continuously with them until the death of Daw Hnit in 1924, except for a short interval in 1919, when, being then about 16 years old, she eloped with Maung Tun Pe, a disciple of U Wimala, the head of a monastery at Yitkangyi, and married him at Thaton. The couple after living there together for about four or six months were brought back to Daw Hnit by U Win, a village headman, and were received back by her in her house. While the respondent was living with Daw Hnit two children were born to her, and she, with her husband and children, lived with Daw Hnit in her house until her death. On the 4th September, 1922, Daw Hnit executed a deed confirming the adoption, and at the same time she executed a power of attorney in favour of Tun Pe, empowering him to manage her estate and affairs, which he did until her death

The appellant denied the adoption, and alleged that neither the deed of adoption nor the power of attorney was executed by Daw Hnit, and that even if the deed of

adoption was executed by her, it was not explained to her, and was obtained by misrepresentation and fraud. He admitted that the respondent lived continuously with Daw Hnit, but alleged that her position in the house was no better than that of other servant girls who were maintained in the house out of charity.

A *keittima* child is a child adopted publicly with the intention that the child shall inherit. The existence of natural children is no bar to such an adoption. No formal ceremony is necessary to constitute adoption, but the adoption must be a matter of publicity and notoriety. It can either be proved by direct evidence of the taking as a *keittima* child on a specified occasion, or it may be inferred from a course of conduct inconsistent with any other supposition: *Ma Ywet* v. *Ma Me* (1); *Maung Thwe* v. *Maung Tun Pe* (2)

The respondent herself gave evidence in the case, and called several witnesses who deposed to the giving and taking in adoption in the presence of some elders specially invited for the occasion. Though they could not fix the exact date of adoption, they all agreed that it was some time after the drowning incident. She also called a large number of witnesses who deposed that they were told by U San Ywe and Daw Hnit that the respondent was their adopted daughter, and that the respondent was treated by them as their own child. The respondent also produced in support of her case several documents amongst which were the deed of adoption, and the power of attorney, and she relied on the terms of certain inscriptions on six marble slabs presented by U San Ywe and Daw Hnit in 1905 to the Shwemawdaw Pagoda at Pegu. The respondent called 21 witnesses in all, and after she herself and 11 of her witnesses including those that had deposed to the adoption had been examined before the District Judge, he was transferred to another place, and the rest of the case was heard by his successor. The appellant also was examined in the case, and he called some evidence to show that the respondent was treated by U San Ywe and Daw Hnit not as their own child, but as a servant girl.

The deed of adoption and power of attorney were alleged to have been executed by Daw Hnit when she was at Natogyi in 1922 for treatment for paralysis. As to the deed of adoption the District Judge found that it was not prepared under the instructions of Daw Hnit, and that even if it was signed by her, as to which the Judge was doubtful, it was not explained to her, and her signature was obtained by fraud. As regards the power of attorney, however, he found that it was executed by her with full knowledge of its contents.

As regards the marble slabs, each slab is said to have inscribed on it at the top the names of U San Ywe, Daw Hnit, their son, Ko Tun Hmyin (who was then dead), and the respondent. As to these slabs there was a conflict of evidence. Maung Pe, a sculptor of Mandalay, gave evidence on behalf of the respondent that the slabs were inscribed by him in 1909 as they now stand on instructions from U San Ywe, and that four of them bore his name on the back and the other two the name of his deceased partner, Maung Po Ket. On the other hand, Maung Sein, a witness for the appellant, said that his father, U Gan, had in 1909 ordered 111 slabs for the *pagoda*, that he allowed several persons to subscribe for some of them, that 6 out of the 111 slabs were subscribed for by U San Ywe and Daw Hnit, and that the headings now on those 6 slabs were not the headings which were originally inscribed on them. It seems that photographs were taken of the inscriptions, but only one was produced. It showed that the letters of the heading were larger than those of the texts below and that the date of the heading was in letters slightly smaller than those of the rest of the heading. Upon this evidence the District Judge found that the headings were forgeries.

The District Judge did not discuss the oral testimony of the witnesses, and having found that the signature of Daw Hnit to the deed of adoption was obtained by fraud, and that the headings of the inscriptions were forgeries, he inferred that the evidence given by the respondent's witnesses was not worthy of credit, and disbelieved the respondent's case.

The learned Judges of the High Court, while agreeing substantially with the District Judge as to his finding on the deed of adoption, differed from him as to his finding on the inscriptions on the slabs. They found that the headings were not subsequent forgeries, but they held that the respondent had failed to prove that the headings were inscribed on the instructions

(1) 3 Ind. Cas. 797; 36 I. A. 192; 10 C. L. J. 253; 11 Bom. L. R. 1193; 5 L. B. R. 118; 3 Bur. L. T. 32; 6 M. L. T. 302; 14 C. W. N. 111; 19 M. L. J. 577 (P. C.).

(2) 42 Ind Cas 863; 44 I A. 251; 22 M. L. T. 411; 22 C. W. N. 97; 27 C. L. J. 68; (1918) M. W. N. 9; 45 C. 1; 20 Bom. L. R. 69; 11 Bur. L. T. 28 (P. C.).

of U San Ywe or Daw Hnit. They examined the other documentary evidence in the case, and accepted the oral testimony of the respondent's witnesses, and held that the adoption was proved.

Their Lordships think that neither the deed of adoption nor the headings on the tablets support the respondent's case. As to the deed of adoption, there are concurrent findings of both the Courts in India, and no case has been made out for departing from the general rule of this Board not to interefere with such findings. As regards the headings on the tablets, their Lordships have examined the evidence, and they see no reason to differ from the finding of the High Court. But though neither of these items is helpful to the respondent's case, there is, in their Lordships' opinion, other documentary evidence which lends support to her case.

First in order of date are certain entries in the assessment rolls. The respondent is described in those entries as Daw Hnit's daughter, and her name appears with that of Daw Hnit in the column of owners. The first entry appears in the assessment rolls for the year 1913-14, which would be about three years after the death of U San Ywe, and her name continues up to the year 1919-20, when it is said it was struck out on instructions from Daw Hnit, this being about the time when she eloped with Tun Pe. The respondent's name was again restored in 1922-23, and it remained on the rolls until the death of Daw Hnit in 1924.

It is the case of both sides that the first entry was made by the Revenue Officer on instructions from Maung Lu Swe, the head labourer and rent-collector of Daw Hnit, but it is urged for the appellant that there is no proof that Lu Swe had any authority from Daw Hnit to ask the Revenue Officer to enter the respondent's name on the rolls. Lu Swe was not examined as a witness, the explanation given by the respondent being that he was then on hostile terms with her. This leaves the position somewhat obscure, and it has been commented upon by both the Courts in India. Their Lordships, however, cannot overlook the fact that in 1913, when the first entry was made, the respondent was only ten years old, and she could not possibly have had any hand in having her name inserted in the records. Her natural father had long since severed all connection with her, and her husband, Tun Pe, had not yet appeared on the scene. There is nothing to suggest that Lu Swe had any interest in having her name entered on the rolls, and, above all in describing her as Daw Hnit's daughter. In these circumstances their Lordships think that the entry must have been authorized by Daw Hnit, and it must have been made with her knowledge and consent. The removal of the respondent's name in the year 1919-20 coincides with her elopement and the consequent change of feeling on the part of Daw Hnit, while the reinsertion of her name in the year 1922-23 marks the restoration of cordial and harmonious relations once again between the two ladies.

Next come the depositions of Daw Hnit in two suits in 1923. It seems that in the year 1922 Daw Hnit granted a lease of her lands to Maung Po Tok, a grand-nephew of U San Ywe, in the joint names of herself and the respondent. In the same year Po Tok borrowed Rs. 510 from Daw Hnit, and executed a promissory note in favour of Daw Hnit and the respondent. In 1923 Daw Hnit and the respondent brought a suit against Po Tok for rent and for money lent. Po Tok put in a defence that the lands had been let to him free of rent because he was a *keittima* son of Daw Hnit. This defence did not succeed, and a decree was passed against him. In that suit Daw Hnit was examined in Court, and in the course of her evidence she said: "Hnin Hlaing is my daughter. Tun Pe is my son-in law and Po Tok is not related to me." This statement seems to their Lordships to be a clear recognition by Daw Hnit of the respondent's status as her adopted daughter.

This was followed by a suit, also in 1923, by Maung Po Kun, another grand-nephew of U San Ywe, against Daw Hnit, in which he claimed a fourth share of the estate on the allegation that he was a *keittima* son of U San Ywe and Daw Hnit, and was also the *orasa* son. The suit was dismissed on the ground that Po Kun had failed to prove the alleged adoption. In that suit Daw Hnit was examined on commission, and in her evidence she said: I did not adopt Maung Po Kun . . . . have affection for Ma Hnin Hlaing. Ma Hnin Hlaing does not want (lit., like) me to give money to anybody, not only to Po Kun." This statement indicates, at the least, that Daw Hnit did not regard the respondent as a mere menial servant in her house.

Their Lordships are satisfied that there is sufficient evidence in this case not only

of the giving and taking in adoption, but also of a course of conduct from which adoption may legitimately be inferred. As regards the appellant himself it appears from his evidence that he left Yitkangyi a few years after the death of U San Ywe, and that he took no interest whatever in the affairs of Daw Hnit. Though present at her funeral ceremonies, he made no claim to perform them which he was entitled to do had he been the heir to her estate. His conduct throughout lends support to the view that he regarded the respondent as the adopted daughter of Daw Hnit and the heir to her estate.

For the reasons stated above, their Lordships are of opinion that this appeal fails, and that it should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The appellants must pay the respondent's costs of this appeal.

R L *Appeal dismissed*

Solicitors for the Appellants.—Messrs. *Stoneham & Sons.*

Solicitors for the Respondent.—Messrs. *Ranken Ford & Chester.*

PRIVY COUNCIL.

Appeal from the Court of Appeal of the Island of Malta.

November 6, 1931.

VISCOUNT DUNEDIN, LORD BLANESBURGH AND LORD DARLING.

GIUSEPPE BIANCO—APPELLANT

versus

GIOVANNI VINCENZO DEMARCO,

SINCE DECEASED—RESPONDENT

Partnership—Absence of partnership deed—Loss in business—Measure of individual liability—Co-partner joining sub-co-partner—Sub-co-partner's liability—Common Law.

Under the Common law of England where there is no partnership deed between the co-partners the loss in the business has to be borne by them in proportion to their contribution of capital. Where a co-partner takes with him a sub-co-partner not in any particular share but whose contribution towards capital is to be a particular sum, if such co-partner contributes further capital towards partnership, the liability of the sub-co-partner in the loss of the business is not thereby increased but will be in proportion to his contribution. [p. 397, col 1.]

Messrs *A. T. Miller* and *C. J Colombos*, for the Appellant.

Messrs. *S. L. Porter* and *H. Atkins*, for the Respondent.

Viscount Dunedin.—On or about the 8th January, 1920, the respondent Demarco was approached by one Dendrinos to embark on the venture of buying a yacht. Demarco and the appellant Bianco were well-known to each other and Demarco communicated Dendrinos' proposal to Bianco. He explained that it was proposed that the capital sum of £12,000 was to be contributed by three adventurers, himself, Dendrinos and another, whose name was not at that time known, but who ultimately turned out to be one Gasan, but the rest of the money necessary was to be raised by mortgage. He was himself contributing £ 4,000. He then asked Bianco if he would take a portion of his share, to which Bianco answered, "I will take £2,000," and on the 8th January he paid £ 2,000 to Demarco. Bianco says he added the words, "and not a penny more," but as that is not admitted by Demarco it can be left out of account. The rest of the money necessary to meet the purchase price was to be raised by mortgages and the idea was to pay off the mortgages out of freights which at the time were very remunerative. But the proposal as to the purchase of the yacht came to nothing as the yacht was bought by someone else. Dendrinos then turned his attentions to acquiring a ship called the "Ituna." Nothing was said as to £12,000. On the contrary the original contribution was to be £13,000, but the general idea was the same, namely, that the ship should be got by an initial contribution of capital by the same three, Dendrinos, Demarco and Gasan, and the necessary extra money raised by mortgage. This was so far done, but with this change, that before all the mortgages necessary had been raised (for the price of the ship was payable by instalments and, therefore, all the money was not needed at once) Gasan and Demarco had quarrelled with Dendrinos and the partnership or co adventurership was dissolved, and two persons of the name of Jackson took the place of Dendrinos. All these arrangements were made without Bianco being consulted in any way, but the fact of the new venture in the "Ituna" was in its initiation communicated to him, and he undoubtedly agreed and acquiesced in the fact that the £2,000 which had been paid for the yacht should be applied to the 'Ituna" venture,

The "Ituna" was, in fact, purchased on the 19th April, 1920, and the initial payment was made as follows:—Demarco paid £6,000, Dendrinos £3,000 and Gasan £4,000 Barclays Bank advanced £12,500 Bills for £12,500 were endorsed by Gasan, in whose name the ship was registered, payable in quarterly instalments on the days of 9th of July and 9th

October, 1920 and 9th January and 2th April 1921.

The "Ituna" made several voyages and earned. remunerative freights, but not enough in themselves to pay off the mortgages. Then in 1921 the "Ituna" was lost by an explosion. An action was subsequently raised under an insurance policy against war risks and failed. The result was that as the mortgages and the bills had to be met and as the earnings of freight had not gone on long enough to make good the money due, there was a very considerable loss on the venture.

As there was no partnership deed between the co-adventurers the loss fell to be borne by them in terms of a section in the Maltese Code, which need not be quoted as it is just the same as the Common law of England, in proportion to their contribution of capital. The practical result to Demarco was that, as he puts it in this action, he had to pay out £11,931 2s. 11d. The action was raised by him against Bianco to obtain a declaration that Bianco had agreed to be a co-adventurer with him to the extent of one half of his, Demarco's, share, and to recover the half of the above sum under deduction of the £2,000 paid as aforesaid and a further sum of £.700 which had been paid by Bianco to Demarco on 7th July, 1920. The defendant Bianco denied that he was associated with the plaintiff as a co-adventurer to the extent of one half of the plaintiff's share of the capital, but admitted that he "invested the sum of £.2,000 in the purchase of the ship." The £ 700 he said was a simple loan. The Judge of the Commercial Court pronounced a judgment declaring:—

"That the defendant was not an associate of the plaintiff in one-half of the share which the latter had in the steamer 'Ituna,' but that the defendant had become an associate of the plaintiff to the extent of two thousand seven hundred pounds; (3) remitting the cause for judgment in connection with the other claim on a date to be fixed after the present judgment shall have become absolute; (4) in view of the difficulties the case has presented, ordering each party to bear his own costs."

On appeal to the Court of Appeal they reversed the judgment. Their reasons may be gathered from the following passage:—

"Whereas when the deed of partnership does not determine each partner's share of the profits and the losses, such share is in proportion to the amount contributed in the partnership estate (Art. 1426 Ordinance No. VII of 1868,) which provision is applicable to associations in participation. The parties interested having agreed to contribute at the formation of the association a capital of twelve thousand pounds £12,000 then considered necessary, in three equal parts, and Bianco having accepted to contribute one-half of the plaintiff's third, there can be no doubt that Bianco intended associating himself with Demarco in the proportion of one-half of the latter's share. The disbursements subsequently made by Demarco, rather than contributions, constitute advances or claims against the association which should have been repaid to him from the steamer's first freights; such advances or claims could not alter his share in the association. A partner cannot, at his pleasure, alter the partnership deed by increasing his contribution and thereby his share of the profits. As Vivante (Diritto Commerciale, Volume II, para 308) holds, no partner can contribute a larger share than that agreed upon, nor can he increase his contribution by notwithdrawing the profits accruing therefrom; these profits are not a contribution towards the partnership funds, but a deposit. Just as Demarco by disbursing during the association further amounts could not be obtained from third parties, could not alter his share of participation in the steamer 'Ituna' as originally established, so also Bianco, notwithstanding those disbursements, continued to be an associate in the proportion of 2,000/12,000, or one-half of Demarco's share of one-third. And as the said association was dissolved owing to the sinking of the steamer in March 1921, Bianco is responsible for the losses sustained by the association in the same proportion, although his share thereof exceeds two thousand pounds (£2,000)."

Against this judgment the present appeal has been taken to His Majesty in Council. Their Lordships are quite unable to agree with the views above expressed by the Court of Appeal. The objections to the reasoning are numerous. It must be kept steadily in view that the defendant was no partner in the partnership or co-adventure for the purchase of the yacht. He was only a sub-co-adventurer with the plaintiff, and the sum of the contribution was only fixed by the plaintiff saying that he was a member of a partnership where his capital contribution was to be £ 4,000, and the defendant saying, "I will take £2,000 of it." Now so long as matters remained exactly as they were it was true that £2,000 being one-half of £4,000, it might be said that the defendant was a co-adventurer to the extent of one-half of the plaintiff's share. But it is quite another affair to say that this fractional co efficient is a part of the bargain. Suppose it had been found necessary and expedient for the three partners Demarco, Dendrinos and Gasan to contribute further capital, an operation which they could do without consulting the defendant, could it possibly be said that the defendant was then bound to be co-adventurer with the plaintiff in one-half of the extra capital which the plaintiff contributed? The argument that he was so bound, bad as it stands in relation to the yacht, becomes little short of fantastic when transferred to an absolutely new adventure, *i. e.*, the purchase of the "Ituna." There was no mention whatever

made of a sum of £12,000 in regard to the "Ituna."

The Court of Appeal in the passage quoted spoke of the plaintiff's third share in the "Ituna." The plaintiff never had a third share in the sense of an equal third share. As a matter of fact the initial contribution of capital for the "Ituna" was not £12,000 but £13,000, of which £.6,000 was contributed by the plaintiff, £.4,000 by Gasan, and £ 3,000 by Dendrinos. Further advances of capital became necessary, and in the end the plaintiff contributed £9,500 of capital. All this is clear from the books kept by the plaintiff himself. He never consulted the defendant as to the additional advances which had to be made, and consequently the theory of the Court of Appeal that the capital remained £12,000 divided into three equal shares and that all other contributions were mere payments on loan, is, in the face of facts, purely imaginary. There is, therefore, no ground for holding the defendant a contributor in respect of half of the plaintiff's ultimate contribution. But from his acquiescence that the sum of £2,000 which he had paid for the acquisition of the yacht should be utilised for the purchase of the "Ituna," it results clearly that to the extent of the £2,000 he became a co-adventurer with the plaintiff As to the sum of £700 there is more difficulty. This sum was undoubtedly paid by the defendant to the plaintiff on or about 7th July 1920, when the plaintiff being in want of money applied to the defendant. The plaintiff says that he asked the defendant whether he would enter the sum "to the ship account or the cattle account," and that the defendant replied, "Do as you like," and that it was entered to the ship account. The cattle account was an account referring to other transactions between the plaintiff and the defendant. The defendant says that it was a mere loan and that view was taken by the Court of Appeal. Their view, however, was almost a necessary corollary to the view they had taken on the main question, but on consideration their Lordships have come to the conclusion that the Judge of the Commercial Court was right, and that the question meant, "Will you take this as an extra contribution to capital or as a payment to be placed to your credit in the cattle transactions?' that the answer being "Do as you like," the plaintiff was entitled to do what he did and add it to the initial of £2,000. As already mentioned, there are other transactions between the plaintiff and the defendant and another action depends in the Commercial Court as to these transactions.

Their Lordships will, therefore, humbly advise His Majesty to reverse the judgment of the Court of Appeal and to restore the judgment of the Judge of first instance. The appellant must have his costs of this appeal, but as in the Court below he at first took up the position that the £.700 was a mere loan, there must be no costs to either party in the Courts below. The petition for the admission of further evidence must be dismissed without any order as to the costs of it.

R. L. *Appeal accepted.*

PRIVY COUNCIL.

Appeal from the Calcutta High Court.

November 20, 1931.

LORD THANKERTON, LORD SALVESEN AND SIR GEORGE LOWNDES.

JOGESH CHANDRA ROY—APPELLANT

versus

EMDAD MEAH—RESPONDENT.

Landlord and tenant—Suit for rent—Tenant denying possession under lease—Onus of proof—Possession, nature of—Tenant's partial possession—Decree for proportionate rent—Point of proportionate rent raised for first time before Privy Council—Practice.

In a suit for rent where the tenant denies that he has ever got possession of the property leased, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant to pay rent. But the onus would be primarily on the tenant where the tenant has already paid the rent under the lease or where the tenant claims that certain properties of which he had not got possession were within the properties let which the landlord denied. *Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (1) and *Kumar Arun Chandra Singha* v. *Bhagaban Chandra Roy Choudhury* (2), referred to. [p. 400, col. 2.]

To succeed in a suit for rent the landlord must not only show that the tenant is in possession of the subject of the lease, but that such possession was attributable to the lease, or might be so. [p. 401, col. 1.]

Where it is proved that the tenant obtained possession of part of the properties under the lease the Court should give a decree for rent subject to an abatement in respect of properties of which the possession is not given. [*ibid.*]

[Their Lordships of the Privy Council allowed the point of proportionate decree for rent to be raised for the first time before their Lordships.]

Mr. *Pringle*, for the Appellant.

Messrs. *W. Wallach* and *A. Pennell*, for the Respondent.

Lord Thankerton.—These are two consolidated appeals from two decrees of the High Court of Judicature at Fort William in Bengal, dated the 12th June, 1928, which reversed a decree of the District Judge of Chittagong, dated the 27th June, 1925, modifying a decree of the Subordinate Judge of Chittagong, dated the 14th June, 1924, and dismissed the suit, in which the appellant was plaintiff, with costs.

The appellant is the owner of a Noabad *taluk* in the District of Chittagong. At the time of the Cadastral Survey operations of 1895 Homar Ali, the father of the respondent, was recorded as holding the tenancy of two *Jotes*, Nos. 83 and 98, in the survey records. Homar Ali died in 1902, leaving a widow, a son (the respondent) and four daughters.

In the present suit, which was instituted on the 15th April, 1920, the appellant seeks to recover from the respondent rent for the year 1326 B.S. (1919-1920) under a *kabuliyat* dated the 11th October, 1917, which related to part of *Jote* No. 83, but it will be necessary to relate the events which led up to the execution of the *kabuliyat* by the respondent

In 1910 the appellant instituted a suit for possession of *Jote* No. 83 against Homar Ali's widow and the respondent and obtained a decree in his favour in 1912. He executed this decree in 1913

In 1916 he brought a similar suit for possession of *Jote* No. 98 against not only the widow and the present respondent, but also against Homar Ali's four daughters as well. In October, 1917, this suit was compromised as between the appellant and Homar Ali's widow and the respondent, the daughters being first excluded from the category of defendants on the petition of the appellant; a *solehnama* was then executed by the appellant, the widow and the respondent, under which, out of the 20 *drones* odd of which the holding consisted, the widow and the respondent were to hold 11 *drones* odd under the appellant at a rent thereby fixed and the appellant was to get *khas* possession of the balance of 8 *drones* odd. The respondent further agreed to pay a sum of Rs. 1,400 in respect of the appellant's costs and mesne profits by instalments and executed a mortgage therefor. In conformity with the compromise the appellant obtained a decree dated the 5th December, 1917. It was part of the settlement of that suit, which related to *Jote* No. 98, that the respondent should execute the *kabuliyat* relative to *Jote* No. 83, dated the 11th October, 1917, already referred to, which forms the basis of the present suit.

By this *kabuliyat* the respondent took a *be kaemi* (non-permanent) settlement as a yearly tenant of 10 *drones* odd out of the 14 *drones* 5 *kanis* odd, which made up *Jote* No. 83 and which were stated to be in the *khas* possession of the appellant, and agreed to pay an annual rent of Rs. 50 and 1,858 *arhis* 9½ *seers* of paddy or Rs. 1,239 1, the price thereof.

In January, 1920, the respondent's sisters brought a suit against the present appellant and respondent for a declaration of their right and confirmation of their possession to the extent of their share as co-heirs of Homar Ali in *Jote* No. 83.

The present suit was brought in April, 1920, and the relief claimed by the appellant is a decree for Rs. 2,048 14 0, made up of (1) the market price of 1 858 *arhis* 9½ *seers* of paddy, with damages thereon at 25 per cent., and (2) cash rent of Rs. 50, with damages at 25 per cent., and the further claims all other or further reliefs which the Court may think fit and proper. The leading defence was that the *kabuliyat* was obtained by the appellant from the respondent by fraud and undue influence; this defence was rejected by the Subordinate Judge and the District Judge and is no longer in issue.

The remaining defences were that the appellant had failed to put the respondent in possession of the subjects let and was therefore not entitled to rent, and that, in any event, the appellant was not entitled to the paddy rent at market price, but only at the price fixed by the *kabuliyat*, and was not entitled to damages.

The suit by the respondent's sisters and the present suit were before the same Courts. On the 13th June, 1924, the Subordinate Judge, gave decree in favour of the plaintiffs in the former suit, and on the 14th June he gave the appellant decree in the present suit for Rs. 50 cash rent and Rs. 1,589-4-0, the market price of the paddy with damages at the reduced rate of 6¼ per cent. He held that the respondent knew, when he executed the *kabuliyat*, that the whole 16 annas would not be available, and that he could not turn round and say that because the appellant could not put him in possession of the whole 16 annas he was not liable to pay rent or that the *kabuliyat* was not binding on him. The appellant appealed against the decree in the

sister's suit, and both parties appealed against the decree in the present suit, to the District Judge.

The District Judge delivered judgment on the appeals in the present suit on the 27th June, 1925. The learned Judge held that the onus was on the respondent to prove that he did not get actual possession of any portion of the land and he declined to accept the respondent's evidence without corroboration; he, therefore, held that the respondent got possession of all the land of the *kabuliyat*. Differing from the Subordinate Judge he held that the paddy rent was fixed at the price in the *kabuliyat*, and he increased the rate of damages to 25 per cent Subject to these modifications, he decreed in the same terms as the Subordinate Judge.

On the 19th August, 1925, the District Judge affirmed the decree of the Subordinate Judge in the sisters' suit against which decision the present appellant appealed to the High Court. In the present suit both parties appealed to the High Court. The appeals in both suits ware heard together and one judgment dealing with both suits was delivered by the High Court on the 12th June, 1928. In the sisters' suit the judgments of both lower Courts were affirmed, but in the present suit the judgments of the lower Courts were reversed and the appellant's suit was dismissed on the ground that the onus was on the appellant as landlord to prove that he had put the tenant in possession—therein differing from the District Judge—and that, in view of the decision in the sisters' suit, it was not possible for the appellant to show that he had put the respondent in possession of the share in which the possession of the respondent's sisters had been confirmed, there being no suggestion anywhere that the latter had at any time been actually dispossessed in respect of that share.

The decree of the High Court in the sisters' suit has not been appealed from, and is now final, but the appellant has appealed against the decree of dismissal of the present suit.

The appellant maintained that the decision of the District Judge was right; he did not press his claim for the market price of the paddy rent. He contended that the District Judge rightly put the onus on the respondent of proving non-delivery of possession and claimed that the District Judge had found as a fact that the respondent was in actual possession, of all the land of *kabuliyat*, such finding being final and binding under s. 100 of the Civil Procedure Code. The passage founded on in the judgment of the District Judge is as follows:—

"The question is whether the appellant" (*i. e.*, the present respondent) "was given actual possession so as to enable him to cultivate it Such possession is quite distinct from the constructive possession of a female co-sharer, which was all that was necessarily in issue in the other suit. The onus is on the appellant to show that he did not get actual possession of any portion of the land. On this point there is only defendant's uncorroborated evidence. He says; 'My father's heirs did not allow me to take possession of the lands covered by the *patta*. We went to Bharat Babu and Jogesh Babu and told them that I could not get possession of the land. The lands were in possession of myself and my father's other heirs. I got no possession of lands outside those which were already in my possession.' If he had stated that there had been partition among himself and his sisters and that they remained in possession of their shares, his case would have been at least intelligible, but he does not say so, and, if he had, I should not have believed him without corroboration, I hold that he got possession of all the land of the *kabuliyat*."

It is clear that the finding in the concluding sentence is based on the failure of the present respondent to discharge the onus of proof which the District Judge held to be incumbent on him, and is not a finding on positive evidence. Their Lordships are unable to agree that the onus was on the tenant in the present case. In their opinion, where there is no dispute as to the identity of the subjects let, but the tenant denies that he has ever got possession of the subjects, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant's obligation to pay rent The cases cited by Counsel for the appellant were either cases where the tenant had already paid rent under the lease or where the tenant claimed that certain subjects, of which he had not got possession, were within the subjects let, which the landlord denied. In these cases the onus would primarily be on the tenant. (*Durga Prasad Singh* v. *Rajendra Narayan Bagchi* (1), *Kumar Arun Chandra Singha* v. *Bhagaban Chandra Roy Choudhury* (2) It was not proved in the present suit that the respondent had paid a previous year's rent.

But, further, their Lordships are of opinion that the District Judge erred in treat.

(1) 21 Ind. Cas. 750; 40 I. A. 223; 18 C. W. N. 66; (1914) 3 M. W. N. 1; 15 M L. T. 68; 19 C. L. J. 95; 26 M. L. J. 25; 16 Bom. L. R. 42; 41 C. 493 (P. C.).

(2) 133 Ind. Cas. 577; 35 C. W. N. 1011; A. I. R. 1931 Cal. 537; 54 C. L. J. 31; Ind. Rul. (1931) Cal. 705.

ing the constructive possession of a female co-sharer as irrelevant The landlord must not only show that the tenant is in possession of the subjects of the lease, but that such possession was attributable to the lease, or might be so. But in the present case it is now certain that possession of the subjects must be attributed—to the extent of their 9 annas 4 pies share—to the sister's possession, for the decree in their favour declares their right and confirms their possession thereof, and, if they were not in possession and required an order for possession, a claim to a mere declaration would not be competent, in view of the proviso to s. 42 of the Specific Relief Act. Even if they were not in actual possession, the sisters' right to such share in the subjects is established, and the appellant could not have given possession to the respondent of any part of the sisters' interest, which was an undivided share and affected the whole of the holding.

Their Lordships are therefore of opinion that the respondent has not been given possession under the *kabuliyat* of the land thereby let, and that the appellant is not entitled to recover the rent as claimed. But the appellant maintained alternatively that he was entitled to the rent claimed, subject to an abatement in respect of the sisters' share, of which he was unable to give possession under the *kabuliyat*. Admittedly such a claim was made for the first time by the appellant at the hearing of this appeal. It is incidentally referred to by the respondent in ground No. 20 of his memorandum of appeal to the District Judge, and is nowhere else referred to, not even in the appellant's case.

Their Lordships agree with the conclusion of the Subordinate Judge on the evidence that the respondent got possession of that share of the land that was available for possession apart from the sisters' share; indeed, this admission is involved in the respondent's own evidence. While this case for an abated rent should have been raised and investigated along with the other questions in the case, their Lordships are of opinion that it would be an injustice, if the appellant is prepared to submit to the penalties of his failure to raise it earlier, that the respondent should escape from payment of rent in respect of the possession which he can alone attribute to the *kabuliyat*.

The position is somewhat unusual. *Jote* No. 83 consisted of 14 *drones* odd; of the 16 annas interest therein the respondent's sisters are entitled to a 9 annas 4 pies share under the decree of 1928, whereas under the decree of 1912 the respondent and the widow, though equally heirs of Homar Ali, have no share as such in the *Jote*, and the appellant has right to the balance of the 16 annas. The *kabuliyat* dealt with 10 *drones* odd out of the 14 *drones* odd, and one Asadali has obtained settlement of the remaining 4 *drones* odd from the appellant. Their Lordships are not satisfied that they have before them all the material on which to decide on the proper amount of the abatement. For instance, it may depend on the circumstances whether the rent under the *kabuliyat* should be apportioned as if the sisters had a 9 annas 4 pies interest in the land of the *kabuliyat*, or whether the 16 annas interest in the whole 14 *drones* of the *Jote* should be apportioned and the whole 4 *drones*, which were reserved by the appellant from the *kabuliyat*, should be treated as part of the appellant's share of the 16 annas interest in the whole *Jote*. If this were so, it might be that the sisters would be entitled to a larger share in the 10 *drones*. Accordingly their Lordships are unable to dispose of the appellant's claim for an abated rent, and, in accordance with the appellant's request, if their Lordships should take that the view, the case will be remitted for the purpose of investigating and deciding what is the proper abatement to make on the rent under the *kabuliyat* for the year 1919-1920 in respect of the sisters' interest as heirs of Homar Ali in *Jote* No. 83, and for a decree for the rent after deduction of such abatement.

Accordingly the appeal should be allowed, but the appellant must pay the costs of the appeal, as he has failed in the issues raised in the case on appeal. The decrees of the Courts below should be set aside, and the case should be remitted to the High Court as above stated, leaving the costs already incurred below to be dealt with by that Court. Their Lordships will humbly advise His Majesty accordingly.

A.

Solicitors for the Appellant:—Messrs. *Barrow Rogers & Nevill.*

Solicitors for the Respondent:—Mr. *J. E. Lambert.*

PRIVY COUNCIL.

Appeal from the Allahabad High Court.

December 14, 1931.

VISCOUNT DUNEDIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

HANS NATH AND OTHERS—APPELLANTS

versus

RAGHO PRASAD SINGH—

RESPONDENT.

Pre-emption—Vendee acquiring share during pendency of suit for pre-emption—Claim for pre-emption, whether defeated—Crucial date—Agra Pre-emption Act (XI of 1922), s. 19.

Under the law as it stood before the passing of the Agra Pre-emption Act of 1922, the vendee's acquisition by gift of a share in the village, pending a co-sharer's suit for pre-emption would defeat that co-sharer's claim for pre-emption. The decisive date as regards the right of the co-sharer to pre-empt is the date of the decree. *Bihari Lal* v. *Mohan Singh* (10), approved, *Ram Gopal* v. *Piari Lal* (9), *Qudrat-unnissa* v. *Abdul Rashid* (11), *Ram Saran Das* v. *Bhagwat Prasad* (12) and *Digambar Singh* v. *Ahmad Said Khan* (19), approved. [p 404, col. 2]

Mr. *B Dube* for the Appellants.

Messrs. *E B. Raikes* and *H. R. Majid*, for the Respondent.

Sir George Lowndes.—The dispute in this appeal is as to the appellants' right to pre emption in respect of a 21/256 share in each of two villages known as *Mouza* Khurma and Jungle Khurma. On 27th July, 1921, the shares in question were sold by one Thakur Prasad to the respondent. It is admitted that at the date of the sale the vendor and all the appellants were co-sharers in the villages, and that the respondent was not.

Two suits were instituted in the Court of the Subordinate Judge of Gorakhpur on 15th and 26th July, 1922, respectively by the different appellants against the vendor and the respondent, in which the right of pre-emption by village custom was asserted.

On 2nd November, 1922, during the pendency of these suits the respondent acquired, *ex facie* by gift, from another co-sharer a small independent fractional share in the villages. If this transfer had been made before suit raised, and had admittedly been by gift, it could not have been suggested that the custom alleged by the appellants applied.

On the execution of the transfer last referred to, a third suit, No. 859 of 1922, was instituted by two of the appellants, alleging that the gift was merely colourable and that the transaction was in reality a sale to the respondent, and claiming the right of pre-emption in the fraction concerned, the value of which appears to have been in the neighbourhood of Rs. 20. This suit was accordingly instituted in the Munsif's Court, but was transferred to the Court of the Subordinate Judge, and all the three suits were tried together.

Issues were raised as to the custom, the gift, the preferential right of the plaintiffs, and the sale price. The Subordinate Judge held the custom to be proved on the strength of entries in the *wajib-ul-arz* of each of the two villages. He was of opinion that the alleged gift was in reality a sale for Rs. 21-4-0; that the plaintiffs (the present appellants) had under the custom a preferential right over the respondent; and that the sale price in the case of the original transaction was that stated in the deed, *viz*, Rs. 12 000. He accordingly, on 18th April, 1923, made decrees for pre-emption in all the threesuits upon the usual terms.

The respondent appealed in each suit. His appeal in the two suits first instituted went in the ordinary course direct to the High Court, but that in the third suit (No. 859 of 1922), owing to the small value of the property, went to the District Judge, and was decided by him with commendable promptitude on 22nd October of the same year. He, for the reasons stated in his judgment, disbelieved the evidence of the plaintiffs' witnesses as to the payment for the fraction, and held that the transaction was a gift, and he accordingly dismissed the suit.

The appeals in the other two suits took more than three and a half years to reach a hearing in the High Court, which their Lordships cannot but regard as unfortunate. By that time a second appeal in the other suit which had been filed from the decree of the District Judge, was also ripe for hearing. All the three appeals came before the High Court on the same day, but that from the District Judge's decree (Suit No. 859 of 1922) was decided first. It met with but short shrift The learned Judges held, no doubt quite correctly, that the finding of the lower Appellate Court as to the gift was a finding of fact which was binding upon them in second appeal, and that therefore the suit was rightly dismissed.

They then proceeded to consider the other two appeals, which they dealt with by one judgment. There was apparently no argument as to proof of the custom, the judgment being based upon the assumption that it was duly established. They were of opinion that the plaintiff

(the present appellants) had "entirely failed to prove that the deed of gift was in reality a deed of sale" and held, following a previous decision of their own High Court *Baldeo Missir* v. *Ram Lagan Shukul* (1) that the respondent had acquired by the gift

"an indefeasible right as a co-sharer in the village before the first Court's decree."

and that this defeated the appellants' claim They accordingly set aside the decrees passed by the trial Judge, and dismissed these suits also. A consolidated appeal in all the three suits now comes before the Board by special leave.

The limits within which effect should be given to a customary right of pre-emption, such as the appellants assert in the present case, have been the subject of constant discussion in the Courts of the Province of Agra. Such claims appear to be of great frequency, and a Special Bench of the High Court at Allahabad seems to have been constituted to deal with them in order to ensure uniformity of decision In 1922 it was thought desirable to legislate, and the Agra Pre emption Act XI of 1922 was passed ss. 19 and 20 of which dealt with question similar to those which have been debated in the present appeal, but it was held in several cases that no change had been made in the law as previously interpreted by the High Court, and in accordance with which the decision under appeal was given. The Act of 1922, was eventually amended by Act IX of 1929, s 5 of which enacts that a right of pre-emption cannot be defeated by a gift subsequent to suit. The question in issue between the parties in these appeals therefore, can hardly arise in the case of future transactions. It is common ground that the present case falls to be decided upon the law as it stood before the passing of Act IX of 1922, and their Lordships think that if there was a current of decisions in the Allahabad High Court against the contention of the appellants, as the judgment of the Appellate Court would seem to indicate, it should not now be disturbed if not manifestly wrong.

When a sale has taken place to a stranger there are three possible views as to the rights of a co sharer *viz*. (1) that an indefeasible right of pre-emption arises by the sale itself and that no change in the status or relations of the parties after the sale can affect the question between them; or (2) that the criterion must be the position of the parties when the right is formally asserted by the institution of a suit; or (3) that the validity of the claim must be judged on the facts existing on the date when a decree has to be passed.

The first view for which theoretically a good deal could be said, has been definitely discarded in the Allahabad Court. So it has been held in several cases that where between the dates of what may be called for convenience the pre-emption sale and the institution of the suit, the pre-emptor has lost his status as a co-sharer by the partition of the village: *Janki Prasad* v. *Ishav Dar* (2) or the stranger purchaser, has resold to another co-sharer *Suresh Mal* v. *Hukam Singh* (3) or has become himself a co-sharer by an undisputed purchase or by a gift: *Ram Hit Singh* v. *Narain Rai* (4) the right of pre-emption is lost.

Counsel for the appellants does not dispute the correctness of any of these decisions; his contention is that the second view is the right one in the judgment under appeal it was the third view that prevailed.

There are no doubt expressions here and there in the decided cases which suggest that the date of the institution of the suit is the crucial date, *Saliq un Nissa* v. *Mati Ahmad* (5) *Rohan Singh* v. *Bhau Lal* (6), and there is a definite body of authority that a re sale by the stranger-purchaser after suit will not defeat the pre emptor, *Ghasitoy* v. *Gobind Das* (7) and *Kehar Singh* v. *Jahangir Singh* (8) but these decisions may all, their Lordships think, be ascribed to the operation of the doctrine of *lis pendens* as embodied in s 52, Transfer of Property Act 1882, and not to any special aspect of the law of pre-emption.

Apart from these cases the *cursus curiae* is, their Lordships think, clearly against the contention of the appellants. It was held as long ago as 1899 by Strachey, C.J., and Banerji, J., that a partition of the village effected after suit filed, but before decree, deprived the pre-emptor of his right *Ram Gopal* v. *Piari Lal* (9). Following this decision and quoting from the judg-

(1) 77 Ind. Cas. 694; A. I. R. 1924 All 82; 45 A. 709; 21 A. L. J. 648.

(2) 21 A. 374; A. W. N. 1899, 126.

(3) 20 A. 100; A. W. N. 1898, 260.

(4) 26 A. 389; A. W. N. 1904, 68; 1 A. L. J. 209.

(5) 25 A. 418; A. W. N. 1903, 74.

(6) 3 Ind. Cas. 42; 31 A. 530; 6 A. L. J. 699.

(7) 30 A. 467; 5 A. L. J. 477; A. W. N. 1908; 221.

(8) 88 Ind Cas. 761; A. I. R. 1925 487; 47 A. 625; 23 A. L. J. 336; L. R. 6 A. 416 Civ.

(9) 21 A. 441; A. W. N. 1899, 163.

ment of the learned Chief Justice at page 444* a case almost precisely similar to the one now before their Lordships was decided in January, 1920, by Tudball and Rafiq, JJ., who held that the vendee's acquisition by gift of a share in the village pending suit defeated the claim of the plaintiff co-sharer to pre emption: *Bihari Lal* v. *Mohan Singh* (10). It is not suggested that either of these decisions has been dissented from in principle in the Allahabad Court; on the contrary the doctrine that the plaintiff's preferential right must be in existence at the date of the decree has been treated as the settled law of the Province: *Baldeo Misir* v. *Ram Lagan Shukul* (1) *Qudratun-nissa* v. *Abdul Rashid* (11), and *Ram Saran Das* v *Bhagwat Prasad* (12).

This being the state of the authorities in the light of which the present appeals came before the Board, it only remains to consider whether the view taken by the Allahabad High Court, that the decisive date is that of the decree is one that can reasonably be supported.

The argument for the appellants which would make the filing of the suit the fact which crystallizes the rights of the parties is mainly based upon the maxim *pendente lite nihil innovetur*. So far as the principle of this maxim finds expression in s. 52, Transfer of Property Act, it undoubtedly applies, and due effect has been given to it in cases where the defence relied upon the resale to a co sharer pending suit: see the instances cited above. But no authority has been brought to their Lordships' notice which would give a wider application to the maxim that this, or would suggest a general doctrine of the law that nothing occurring between the date of the institution of the suit and the decree could alter the relations existing between the parties. The maxim has been cited and the doctrine considered in many cases (*Ravji Narayan* v. *Krishnaji Lakshman* (13) and cases there cited *Manual Fruval* v. *Sanagapalli* (14), *Krishappa* v. *Bahira* (15); *Brahannayaki* v. *Krishna* (16) and *Byramji* v. *Chunilal* (17) before the passing of the Transfer of Propery Act, but it has never, so far as their Lordships can discover, been applied except in cases which would now come under s. 52 of that Act. Its application in England is discussed in Storey's Equity Jurisprudence, ss. 405-6 where the cases are collected, but the learned author seems to regard the maxim applicable only to "a purchase made of property actually in litigation"; see also *Bellamy* v. *Sabine* (18).

It has also been brought to their Lordship's notice that the Courts of neighbouring Provinces have dissented from the Allahabad decisions on various points and various grounds but in the view their Lordships have taken of this appeal they think, that no useful purpose would be served by an examination of these cases. They are satisfied that the decision of the High Court now under appeal is in accordance with a consensus of judicial opinion in the Agra Province, which they think should not now be disturbed. It is stated by Sir John Edge in delivering the judgment of the Board in *Digambar Singh* v. *Ahmad Said Khan* (19) at page 18* that:—

"In all cases the object (of a custom of pre-emption) is as far as is possible to prevent strangers to a village from becoming sharers in the village."

If this object would not be attained by a decree in favour of the plaintiff-pre-emptor, it may not unreasonably be held that such a decree should not be passed. In the present case it is not now contested that the respondent was at the time when the appellants' suits stood for adjudication a co-sharer in the villages and no decree which might have been passed in their favour could deprive him of his status as such. If the acquisition by him of a share after the pre-emption sale but before the suit was instituted would be effective to defeat the appellants' claim, as it is admitted that it would, their Lordships think it difficult to see, why the same reasoning should not be applicable in the case of a share acquired at any time before the adjudication of the suit.

For these reasons their Lordships are of opinion that these consolidated appeals fail and that the decrees passed by the High

(10) 55 Ind. Cas. 71; 42 A. 268; 18 A. L. J. 220; 2 U. P. L. R. (A.) 48.
(11) 96 Ind. Cas. 549; A. I R. 1926 All. 661; 48 A. 616; 24 A. L. J. 773.
(12) 113 Ind. Cas. 442; A. I. R. 1929 All. 53; 51 A. 411; (1929) A. L J. 290 (F. B).
(13) 11 Bom. H. C. R. 139.
(14) 7 M. H. C 104.
(15) 8 Bom. H. C. R. 55.
(16) 9 M. 92.
(17) 27 B. 266; 5 Bom. L. R. 21.
(18) (1858) 1 De Gex. & J. 566; 26 L. J. Ch. 797; 3 Jur. (N. S.) 943; 6 W. R. 1.
(19) 28 Ind. Cas. 34; A. I R. 1914 P. C. 11; 42 I. A. 10; 37 A. 129; 13 A L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 Cr. L. J. 237; 28 M L. J. 556; 17 Bom. L R. 393; (1915) M. W. N. 581 (P. C.).

*Page of 21 A. L. J.—[Ed.]
*Page of 42 I. A.—[Ed.]

Court must be affirmed, and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the respondent.

A. *Appeals dismissed.*

Solicitors for the Appellants—Messrs. *Hy. S. L. Polak.*

Solicitors for the Respondent—Messrs. *Hardcastle Sanders & Co.*

PRIVY COUNCIL.

Appeal from the Calcutta High Court.

November 24, 1931.

LORD THANKERTON, LORD SALVESEN AND SIR GEORGE LOWNDES.

PROMATHA NATH MITTRA AND OTHERS —APPELLANTS

versus

GOSTHA BEHARI SEN AND OTHERS— RESPONDENTS.

Specific Relief Act (I of 1877), ss. 14, 15, 16—Co-sharer agreeing to lease entire property believing other co-sharer had given consent—Other co-sharer refusing to join—Suit for specific performance—Maintainability—Construction of contract.

Where a co-sharer professed to grant a lease of the entire estate in a property of which he held a share only, in the belief that the lessee had already obtained the consent of the other co-sharer :

Held, that it could not be deemed that there was a concluded contract, whereby the co-sharer undertook a binding obligation on behalf of himself and the other co-sharer to obtain the lease of the property and no suit for specific performance to execute a *kabuliyat* and give possession can lie against the entire body of the proprietors. [p. 405, col. 2; p. 406, col 1.]

Held, further, that even assuming that there was a concluded contract, specific performance of the agreement in part could not be decreed under s 15, Specific Relief Act, as the plaintiff had not relinquished all claim to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendants. [p. 407, col. 2]

Messrs. *A. M. Dunne* and *B Dube*, for the Appellants.

Mr. *S. Hyam*, for the Respondents.

Lord Salvesen.—This is an appeal from a judgment and decree dated 16th August, 1928, of the High Court of Judicature at Fort William in Bengal, which affirmed a judgment and decree dated 13th February, 1926, of the Additional District Judge of Alipore, who had reversed the judgment and decree dated 21st August, 1924, of the Subordinate Judge of Alipore.

The facts of the case may be very shortly stated. The suit relates to three plots of land of the total area of 6 *bighas*, situated not far from Calcutta. The appellants, who are known as the Mittras of Shambazar, and are hereafter referred to as Mittras have a 12 annas undivided share in these lands. The defendants-respondents, hereinafter referred to as Boses own a 4 anna share. The appearing respondent, Gostha Behari Sen (hereinafter called the respondent), was desirous of obtaining a lease of the whole lands, and commenced negotiations for this purpose in the beginning of 1919 by sounding the appellants through their representative as to their willingness to lease their interests in the lands. Nothing came of these primary negotiations, but in January 1920, the appellant again called at the house of the Mittras According to his own evidence, he was then informed that settlement could only be made with the consent of those who represented the Boses' four anna share. At the same time the Mittras indicated the terms upon which they for their part would be disposed to agree to such a lease. Within eight or ten days after this the respondent, according to his own evidence, saw the representatives of the Boses, who told him that they had given their consent to the proposed lease and had instructed the manager of the Mittras accordingly. He then called on the Mittras on 13th January, and the result of his interview with them was a document in the following terms :

"A *be-meadi* (without any fixed period) settlement with Gosto Behari Sen in respect of the *jama* (tenancy) at Bonehughli formerly held by Jogendra Nath Bagchi and at present in the *khas* possession of the estate is approved on the following terms: (1) A total sum of Rs. 300 should be paid as *Selami* (bonus) for this *jama*; (2) the annual rent is fixed at Rs. 60; (3) the lessee would not be entitled to alienate this *jama* at any time on any ground whatever; if he does, the *jama* would become *khas*; (4) if the land is acquired by Government the proprietors would get a moiety of the compensation money; (5) the lessee would not be authorized to make a permanent or *Kaemi* Settlement with, or to grant a long lease to, any person. 28th September 1926.

(Sd.) P. Mitra.
(Sd.) B. B. Mitra.

"13th January, 1920."

It will be observed that this document was not signed by the respondent and that it deals with the whole lands, of which it was known to the parties at the time that the Mittras only held a 12 annas undivided share. Yet, on the terms of this document alone and without reference to the evidence, which gives no support to his conclusion, the District Judge has held that it was a "final contract" and that the Mittras thereby undertook a binding obligation on behalf of themselves and of the other co-sharers that the respondent was to obtain a

lease of the whole lands on the terms briefly set forth in the document itself. Their Lordships are clearly of opinion that, looking to the state of mind of both parties at the time, such an obligation cannot be implied. On the one hand, the Mittras had clearly stated from the first that they would only grant a lease to the respondent if the consent of the other co-sharers was obtained and, on the other hand, the respondent was at the time under the belief that he had already secured the assent of these co-sharers to the proposed lease. It is incredible under these circumstances that the appellants should either have been asked or agreed to bind themselves to an unconditional contract of lease of lands which in part did not belong to them. On the other hand, the document is entirely consistent with the attitude of the appellants that they were adjusting the terms of the proposed lease on the footing that the other co-sharers in the lands had already consented, or at all events were prepared to consent, to a settlement on similar terms. Moreover, it was throughout admittedly in the contemplation of both parties that a formal *kabuliyat* would be drawn up as between the respondents and all the co-sharers in which the full terms of the proposed lease would be embodied. In fact, an oral agreement to this effect was entered into at the same interview. Thus it would be more proper to describe the document as heads of a proposed agreement than as a final contract, as it has been interpreted the District Judge.

Following on the signature of the Mittras to the document in question, the respondent paid Rs. 300, which was to be the *selami* in respect of the whole lands. This is easily explained on the footing that the respondent believed that he had already obtained the consent of the other owners and that the whole matter of the proposed lease had been substantially arranged with all the parties concerned.

In terms of the arrangement made as above set forth the respondent on 15th January had a draft *kabuliyat* prepared and sent to the appellants' representatives. This draft was revised by them and was subsequently registered by the respondent. This draft contains numerous additions to the heads of agreement of 13th January, and it is addressed not to the Mittras alone, but to the other co-sharers. So far as the Mittras were concerned, the plain inference from the terms of the *kabuliyat* is that no lease could be concluded without the signature of the other co-sharers to whom along with them it was addressed. On the other hand, the respondent had previously ascertained that his belief that the Boses would join in the proposed lease was unfounded. On 14th January, 1920, he called upon the Maharaja, who represented one of the co-sharers, and showed him a copy of the terms. He did not however obtain the signature of the Maharaja. Notwithstanding this, and apparently in the hope that he might yet induce the Maharaja to accept the terms provisionally arranged with the Mittras, he registered the *kabuliyat* on 24th January and thereafter again called on the Maharaja on 3rd February to induce him to accept the *kabuliyat* but failed to get him to agree to its terms. A third attempt had the same negative result. On 5th March, 1920, he caused his solicitor to write to the appellants to the effect that they and the other co-sharers had granted a permanent lease of the property in question and that the Mittras had undertaken to grant the usual *amalnamah* in his favour and undertook to get the same signed and executed by the Maharaja and Manmatha on behalf of the Boses. This was the first time, so far as the evidence discloses, that this attitude was taken up on his behalf, and it was not adhered to in the plaint of the suit which he raised two years later. This plaint proceeds on the footing that it had been agreed by all the owners of the property in the beginning of January 1920, that they should grant him a lease of the lands in question and the suit was accordingly directed against all the co sharers. He accordingly prayed :

"(a) That the defendants be ordered to execute an *amalnamah* in favour of the plaintiff corresponding to the terms of the said *kabuliyat* executed by the plaintiff and annexd hereto; (b) that the defendants do make over possession to the plaintiff of the said lands and premises."

The leading issues of the case as adjusted by the Subordinate Judge were :

"2. Whether all the defendants agreed to the proposal of the plaintiff to take a lease of the land in suit? Had defendants Nos. 1 to 3 any power or authority to make settlement with the plaintiff or to act in that behalf? 4. Was there a valid agreement to lease between the parties? If so what are its terms and is it binding on all the defendants."

All these issues were found against the plaintiff by the learned Subordinate Judge, and 2 and 3, which are issues of fact have been found against the respondent by the District Judge, whose findings of fact are conclusive. On issue No. 4, which their Lordships think was at all events in part an issue of law, they are in agreement with

the learned Subordinate Judge. The whole actings of the parties, and the conduct of the respondent in particular are wholly inconsistent with the view that is now put forward and was sustained by the District Judge and the High Court, that the appellants undertook a binding obligation to the respondent to lease their own 12 annas share in the lands to him irrespective of what action the other co-sharers might take. The point has never been raised in the pleadings of the parties and was only suggested in argument when the respondent's Pleader realized that the attitude taken up in the plaint was incapable of proof. The result is that there was no concluded contract of lease with respect to the land in question, the whole negotiations having proceeded on the footing that all the owners of the property would consent to the lease. As the consent of the Boses was never obtained the negotiations fell to the ground and the Subordinate Judge was right in dismissing the suit.

Even on the assumption that the interpretations put upon the document of 13th January were well founded, their Lordships would have been unable to sustain the view of the learned District Judge and of the High Court, that the respondent was entitled to the relief which has been given him. The suit as framed is obviously one for specific performance and not for a mere declaration of title. The plaintiff prays that the defendants be ordered to execute an *amalnama* in favour of the plaintiff, corresponding to the terms of the *kabuliyat* annexed to the plaint. That cannot be done as the *kabuliyat* is addressed not merely to the appellants, but to the other two defendants, who have never accepted it. They agree with the learned Judges of the High Court that ss. 14, 16 and 17, Specific Relief Act have no application to the present case. Section 15 however is in these terms:

"Where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the other party, direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation, either for the deficiency or for the loss or damage sustained by him through the default of the defendant."

And it is upon this that the learned Judges of the High Court proceeded. The proviso to the section however has been overlooked. The plaintiff has not relinquished all claim to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendants On the contrary, he claimed in his plaint Rs 600 as loss of profit already suffered and he has obtained a decree for the return of that share of the *selami* which enured to the 4 anna share. The learned Judges who allowed the appeal on the ground that an important question of law was involved stated this as one of the questions which they thought might properly be submitted to this Board, and their Lordships have thought it right, although in the view that they take of the case it is not necessary for their decision that their opinion should be recorded.

On the whole matter their Lordships will humbly advise His Majesty that the appeal should be sustained and the judgments of the High Court and the District Court re-called with costs, and the judgment of the Subordinate Judge affirmed. Respondent No. 1 must pay the appellant's costs of the appeal.

A. *Appeal allowed.*

Solicitors for the Appellants.—Messrs. *Watkins & Hunter.*

Solicitors for the Respondent.—Messrs. *Clark, Rawlins & Co.*

PRIVY COUNCIL.

Appeal from the Calcutta High Court.

May 18, 1931.

LORD BLANESBURGH, LORD TOMLIN AND SIR JOHN WALLIS.

ALFRED ERNEST MITCHELL AND OTHERS—APPELLANTS

versus

CARR LAZARUS PHILLIPS AND OTHERS—RESPONDENTS.

Principal and surety—Deed of guarantee—Construction—Debt secured by mortgage—Surety, whether liable only for deficiency after realising mortgage securities—Right to securities.

The material clauses in a deed of guarantee ran as follows—(1) "In consideration of your having at our request agreed to obtain a loan of Rs. 40,00,000 bearing interest at six per cent per annum from the Imperial Bank of India for the sole benefit of John Carapiet Galstaun for the purpose of satisfying certain decrees and paying certain pressing debts such sum of Rs 40,00,000 to bear interest at the rate aforesaid and the re-payment thereof to be secured by a mortgage to be executed by the said John Carapiet Galstaun in your favour of the properties ..... We hereby guarantee to you the payment by the said John Carapiet Galstaun of the said sum of Rs 40,00,000 to the limit of our

aggregate and individual liability hereinafter prescribed

(*ii*) This guarantee shall be a continuing guarantee, but our aggregate liability thereunder shall not under any circumstances exceed the sum of Rs. 18,00,000 and the liability of each of us individually in respect of the said sum shall not exceed the sum of Rs. 6,00,000.

(*iii*) Within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said John Carapiet Galstaun in respect of such advance as aforesaid and not merely to so much thereof as shall be co-extensive with our aforesaid maximum liability hereunder."

The High Court held that upon its true construction the guarantee only provided for a guarantee of the balance which should remain owing after the creditor had exhausted his remedies under the mortgage against the principal debtor. On appeal:

Held, (*i*) that the guarantee covered the whol debt of 40 lakhs to the limit of the aggregate and individual liability of the guarantors and not merely the deficiency remaining after realising the mortgage securities.]p. 409, col. 1.]

(*ii*) that cl. (*iii*) was a clause commonly employed in the case of a limited guarantee to enable the creditor at any rate up to a point to retain as against the guarantor dividends received in the bankruptcy of the principal debtor and it did not cut down but re-inforced the obligation imposed by cl. (*i*). [*ibid.*]

(*iii*) that this construction of the guarantee was not in any way affected by the practice of the Courts in India under O. XXXIV, Civil Procedure Code, in relation to suits to enforce a mortgage. [p. 410, col. 1.]

Their Lordships further disapproved of the view that the sureties would not be entitled to the benefit of the securities until the whole of the 40 lakhs had been discharged. [p. 409, col. 2.]

Messrs. *W A. Greene* and *G. D. McNair*, for the Appellants.

Messrs. *L. DeGruyther* and *A. T. Macmillan*, for the Resondents.

Lord Tomlin.—In the suit out of which this appeal arises the appellants as legal personal representatives of a deceased creditor are seeking to recover from the respondents as guarantors part of a debt due and owing from the principal debtor Before the trial Judge the appellants succeeded but on appeal the High Court of Judicature in Bengal reversed the judgment of the trial Judge and dismissed the suit.

On 14th February 1927, one Galstaun mortgaged real estate in and near Calcutta and personal estate of various kinds to Arathoon Stephen the appellants' testator to secure a loan of Rs. 40,00,000 and interest. Stephen in fact borrowed the money from the Imperial Bank in order to lend it to Galstaun. On 9th February 1927, the respondents in connexion with the transaction had executed in favour of Stephen a guarantee in writing in the following form;

"(1.) In consideration of your having at our request agreed to obtain a loan of Rs 40,00,000 bearing interest at six per cent. per annum from the Imperial Bank of India for the sole benefit of John Carapiet Galstaun for the purpose of satisfying certain decrees and paying certain pressing debts such sum of Rs. 40,00,000 to bear interest at the rate aforesaid and the repayment thereof to be secured by a mortgage to be executed by the said John Carapiet Galstaun in your favour of the properties included in the mortgages held by Framroz Edulji Dinshaw and a second mortgage of the properties included in the mortgage executed by the said John Carapiet Galstaun in favour of the Prudential Assurance Co, Ltd We the undersigned Carr Lazarus Phillips of No. 33, Alipore Park Road, Alipore, Arathoon Mackertoom Arathoon of No. 3, Rowdon Street, in Calcutta, and Arathoon. Theodore Creet of Ghusick Colliery, in the District of Raneegunge hereby guarantee to you the payment by the said John Carapiet Galstaun of the said sum of Rs. 40,00,000 to the limit of our aggregate and individual liability hereinafter prescribed.

"(2.) This guarantee shall be a continuing guarantee, but our aggregate liability thereunder shall not under any circumstances exceed the sum of Rs. 18,00,000 and the liability of each of us individually in respect of the said sum shall not exceed the sum of Rs 6,00,000, being the sum placed opposite our respective signatures at the foot hereof and should the common liability be less than the said maximum aggregate sum, the share due from each one of us in respect thereof shall be in strict proportion to his individual liability hereunder and not otherwise.

"(3.) Within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said John Carapiet Galstaun in respect of such advance as aforesaid and not merely to so much thereof as shall be co-extensive with our aforesaid maximum liability hereunder.

"(4) You shall be at liberty without discharging us from liability hereunder to grant time or other indulgences to the said John Carapiet Galstaun and to accept payment from him in cash or by means of negotiable instruments or otherwise."

On 14th May 1927 Stephen died and on 12th October 1927 the appellants as his executors and trustees demanded from Galstaun immediate payment of the loan and interest and gave him notice that in default of payment within three months they would sell the mortgaged properties. On 15th October 1927 the respondents were notified of the appellant's demand against the principal-debtor. The principal-debtor failed to pay and on 8th June 1928 the appellants notified the respondents of this fact and demanded under the guarantee payment of six lakhs from each of them. On 12th July 1928 this suit was instituted by the appellants against the respondents who had failed to satisfy any part of the demand made upon them. On 8th April 1929 the appellants instituted a suit against Galstaun to enforce the mortgage. What has happened in that suit does not appear. On 26th April 1929 judgment in the present suit was given in favour of the ap-

pellants for six lakhs and interest against each of the respondents.

The respondents appealed and on 29th August, 1929, the judgment of a Division Bench of the High Court was given allowing the appeal and dismissing the suit. The Judges who heard the appeal appear to have taken the view (1) that upon its true construction the guarantee only provided for a guarantee of the balance which should remain owing after the creditor had exhausted his remedies under the mortgage against the principal debtor; and (2) that these remedies not having been exhausted the suit was premature and ought to be dismissed.

Ghose, J., who delivered the leading judgment was influenced by the fact that upon the construction for which the present appellants contend Galstaun might have been asked to repay immediately after the execution of the mortgage and that the guarantee would have then become immediately enforceable. He thought it must have been the intention of the parties that the security specified in the mortgage should be realized first and that the guarantee should only operate in respect of any deficiency remaining after such realizations. He further took the view that the word "ultimately" in cl. 3 of the guarantee indicated that the guarantee only covered the final deficiency.

The other Judge, Mr Page, came to the same conclusion but only after much consideration. He thought that all reference in the guarantee to the mortgage by Galstaun was unnecessary except upon the footing that the mortgage was to be realized first and as supporting the view which he adopted he laid stress upon the phrase "the whole debt that shall ultimately be due."

Their Lordships are unable to agree with the judgments of the appellate Judges. The language of cl. 1 is plain. By it the guarantors guarantee the payment by Galstaun of the sum of Rs 40 lakhs to the limit of their aggregate and individual liability thereinafter prescribed.

Clause 3 is the clause commonly employed in the case of a limited guarantee to enable the creditor at any rate up to a point to retain as against the guarantor dividends received in the bankruptcy of the principal debtor.

The form of the guarantee appears to have been based upon a precedent appropriate to a continuing guarantee although the guarantee in question was not in fact a continuing guarantee, but one for a fixed sum. This may account for the presence of the word 'ultimately." The word is not aptly employed, but in their Lordships' judgment the meaning of the clause in which it occurs is plain. A contrast is therein being drawn between (1) the whole of what may eventually become due from the principal debtor for principal and interest, and (2) a part of the total debt co-extensive with the guarantors' maximum liability and it is indicated that it is the whole debt and not a part which is guaranteed, although part only has to be paid under the guarantee. In other words it does not cut down but reinforces the obligation imposed by cl. 1.

Their Lordships are unable to appreciate the force of the criticism that the guarantors' liability might upon the construction of the guarantee contended for by the appellants become immediately enforceable

The same criticism might be applied to every guarantee where there is a mortgage with a covenant by the principal debtor to repay on demand or at the expiration of some short period such as six months.

In transanctions of this kind it is normal practice to make the liability to pay under the mortgage arise on demand or within a short period even though the anticipation of the parties may be that the loan will remain outstanding for a substantial time.

Nor do their Lordships understand how the reference to the mortgage in the guarantee can be treated as unnecessary. Having regard to the rights of a surety in respect of the securities taken by the creditor it is a matter of first importance to the surety to know what those securities are. Further, the fact that such a mortgage was to be taken may well have been the determining factor in inducing the guarantors to give their guarantee.

In this connexion their Lordships desire to point out that, while it is unnecessary for them in this appeal to express an opinion as to what will be the rights of the respondents in respect of the mortgage after their liability under the guarantee has been discharged, they must not be taken to approve the statement of Ghose, J., that

"not until the sureties in the present case have paid off the entirety of the mortgage debt due to Stephen would they be entitled to the securities which Stephen held, *i. e.*, even if the sureties paid off a sum of Rs. 18 lakhs they would not be entitled to the said securities until the balance of 40 lakhs was

realized. The sureties would in such a case be without any security whatsoever during the interval"

Lastly their Lordships do not think that the construction of the guarantee is in any way affected by the practice of the Courts in India under O XXXIV, Civil Procedure Code, in relation to suits to enforce a mortgage.

In the result, therefore, their Lordships are of opinion that the appeal should succeed and that the judgment of the Appellate Court should be reversed and that of the trial Judge restored. Their Lordships will humbly advise His Majesty accordingly. The appellants will have their costs here and below.

R. L. *Appeal allowed.*

Solicitors for the Appellants:—Messrs. *Morgan, Price, Marley & Rugg.*

Solicitors for the Respondents:—Messrs. *Nisbet, Drew & Loughborough.*

PRIVY COUNCIL.

Appeal from the Calcutta High Court.

November 30, 1931.

LORD THANKERTON, LORD SALVESEN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

KRISHNA CHANDRA BHOWMICK —APPELLANT

versus

PABNA DHANA BHANDAR CO., LTD. AND OTHERS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), ss 2, 3, 13—Sale for arrears, when justified—'Arrears', meaning of—Sale of share in respect of which separate account is kept—Necessary conditions—Sale before last date—Validity.

Before liability to sale under the Bengal Revenue Sales Act attaches there must be : (1) the whole or a portion of a *kist* or instalment unpaid; (2) the conversion of such unpaid amount into an arrear on the first of the following month, and (3) the passing of the latest date of payment of such arrear, as fixed under s. 3 and the official notice of the Board of Revenue [p 411, col 2]

In order to justify the sale of a share in an estate in respect of which a separate account is kept the estate must have become liable to sale for arrears of revenue, and an arrear of revenue must be due from that share according to the separate account. [p. 411, col. 1.]

By notice in the Calcutta Gazette the date for payment of instalments of revenue and the latest dates for payment of arrears were fixed as 28th June, 28th September, 12th January, and 28th March. The Collectorate account for the third *kist* of 12th January, 1924, showed a credit balance of seven annas four pies on the general account of *Touzi* No 10, and a debit balance of Rs. 35-2 in the separate account of No. 10-6, to the satisfaction of which the Collector appropriated sufficient of the money deposited with him in terms of s. 15 of the Act. In the accounts for the fourth *kist* of 28th March, the general account of *Touzi* No 10 showed an unpaid balance of six annas five pies, but the separate account of share No. 10-6 showed that the sum of Rs. 20-13, being the current demand of revenue in respect of the fourth *kist*, had been paid on 27th March, 1924. On the 26th June, share No. 10-6 was sold for arrears :

Held, that inasmuch as the only arrear of the revenue of the estate which could be said to justify the sale was the unpaid balance of six annas five pies of the fourth *kist* of 28th March, 1924, and this unpaid balance could not be considered an arrear until the first of the following month, *i e*, 1st April, 1924, the latest day of payment was accordingly 28th June, 1924, two days after the sale took place—and the estate could "not become liable to sale for arrears of revenue" until after 28th June, 1924 and, therefore, the sale of share No. 10-6, was invalid on this ground alone. *Krishna Chandra Bhowmik* v. *Pabna Dhana Bhandar*, 117 Ind. Cas. 552 affirmed *Saraswati Bahuria* v. *Surajnarayan Chaudhuri* (1), followed [p. 412, col. 1.]

Mr *B Dube*, for the Appellant.

Mr. *H. R.Majid*, for the Respondents.

Lord Thankerton.—This is an appeal against a judgment and decree, dated 23rd May, 1923, of the High Court of Judicature at Fort William in Bengal, which affirmed a judgment and decree, dated 22nd July, 1926, of the Subordinate Judge of Pabna, whereby a sale for arrears of revenue was set aside.

There is an estate which forms *Touzi* No. 10 of the Pabna Collectorate. Respondents Nos. 2 to 11, who were the original coproprietors of a share of this estate, opened a separate account for payment of their share of revenue, known as account Nos. 10-6, in terms of s. 10, Bengal Revenue Sales Act, XI of 1859. Thereafter they mortgaged their interest in the separate account along with other property to the respondent company No. 1, who, on 19th November, 1923, purchased the property along with others under a mortgage-decree of sale obtained by them in 1918. Respondents Nos. 2 to 11 then instituted suits to set aside the mortgage sales, and these suits were finally disposed of by compromise on 16th June 1924, under the compromise the sale in respect of No. 10 6 was set aside but respondent No. 1 retained their mortgage lien thereon.

On 6th June, 1924, share No. 10/6 was sold by the Collector of Pabna for arrears of revenue under the Act of 1859, and was bought by the present appellant. After an unsuccessful appeal to the Commissioner of revenue for the Division under s. 25 of the Act, respondent No. 1 brought the present suit on 10th July, 1925, in the Court of the Subordinate Judge at Pabna for annulment of the sale, or alternatively for a declaration that the purchase of the appel-

lant is subject to the mortgage lien of respondent No. 1 and for possession on the basis of that lien. It is not disputed that the conditions precedent to the jurisdiction of the Civil Court prescribed by s. 33 of the Act have been complied with in the present suit.

Twelve issues were settled at the trial, but, for the purpose of disposal of this appeal, only two need be referred to, *viz*, "2. Was any arrear due justifying the sale by the Collector?' "10. Is the sale liable to be set aside on the ground alleged in the plaint?" The remaining issues related to various alleged irregularities in the proceedings leading up to the sale and the alternative relief asked for, and these have been dealt with in the Courts below, but their Lordships find it unnecessary to deal with them, as, in their opinion, issue No. 2 was rightly answered in the negative by both Courts below, though their Lordships have come to that conclusion on somewhat different grounds, following a recent decision of this Board, which is referred to later. The opinions of the Courts below proceeded on a construction of the Act which must now be held to be erroneous, in view of the more recent decision of this Board just referred to.

It will be convenient to refer in the first place to the relevant sections of the Act of 1859. The sale of the separate account No. 10-6 was instituted by the Collector under the authority of s. 13, which provides as follows:

"Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts, an arrear of revenue may be due. In all such cases notice of the intention of excluding the share or shares from which no arrear is due, shall be given in the advertisement of sale prescribed in s. 6 of this Act. The share or shares sold together with the share or shares excluded from the sale, shall continue to constitute one integral estate, the share or shares sold being charged with the separate portion or the aggregate of the several separate portions of *jumma* assigned thereto."

It is, therefore, clear that in order to justify the sale of No. 10-6: (*a*) the estate must have become liable to sale for arrears of revenue, and (*b*) an arrear of revenue must be due from No 10 6 according to the separate account. What is an arrear of revenue is to be found in s. 2, which provides as follows:

"If the whole or a portion of a *kist* or instalment of any month of the era, according to which the settlement and *kistbundi* of any *mahal* have been regulated, be unpaid on the first of the following month of such era, the sum so remaining unpaid shall be considered an arrear of revenue."

The latest date for payment of arrears and the liability to sale are dealt with in s. 3 as follows:

"Upon the promulgation of this Act, the Board of Revenue at Calcutta shall determine upon what dates all arrears of revenue and all demands which by the Regulations and Acts in force are directed to be realized in the same manner as arrears of revenue, shall be paid up in each district under their jurisdiction, in default of which payment the estates in arrear in those districts, except as hereinafter provided, shall be sold at public auction to the highest bidder. And the said Board shall give notice of the dates so fixed in the Official Gazette, and shall direct corresponding publication to be made as far as regards each district in the language of that district, in the office of the Collector or other officer . . . . . ."

The section goes on to provide for notice by the Board of the dates so fixed in the Official Gazette and otherwise. It is decided by the judgment of this Board in *Saraswati Bahuria* v. *Surajnarayan Chaudhuri* (1) that, before liability to sale attaches, there must be: (1) the whole or a portion of a *kist* or instalment unpaid, (2) the conversion of such unpaid amount into an arrear on the first of the following month, and (3) the passing of the latest date of payment of such arrear, as fixed under s. 3 and the official notice of the Board of Revenue.

As regards the present case it is agreed that, by notice in the Calcutta Gazette of 10th August, 1910, the dates of payment of instalments of revenue and the latest dates for payment of arrears were fixed as 28th June. 28th September, 12th January, and 28th March.

The admitted facts in the present case are, first, that the Collectorate account for the third *kist* of 12th January, 1924, showed a credit balance of seven annas four pies on the general account of *Touzi* No. 10, and a debit balance of Rs. 35-2, in the separate account of No. 10-6, to satisfaction of which the Collector appropriated sufficient of the money deposited with him in terms of s. 15 of the Act; secondly, that in the accounts for the fourth *kist* of 28th March, the general account of *Touzi* No. 10 showed an unpaid balance of six annas five pies, but the separate account of share No 10-6 showed that the sum of Rs. 20-13, being the current demand of revenue in respect of the fourth *kist*, had been paid on 27th March, 1924, and there was thus no unpaid balance in the separate account in respect of that *kist*.

Reverting to the provisions of s. 13, the

(1) 130 Ind. Cas. 676; A. I. R. 1931 P. C. 57; 10 Pat. 496; 35 C. W. N. 444, 60 M. L. J. 350; (1931) M. W. N. 369; Ind. Rul. (1931) P. C. 84; 53 C. L. J. 307; 12 P. L. T. 357 (P. C.).

only arrear of revenue of the estate which is said to justify the sale is the unpaid balance of six annas five pies of the fourth *kist* of 28th March, 1924. But this unpaid balance could not be considered an arrear until the first of the following month, *i. e.*, 1st April, 1924, and the latest day of payment was accordingly 28th June, 924—two days after the sale took place—and the estate could not "become liable to sale for arrears of revenue" until after 28th June, 1924. It is, therefore, clear that the sale of share No. 10-6, was invalid on this ground alone and it is unnecessary to consider whether No. 10-6 was a share "from which, according to the separate accounts, an arrear of revenue may be due" within the meaning of s. 13; but it may be pointed out that the deficiency of Rs. 35-2, shown in the separate account of the January *kist* could not be considered an arrear until 1st February, 1924, and there could be no default in payment until 12th March, 1924—and that only on the doubtful assumption that, in a question with the Collector, it remained unpaid after the latter had appropriated part of the deposited moneys in satisfaction of it. But their Lordships find it unnecessary to consider this question.

Accordingly, their Lordships are of opinion that the sale should be annulled, and they will humbly advise His Majesty that the decree of the High Court of 23rd May, 1928, should be affirmed and the appeal dismissed with costs.

A. *Appeal dismissed.*

PRIVY COUNCIL.

Appeal from the Madras High Court.

December 7, 1931.

VISCOUNT DUNEDIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

Sri Sri Sri KRISHNA CHENDRA GAJAPATI NARAYANA DEO —APPELLANT

versus

CHALLA RAMANNA AND OTHERS— RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Points not raised in pleadings but in issues—Decision, whether res judicata.

Where a point is not properly raised by the plaint, but both parties have without protest chosen to join issue upon that point, the decision on the point would operate as *res judicata* between the parties. [p 413, col. 1]

Messrs. *J. M. Parikh* and *V. V. Jog'ah*, for the Appellant

Messrs *E B Raikes* and *K V. L. Narasimhan*, for the Respondents.

Viscount Dunedin.—This case is in a curiously unsatisfactory position. The plaintiff is it is *zemindar* of the Parla kimedi in his capacity as trustee for two gods. The defendants are the occupying tenants of the village of Kosamala, 183 in number. The only relief asked in the plaint was as follows:

"(a) For a declaration that the settlement of the *Mokhasa Amaniya* village of Kosamala made in or about 1869 by the Court of Wards acting on behalf of the plaintiff's late grandfather, the then trustee of the gods Sri Ramaswami and Sri Jagannadhaswami of Parlakimedi, and continued since about 1869, by which the said village has been annually leased out at a money-rent determined according to fixed block rates, is beyoned the powers of a trustee and is not binding on the plaintiff, who is the present trustee of the said gods;

(b) for a declaration that the plaintiff as the present trustee of the said gods is entitled to claim rent in kind from the defendants in respect of their holdings in the said *Amaniya* village of Kosamala;

(c) For an injunction directing defendants to pay rent in kind to plaintiff from *Fasli* 1326 in respect of their holdings in the said village of Kosamala."

Now it is perfectly clear that the only real question raised by the above recited prayer is the question whether the plaintiff was entitled to have the rent in kind instead of money rent. But when the case got before the Temporary Subordinate Judge he framed issues which strayed far beyond that simple question and these issues were adopted by the District Judge before whom the case came to depend. Leaving out issues which were either irrelevant or redundant, the critical issues are as follows:

"(5) Are the defendants *raiyats* of Kosamala with no permanent rights of occupancy?

(6) Was the *melvaram* (the Government or landlord's share of the crop) and *kudivaram* of the lands in Kosamala vested in the gods Sri Ramaswami and Sri Jagannadhaswami?

(7) Did the defendants ever pay *varam* rent, rent in kind according to sharing system, to the landlord?

(8) What was the system of tenure prevalent prior to 1869?

(11) Is the plaintiff entitled to claim rent in kind from the defendants for all or any of the reasons stated in plaint, paras 8 to 12?

Taking Nos, 7, 8 and 11 first, as the issues which the plaint jutisfied, they raise pure questions of fact Payment in money had even as the plaint admitted, being going on since 1869—that is, nearly 50 years—and it was proved to have been a rule since at least above the beginning of last century. The plaintiff's right to have a rent in kind depends on his being able to show that the rent in olden days used to be in kind. This he was quite unable to show, as found by the District Judge, and this finding was affirmed by the High Court when the appellant appealed against a dismissal of the suit These are concurrent findings in fact, so that this point, the only point really raised by the plaint could not be argued

before this Board. But, as has already been shown, the District Judge fixed issues which strayed into other matters, and evidence was led upon these points as raised by issues Nos. 5 and 6. The District Judge, notwithstanding that he dismissed the suit, held that the respondents had not proved occupancy rights. This finding was reversed by the High Court, who held that the respondents had occupancy rights, but that settlement by the Court of Wards of 1869 was not a permanent settlement. They therefore, dismissed the appeal and the suit was dismissed.

As their Lordships have pointed out, all this inquiry about occupancy rights and as to whether the settlement of 1869 was a permanent one, was not properly raised by the plaint but as both parties have without protest chosen to join issue upon these points, their Lordships see no reason why these matters in dispute should not be *res judicata* between them. On consideration of the evidence on these questions, which are questions of fact, their Lordships see no reason to differ from the result arrived at by the High Court *viz.*, that the respondents have occupancy rights, but that the settlement of 1869 was not a permanent settlement.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal and find the appellant liable in costs to the respondents.

A. *Appeal dismissed.*

PRIVY COUNCIL.

Appeal from the Madras High Court.

November 27, 1931.

VISCOUNT DUNEDIN, LORD BLANESBURGH AND SIR JOHN WALLIS.

SECRETARY OF STATE—APPELLANT

versus

SANNIDHIRAJU SUBBARAYUDU AND OTHERS—RESPONDENTS.

Madras Irrigation Cess Act (VII of 1865), s. 1—'Belongs', meaning of—Riparian owner taking water from Government stream—Liability to pay cess—Rights of riparian owners.

A riparian owner is not liable to pay water-cess to Government for using water of a stream belonging to the Government, land on one side of which belongs to him, as he takes it in respect of a natural, or of an easement, right. *Kandukuri Balasurya Row* v. *Secretary of State* (4), referred to. [p 415, col. 1.]

A river 'belongs' to the Government within the meaning s. 1, of the Madras Irrigation Cess Act, 1865, when the *solum* of the stream belongs to the Government, which happens when the Government is the proprietor of lands abutting on the river on both sides or when the river is tidal and navigable. [p. 414, col. 2.]

A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. His right to the use of the stream does not depend upon the ownership of the soil of the stream and he can take water first of all for domestic use and then for other uses connected with the land of which irrigation of the lands which form the property is one The right is a natural right and not in the strict sense of the term an easement, though in many cases it has been called an easement In particular it is not capable of being lost *non utendo* and the maxim *tantum prescriptum quantum possessum* has no application. [p. 415, cols. 1 & 2.]

(English cases discussed.)

Messrs. *A. M. Dunne* and *B. Dube*, for the Appellant.

Messrs. *L. De Gruyther* and *K. L. Narasimham*, for the Respondents.

Viscount Dunedin—The original plaintiff in this suit is dead and the suit is continued by his legal representatives. The plaintiff owned land abutting on a branch of the Godavari called the Chilapa Kalva. From that in exercise of what he considered his riparian rights, he took water. The Government, through the Collector of Godavari, charged a water-cess of Rs. 8-5 8 for his use of the water. He paid under protest and then raised the present suit against the Government to recover the money so paid. The sole question, therefore, is whether the water-cess was legally levid. The cess bore to be levied in virtue of the provisions of the Madras Irrigation Cess Act, VII of 1865. The preamble of the Act is in these terms:

"Whereas, in several districts of the Madras Presidency, large expenditure out of Government funds has been, and is still being, incurred in the construction and improvement of works of irrigation and drainage, to the great advantage of the country and of proprietors and tenants of land and whereas it is right and proper that a fit return should, in all cases alike, be made to Government on account of the increased profits derivable from lands irrigated by such works:"

Then follow the words of the Act which, so far as material to the present case, are to be found in s. 1:

"1.—(*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by Government. * * * * * it shall be lawful for the Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water and the Government may prescribe the rules under which, and the rates at which such water-cess as aforesaid shall be levied; and alter or amend the same from time to time.

Provided that where a *zemindar* or *inamdar* or any other description of landholder not holding under *raiyatwari* settlement is by virtue of engagements with the Government entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more."

Now the facts which have not been a matter of dispute may be thus stated:

(1) The plaintiff's land is bounded by the river. (2) At the place where he has taken the water there are Government lands on the opposite side of the stream. (3) He only uses the water he takes for the purpose of the irrigation of his own property. (4) The river at this place is tidal.

There are also two disputed facts: First, the plaintiff originally averred that he had taken the water at this place from time immemorial. The Government said he had only taken the water recently. The latter was found to be the case both by the Judges of the inferior Court and the Court of Appeal, and consequently it cannot be and has not been argued to the contrary by the respondents in this appeal. Secondly, the Government aver that the river at the place where the water is taken being tidal is also navigable. The District Munsif before whom the case depended found that the river was navigable by big boats for six or seven months and by fishing boats for the remainder of the year. He, therefore, found that it was navigable as well as tidal. Upon that ground and the ground that the Government owned land on the other side of the river, he held that the river belonged to the Government. Riparian rights to be good against the Government, he decided, must be customary immemorial rights, and as he had found the fact of long user against the plaintiff, he decided that the cess was duly levied and dismissed the suit. On appeal to the Subordinate Judge he confirmed the judgment of the Munsif on substantially the same grounds. Appeal being taken to the High Court in Madras, they reversed the judgment and decreed the suit.

As to the river being navigable, they were not satisfied that the evidence tendered was sufficient. They considered that navigability must extend during all the year and, as the character of the fishing boats had been left dubious, they would have been prepared to remit the case for further evidence on the point had it been necessary for them to do so, but, in their opinion, the case could be disposed of upon the assumption that the river did in terms of the section "belong" to the Government, and they accordingly proceeded on that assumption. The judgment of the Court was decided by Ramesam, J., and the deciding passage may be found expressed as follows:

"A riparian right is a natural right and is not acquired by immemorial user. It exists by law, it may be lost by the adverse enjoyment of another but it has not got to be enjoyed to be kept up. Whatever the enjoyment at the date of the grant may be, the measure of the right that passes is determined only by the configuration and the width of the river and stream. I, therefore, think in this case the plaintiff is entitled to draw water from the *Addarapu kalva* in exercise of his rights as a riparian owner and so long as he does not extend those rights he is not liable to water-cess. That in India rights of the riparian owner include also the right to take reasonable quantity of water for purposes of irrigation scarcely admits of any doubt.

There have been in the Madras Courts a considerable number of cases dealing with the Act of 1865. The judgments pronounced in them, and still more the *dicta* contained in the judgments, are exceedingly contradictory. In their Lordships' view, it would serve no good purpose to go through the cases and pick out the different *dicta* with which they do or do not agree. They prefer, therefore, to lay down quite shortly the various propositions in law which suffice for the determination of the present case.

The first question that presents itself is obviously whether the river in the phraseology of the Act "belongs" to the Government. Now the word "belongs," easily applicable to works, etc., is obviously ill suited to be applied to a river. Running water at common law, though many people may have the right to take and use it, belongs in a river to no one. It passes on and successive people have rights in regard to it. So that literally no "river" could belong to the Government unless it was a river which from the source to the sea was within Government lands, or tidal and navigable so that it was always Government property. But clearly the word "belongs" cannot be so restricted. The idea, therefore, must be that the river belongs to such person or persons as have the ownership of the water for the time being at the place at which it is taken. Belonging points to exclusive belonging. It, therefore, seems to follow that within the expanded meaning a river only belongs to the Government when the *solum* of the stream belongs to the Government. This will happen either when the Government is proprietor of the lands abutting on the river on both sides or when the river is tidal and navigable. So much for the expression as it was used in 1865. But then there is the Act of 1905. That Act with its general and sweeping enactments has certainly the effect that in future when there is a contest as to the right of water, the opponent of the Government will be put to prove his title. He will not be able, as he otherwise would have been when attacked by the Government, to put them to prove their title. But Counsel for

the Government did not argue that the Act of 1905 made the river belong to the Government, and as the natural rights of persons are expressly excepted it can have no effect on the riparian rights of the parties in the present case.

The result is that in this case the river only belongs to the Government if the river is both tidal and navigable. Their Lordships, without deciding, will assume, as the High Court did, it is so; for if it is not, the right to levy cess is gone. They will, therefore, assume that it is. Now come the following considerations:

(1). A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. In ordinary cases the fact that his land abuts on the stream makes him the proprietor of the bed of the stream *usque ad medium filum* But he may not be. He may be ousted by an actual grant to the person on the other side, or he may be and often is ousted by the Crown when the stream is tidal and navigable, because where the stream is tidal and navigable the *solum* of the bed belongs to the Crown. Yet in neither of these cases are his rights as a riparian owner to take water affected. He would have no right in the two cases put to erect an *opus manufactum* in the bed of the stream even if from the point of view of navigation or diversion of the direction of the flow it was unobjectionable, for the land is not his, but his right to take water remains. In *Lyon* v. *Fishmanger's Company* (1) in the judgments of Lord Chancellor Cairns, Lord Chelmsford and Lord Selborne will be found clearly laid down these two propositions; (*a*) a riparian owner has the same rights in a tidal and navigable river as he has in a river which is not tidal and navigable; (*b*) the right of a riparian owner to the use of the stream does not depend upon the ownership of the soil of the stream.

(2) The right of a riparian owner to take water is, first of all, for domestic use, and then for other uses connected with the land, of which irrigation of the lands which form the property is one. But there is a difference in degree between these primary and secondary rights. The whole matter was carefullv explaind by Lord Cairns in *Swindon Waterworks Company* v. *Wills and Berks Canal Navigation Company* (2). At page 704* Lord Cairns says:

"Undoubtedly the lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water, that is quite consistent with the right of the upper owner also to use the water for all ordinary purposes, namely, as has been said, *ad lavandum et ad potandum*, whatever portion of the water may be thereby exhausted, and may cease to come down by reason of that use. But, further, there are uses no doubt, to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored after the object of irrigation is answered, in a volume substantially equal to that in which it passed before."

The same views were expressed by Lord Macnaghten in the more recent case of *McCartney* v. *Londonderry and Lough Swilly Railway Company* (3). At page 317† he says:

"In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary, but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparain owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character."

Now, in speaking of the returning of the water it must be remembered that both Lord Cairns and Lord Macnaghten were speaking of a diversion of the whole stream. When only a part of the stream is taken, and that for purposes of irrigation, the only limitation is that the amount taken shall not be so much as to hurt the right of the inferior owner to have the stream passed on to him practically undiminished.

(3) Further, the right is a natural right and not in the strict sense of the word an easement, though in many cases it has been called an easement. In particular, it is not capable of being lost *non utendo* and the maxim *tantum prescriptum quantum possessum* has no application. It is not the only right of this class—analogous to an easement and yet not strictly an ease-

(1) (1877) 1 A. C. 652; 46 L. J. Ch. 68; 35 L. T. 569; 5 W. R. 195.

(2) (1878) 7 H. L. 697; 45 L. J. Ch. 638; 33 L. T. 513; 24 W. R. 284.

(3) (1904) A. C. 301; 73 L. J. P. C. 73; 91 L. T. 106; 53 W. R. 385.

*Page of (1876) 7 H. L.—[*Ed.*]

†Page of (1904) A. C.—[*Ed.*

ment. The right of support, that is to say, the natural right of support as distinguished from the easement of enhanced support, is another example. It is probably a confusion as to this that led the lower Courts in this case astray.

Applying these principles, it follows that the plaintiff had absolute right to take the water and use it for irrigation of his property, for there is no complaint at the instance of a lower proprietor that too much has been taken, and he uses it for his own property alone. But then comes the Act, and although the plaintiff is within his rights in taking, yet on the hypothesis that the water comes from a river belonging to the Government, he is liable in cess unless he can have resort to the proviso. In *Kandukuri Balasurya Row* v. *Secretary of State* (the *Urlam case*) (4), which has been so often cited and so often commented on, Lord Parker puts the point quite clearly at page 172*

"If, for example, a riparain owner irrigates his land with water derived from a river or stream of which it can be truly said that it is a river or stream belonging to the Government, a cess would appear to be leviable even though the Government had never spent a single rupee in improving the source of supply. If in order to avoid this result, reliance were placed on the first proviso, the question would arise whether it were possible to imply some engagement with the Government arising out of the natural or prescriptive right of the riparian owner."

The case that Lord Parker is here putting is where there is no more than the naked fact that the taker of the water takes it in respect of either a natural or of an easement right. Lord Parker did not go on to decide in terms the question he had raised. He did not do so because there was something more to be considered in the case before him, *viz.*, the effect of the *sanad* arranged at the time of the Permanent Settlement. Nor does *Kandukuri Balasurya Row* v. *Secretary of State* (*the Urlam case*) (4) actually decide the present case, because the rights of the *zemindar* in question were easement rights. The actual decision necessarily shows this, because the enjoyment was limited by the size of the channels and cuts which brought the water. Nevertheless in the present case their Lordships think that what was clearly laid down in that case decided the point. It was obviously possible to argue that by engagement was meant an engagement which specially dealt with the supply claimed, but this argument was rejected.

(4) 41 Ind Cas. 98; A. I. R. 1917 P. C. 42; 44 I. A. 166; 40 M. 886; 33 M. L. J. 144; 22 M. L. T. 76; 15 A. L. J. 697; 21 C. W. N. 1089; (1917) M. W. N. 536; 19 Bom. L. R. 751; 6 L. W. 340; 2 P. L. W. 260; 26 C. L. J. 391 (P. C.)

On page 173* Lord Parker says:

"Their Lordships cannot accept the contention that the proviso applies only where there is an express contract that the supply to which the person claiming the protection of the proviso is entitled shall be free from anything in the nature of a future tax,"

And then the judgment goes on, after a review of history as to the Permanent Settlement and an argument which need not be quoted, to find in terms that the Government *sanad* permanently fixing the *jama* for the property (which, it may be added, was accompained by the *zemindar's kabuliyat* or counterpart engaging with Government for the payment of the permanently settled *jama*) may be such an engagement, though it makes no mention of water rights. In other words, if the water rights claimed are within the property which was, so to speak, enfranchised by the *jama* fixed at the Permanent Settlement, then the *sanad* which fixed the *jama* is an engagement within the meaning of the Act. Of course, the Permanent Settlement was dealing with the Government right to a payment which represented and replaced the *mel aram* of more ancient times, but the test is the same as the test which would be applied to a conveyance. In a conveyance you ask what passed. In the case of the Permanent Settlement you ask what was the extent of the property that was settled. In the *Kandukurya Balsuri Row* v. *Secretary of State* (*Urlam case*) (4) the water rights in question passed because they were existing water rights enjoyed by way of easement at the time of the settlement. Here what passed was the property, and the property, being riparian, had inherent in it without special mention the riparian rights. While it must be understood that their Lordships must not be held to concur in each and all of the expressions used in the judgment of the High Court, they are of opinion that the result arrived at by them was right.

An observation is not out of place that, although it is well settled that an enactment cannot be cut down in its meaning by the preamble, yet it is at least satisfactory to feel that the present judgment is in accordance with the express intention of the preamble when a judgment to the opposite effect would have been a flagrant overstepping of it. Their Lordships will humbly advise His Majesty to dismiss the appeal, with costs as between Solicitor and client, in accordance with the terms upon which the Government obtained special leave to appeal in this case.

A. *Appeal dismissed.*

*Page of 44 I. A. [Ed.

PATNA HIGH COURT.

First Civil Appeal No. 131 of 1928.
July 6, 1931.

KHWAJA MOHAMAD NOOR, AND SCROOPE JJ.

Syed SHAH MUHAMMAD KAZIM—
DEFENDANT—APPELLANT
versus
Syed ABI SAGHIR AND OTHERS
—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Wakf, *essentials of—Constructions of grant—Valid objects—Some of objects invalid, effect of*—Sajjadanashin—*Ground for removal*—Sajjadanashin *and* mutawalli, *distinction between*—*Court's powers to separate offices of* mutawalli *and* sajjadanashin — *Civil Procedure Code (Act V of 1908), s 92—'Trust and trustees,' meaning of—'Public', meaning of—Trust not admitted—Application of section—Necessary parties in suit under section—Suit for removal of trustees, maintainability of.*

In determining whether or not a particular grant is a *wakf* it is not of much importance to see in whose name the grant is made. The crucial question is always for what purpose the grant is made.

In order to interpret a document and to determine whether or not the property granted to an individual by name is *wakf* it is necessary to refer to the customary use of the income of the property. [p. 420, col. 2.]

The term '*wakf*' literally means detention or stoppage and the legal meaning of it according to the Hanafi School of Muhammadan Law is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of mankind. [p. 420, col. 1.]

The requirement of a valid *wakf* is a substantial dedication of the usufruct of the property to charitable, religious or good purposes within the meaning of Muhammadan Law, no particular form is necessary for creating a *wakf*. A *wakf* may be construed from Royal grants of property made in favour of individual persons as long as it is for a perpetual religious charitable or good purposes. The dedicator need not use the word *wakf* at all or may not formally transfer the property to the ownership of God and the appropriation of property to pious and charitable purposes would suffice to constitute a *wakf*. A grant to an individual heritable by his descendants may be a *wakf*. If there is a substantial dedication to a valid object it will not cease to be a *wakf* because some objects are mentioned which are not legal objects of *wakf*. The *wakf* will be valid and the whole income will be devoted to for the valid purposes. The expenses over the drum-beaters, casual visitors and maintenance of the *sajjadanashin* of a *khankah* and his heirs are objects of a valid trust. The essentials of a valid *wakf* are: (1) an appropriator must destine the ultimate application of the income to the objects not liable to become extinct ; (2) the appropriation must be at once complete; (3) there must be no stipulation in the *wakf* for sale of property and expenditure of the price on the appropriator's necessities ; (4) perpetuity must be a necessary condition. [p. 420, col. 2; p. 421, col. 2.]

A present to a dead man cannot by any stretch of imagination be construed to mean a personal grant to the successor of the saint. [p. 423, col. 1.]

A *khankah* is a monastery or religious institution where *darveshes* and seekers of truth congregate for religious instructions and devotional exercises, professing esoteric belief, whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrine. A *khankah* is usually under the governance of a *sajjadanashin* who not only acts as *mutawalli* or manager of the institution and of the adjoining mosques, but also as the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin* and after his death the spiritual line (*sil silla*) is extended by succession of *sajjadanashins*. Generally members of his family chosen by him or according to the directions given by him in his lifetime or selected by the *faqirs* and *murids* are formally installed. [p. 423, col. 2.]

An assignment of income does not always mean an assignment of corpus. All depends upon the terms of the grant and its construction. [p. 428, col 1.]

Though the partition of the endowment itself is illegal, distribution of profits arising from it is legal. [p. 429, col. 1.]

The usage can be taken into consideration in deciding whether there is a trust. [p. 430, col. 2.]

The words 'trust' and 'trustees' in s. 92, Civil Procedure Code, have been used in their ordinary sense and not in any technical sense as used in English Law or in the technical sense in which the word *wakf* is used in Muhammadan Law. Section 92 contemplates that there is a property burdened with obligations for purposes of a charitable or religious nature. It will apply in all cases whether *wakf* or not where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature. [p. 431, col. 1.]

A trust in the sense of an obligation attached to the ownership of property is known to and recognised by Muhammadan Law. [*ibid.*]

The distinction between an English trust for charitable and religious purposes and a *wakf* under Muhammadan Law is more historical than legal. Different systems of law have different explanations as to the legal ownership of a property dedicated for public, religious or charitable purposes. English law recognises two estates one legal and another equitable. Imam Abu Haneefa holds the ownership continuing in the appropriator, his two disciples hold the ownership to be in God, *Shias* in the beneficiaries and the Hindus in the idol. But whatever may be the difference in the conception of the legal ownership of the property there is no difference whatsoever that the beneficiaries have a right in the property which the Courts will enforce. The distinction of legal and equitable estate is of no consequence. The same Courts exercise both jurisdictions. The difference in the law of trust and *wakf* as to the transferability or otherwise of the property is also due to this difference in the conception of ownership of the property. As under English law the legal ownership is vested in a human being he can transfer it subject to the obligations placed upon it. Under the Muhammadan Law while the ownership is vested in God the *mutawalli* is His manager; he cannot transfer the corpus of the property. A *wakf* in the terms of English Law is a trust and the legal ownership is vested in God and the equitable ownership in the *cesti que* trust, and as nobody can transfer the property vested in God the *wakfs* are not transferable. [p 431, col. 1.]

A person who himself comes in possession of properties as trustee cannot take up the position that they are his private properties. [p. 434, col. 1.]

The word 'public' in s. 92, Civil Procedure Code, means a section of the public and it is beyond dis-

nd for distribution of alms and charities etc. are bjects of a public nature within the meaning of the section. [p. 434, col. 1.]

In a suit under s. 92, Civil Procedure Code, only the trustee is a necessary party. [p. 434, col. 2.]

Section 92, Civil Procedure Code, applies even when the trust is not admitted and the very existence of the trust is in dispute. [*ibid*]

Where there is a breach of trust a suit for declaration that there is a trust and for the preparation of a scheme or removal of the trustees is maintainable only under s. 92, Civil Procedure Code. [p. 434, col. 2.]

A *sajjadanashin* can be removed where a proper case is made out against him for such removal. Cases of mismanagement or in capacity will not ordinarily be sufficient to remove a *sajjadanashin* as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property but that he is of such a low morality that his continuance as the superior head of the sacred shrines and institutions is repugnant and undesirable. [p. 435, cols. 1 & 2.]

Even if the office of the *sajjadanashin* and that of the manager have been held by one and the same person since the creation of the trust, if the Court finds that the present incumbent is unfit to continue as manager though quite worthy to be *sajjadanashin* it is not bound to follow either the terms of the grant, if any, or the usage which has been in force so far. [p. 437, col. 1.]

Courts will not apply the principle governing the case of a *mutawalli* to a *sajjadanashin*. By him the spiritual line of the founder is continued. People become his disciple mostly not so much on account of his personal qualifications but on account of the fact that by becoming his disciple they will connect themselves in a spiritual link with the founder saint. [p. 435, col. 1.]

A *sajjadanashin* is not a *mutawalli* and his powers of expenditure are wide and as long as he keeps up the institution in a fairly decent condition he is not accountable to anybody. [p. 437, col. 1.]

First Appeal against the decision of the District Judge, Monghyr, dated the 12th May, 1928.

Sir *Abdul Rahim* (with him Messrs. *Hasan Jan*, *A. A. Syed*, *Syed Hasan*, *Gholam Muhammad* and *H. R. Kazmi*), for the Appellant.

Mr. *Khurshaid Husnain* (with him Messrs. *Muhammad Hafiz*, *Syed Ali Khan*, *A. H. Fakhruddin*, *Amir Ali Khan Warzi*, *Syed Naimul Haq*, *Ali Saghir* and *Ahmad Reza*), for the Respondent.

Khwaja Mohamad Noor, J.—This appeal arises out of a suit instituted with the previous sanction of the Legal Remembrancer under s. 92 of the Civil Procedure Code and relates to the properties mentioned in schedules 1 *a* and 1 *b* of the plaint commonly known as the Maulanagar *khankah* estate, on the allegation that they are public trust properties and is for their declaration as such with a prayer that a scheme be prepared for their management and for the removal of the defendant from his office of *sajjadanashin* and manager and, finally, for a declaration that a substantial part of their income is to be spent upon public, religious and charitable objects.

Maulanagar estate has its origin from a Muhammadan Saint Shah Najimuddin *alias* Shah Maula who settled in the locality sometime in the latter part of the seventeenth or in the earlier part of the eighteenth century A. D. This saint seems to have attracted the attention of the ruler of Bengal and a grant of *Pargana* Abhaipur was made to him. This grant is not available nor its exact date is known, but its terms can fairly be gathered from a subsequent grant or *sanad* relating to this very *pargana* in favour of Shah Gholam Maula, the successor of Shah Najimuddin. By the *sanad* dated the 22nd *Jama deussani* 1161 A H. (1748) Nawab Alivardi Khan, the Governor of Bengal, made or confirmed a grant of Abdaipur to Shah Gholam Maula who, it is said, was the wife's brother of Shah Najimuddin—a fact which has been accepted by the compiler of the Gazetteer of the District of Monghyr. Two copies (or copies of copies) of this *sanad* are on the record. A complete copy has been filed by the plaintiff (Ex. 10) and an incomplete one (Ex. V) by the defendant. They are in the form of an order to the Revenue Officer of the State (*motasaddis* etc.) Leaving aside the controversial words of the *sanad* for the present it recites that the entire *pargana* aforesaid (*Pargana* Abhaipur Sarkar Monghyr in the province of Bihar) had been from before granted revenue-free (*i*) for defraying the expenses of the drum-beaters appointed by *Huzur* (the Nawab himself) and for the casual visitors to the Moulanagar *khankah* and as *madadmash* (maintenance) of the holy saint Hazrat Shah Najimuddin Ali deceased. It then proceeds that having regard to the rights (or claims) of the Great Divine Shah Gholam Maula *sajjadanashin* (successor) of the deceased saint the grant as per detail is confirmed in the name of the Great Sheikh Muhammad Bhek, a servant of the said Shah

"It is proper that you (meaning the Revenue Officer of the *pargana*) should consider that the entire *pargana* aforesaid is granted revenue-free for defraying the expenses of the casual visitors to the Moulanagar *khankah* and the drum-beaters appointed by *Huzur* and *madadmash* (maintenance) to Shah Ghulam Moula descendable to the children etc. etc."

Then comes the details of the properties and again the terms of the grant are practically repeated.

This grant was by a *sanad* dated the 11th

of March 1791 (Ex. U) in favour of the descendants of Shah Gholam Moula confirmed by the East India Company when they took over the Diwani of Bengal, Bihar and Orissa. It appears that (the exact date is not known) another grant consisting of Mustafanagar etc. was made in *istamrari mukarrari* settlement to Shah Gholam Moula by the Governor of Bengal under the seal of Raja Sitab Rai. This was also confirmed by the East India Company under a *sanad* dated the 7th of February 1787 granted to the aforesaid persons. This recites that Mustafanagar and Murtazanagar etc. were given in *istamrari mukarrari* to Shah Gholam Moula for defraying the expenses of the students, the *faqirs* (beggars) and the casual visitors of Moulanagar *khankah* and confirms and enjoins that the said persons should make proper cultivation of the said villages and, after payment of the *istamrari mukarrari jama*, should utilize the entire *jama* in defraying the expenses of the causal visitors, students etc. The revenue free property of *Pargana* Abhaipur and the *mukarrari istimrari* of Mustafanagar etc., and their appurtenances are the subject-matter of the present litigation.

The suit was instituted by five plaintiffs, but subsequently nine Muhammadans of Moulanagar with the sanction of the Legal Remembrancer were added as plaintiffs. Four of the latter subsequently withdrew from the suit and the remaining ten proceeded with it. The plaintiff's case is that the properties described above, namely, *Pargana* Abhaipur and villages Mustafanagar and Murtazanagar etc., are endowed properties and constitute a trust for public purposes of a religious and charitable nature and that a substantial part of their income should be spent towards such object. They allege that according to the custom prevailing in this trust the properties are managed by *sajjadanashins* and that on the death of a *sajjadanashin* his successor is elected by the maintenance-holders who are by courtesy called share-holders. The *sajjadanashin* is to spend suitable amounts on the religious and charitable objects of the trust and to distribute the balance among the descendants of Shah Gholam Moula called by courtesy share holders; and according to the same custom, the *sajjadanashin* on his installation is to execute an *ekrarnama* binding himself to carry out the objects of the trust and, as its counterpart, the electors execute a *mahzarnama* describing the duties of the *sajjadanashin* and the manner in which he is to carry them out. The plaint goes on to say that in pursuance of this custom the last *sajjadanashin* was Shah Sami Ahmad, that up to his time visitors were looked after and a *madrassa* was kept up and in short the trust was fairly well-managed. On his death in 1913, however, the defendant was elected *sajjadanashin*, though with some demur. He has avoided the execution of the customary *ekrarnama* and he committed various acts of malfeasance and misfeasance. Consequently in October 1922 with the previous sanction of the Legal Remembrancer a suit was instituted for his removal. In that suit the defendant denied the existence of *wakf* but later on the matter was compromised out of Court and on the petition of both the parties the suit was dismissed without costs on the 22nd of June 1923, the defendant having executed an *ekrarnama* on the 21st of June 1923. The terms of this *ekrarnama* are given in detail in the plaint. It is alleged now that subsequently the defendant started committing acts of mismanagement and breaches of trust and has even gone the length of cancelling the *ekrarnama* executed by him on the 21st of June 1923 On these grounds the plaintiffs seek the removal of the defendant from the *sajjadanashinship* of the *khankah* and estate and ask for preparation of a scheme for their management.

In the written statement the defendant controverts almost all the allegations of the plaint and on the pleadings the learned District Judge framed nine issues and decided all in favour of the plaintiff. He has passed a decree removing the defendant, directing the full discovery of the trust estate and the taking of its account from the defendant, declaring that the public, charitable and religious objects are a first charge on the estate and directing the preparation of a scheme for carrying out of the objects of the trust. He has appointed a Receiver to take charge of the properties pending preparation of the scheme and the appointment of a manager or *sajjadanashin*. The defendant has appealed.

Sir Abdur Rahim appearing on his behalf has confined himself to Issues Nos. 1, 5 and 6 as framed by the learned District Judge.

"Issue No. 1.—Is the suit maintainable?

Issue No. 5.—Is the subject-matter of the suit a trust property as contemplated by s. 92 of the Civil Procedure Code?

Issue No. 6—Has the defendant been guilty of charges, set out in para. 22 of the plaint on any breach of trust or neglect of duties and is he or not a fit and proper person to hold charge of the trust properties?

The fifth issue is the main issue in the case and I take it up first. Sir Abdur Rahim contends that the property in suit is neither a *wakf* under Muhammadan Law nor a trust under the English law. The term '*wakf*' literally means 'detention or stoppage' and the legal meaning of *wakf* according to accepted doctrine of the *Hanafi* School is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of mankind.

The earliest decision on the question is *Kulb Ali Hussain* v. *Syf Ali* (1). There the Court had to construe a Royal grant enjoining that *Mauza* Bishunpur should be exempted from the payment of revenue, that the profits arising from its land should be applied to the support of religious mendicants and students and the repairs of mosques and other public edifices, and that the general superintendence of its resources should be confided to one Darvesh Hussain and should remain vested in him, his heirs and successors. The Saddar Diwani Adawlut basing its decision upon the opinion of its law officers held this to be a *wakf*. The law officers declared that the appropriation of land or other property to pious and charitable purposes *is sufficient to constitute a* wakf *without the express use of that term in the grant.* The grant was again in issue in the case of *Asheerooddeen* v. *Sreemutty Drobo Mayee* (2) and was found to be a *wakf*. See also the Sasaram case, *Quadira* v. *Shah Kabeer Oodden Ahmud* (3). The second of the two grants which formed the subject-matter of that case is an order on the Revenue Officers (as in the present case, in the following terms.....

"granted as *inam altumgha* free from all charges to Shah Quamooddeen for the support of travellers .....Let the Imperial Officers constantly remembering this order leave the above grants in his and his children's possession from generation after generation."

In this case the grant was to Shah Quamuddin by name and not by virtue of his holding any office, to him and his children, heirs and successors for the support of travellers etc. The words used are "*warid sadir*" as in the grant which is the subject-matter of the present litigation. Thus the only difference between the grant in the Sasaram case and this grant is that there is a clear mention of a provision for the maintenance of the grantee and his descendants. The effect of this case is to lay down that a grant to an individual, heritable by his descendants, may be a *wakf* in spite of the fact that the word *wakf* is not mentioned and that there is no transfer of the property to God. The *Muftis*, while dealing with the firman which I have quoted above, expressed their views in the following terms.—

"We infer from the purport of the second firman that Sheikh Quamuddin is the grantee and the travellers are mentioned, because many such alight at a Sheikh's house and become a burden on his hospitality. Whereas then Sheikh Quamuddin is a determinate grantee, the intent of the grantor is the creation of a proprietary right in him by that permanent grant and not a *wakf*."

This is exactly the contention of Sir Abdur Rahim before us. He argues that as the travellers and others used to visit Shah Najimuddin and Shah Gholam Moula, the grantor made a grant to them personally in order to enable them to meet the expenses. When the case was referred to *Kazi-ul-kazzat*, he gave as his opinion that 'there were some expressions in particular firmans which might be considered as conveying a gift with certain stipulations for the repair of the *khankah* and support of the poor and others which supported the construction of their being a grant of *wakf*'. Then comes a very important passage: "In cases of such perplexity", he declared, "reference should be had to the custom of the country and the question should be decided by the sense attached by common usage to the expressions." In other words, the opinion was that in order to interpret a document and to decide whether the property granted to an individual by name is or is not *wakf*, it is necessary to refer to the customary use of the income of the property. The Sasaram *wakf* came up again for consideration before the Privy Council in *Jewan Dass Sahoo* v. *Shah Kabirooddeen* (4). Their Lordships construed the grant and held that the word '*altumgha*' or '*altumgha inam*' used in the Royal grant does not by itself convey an absolute proprietary right to the grantee where from the general tenor of the grant it is to be inferred that a *wakf* or endowment to religious and charitable uses was intended; and that it is not so necessary to consider the words used in

(1) 2 Sel. Rep. (S. D. A. Beng.) 139.
(2) 25 W.R. 557.
(3) 3 Sel. Rep. (S. D. A. Beng) 544.
(4) 2 M. I. A. 390; 6 W. R. 3; 1 Suther 100.

the grant as to find out what the intention of the grantor was. When I come to consider the various documents produced in this case I shall show from the grants that the grantor intended that at least a substantial portion of the income of the property, if not the whole of it, should be devoted to public, charitable and religious purposes. Sir Abdur Rahim relies upon the decision in *Kuneez Fatima* v. *Saheba Jan* (5). In this case there was the *sanad* as usual addressed to the *mutsaddis*, *chowdhuries* and *kanungoes* of *Pargana* Bhagalpur. The grantee had a large family to support and had to defray the expenses of a *khankah* for travellers and benighted students etc., and in consideration of this the village was given to him at a fixed annual *jama* of Rs. 896. It was found as a fact that the property had never been considered as endowed by any of the descendants of the original grantee and was not *wakf*. In this case the grant was made in favour of an individual and recited that the grantee had to meet certain expenses and, therefore, the grant was being made ; it was clearly a case in which the expenses incurred by the grantee were motives for making the grant and the treatment of the property as private was considered as a ground for holding the property not to be a *wakf*.

The next case to be considered is the decision in *Muthu Kana Ana Ramanadhan Chettiar* v. *Vava Levvai Marakayar* (6), which was modified by the Privy Council: *Mutu K. A. Ramanadan Chettiar* v. *Vava Levvai Marakayar* (7). The High Court as well as the Privy Council held that the test whether a deed was or was not valid as *wakf* was to see if the effect of the deed was to give the property substantially to charitable uses. Then the Judicial Committee observed that in that case though the sum devoted to the charities was not large for the present, it was abundant for their need; and that the dominating purpose and the intention of the grantor in executing the deed was to provide for those charities. In the case of *Abdul Rahim* v. *Narayan Das Aurora* (8), their Lordships of the Privy Council had to consider the question of a *wakf* in which there were severable provisions for substantial religious purposes and for the benefit of the settlor's family. The dedication was held to be a *wakf* in spite of the fact that there were some provisions for the maintenance of the family of the dedicator himself.

Another case is *Balla Bai* v. *Ata Ullah Khan* (9), where their Lordships held that the *wakf* is not necessarily bad because of auxiliary provisions made therein by the settlor for the maintenance of himself and his dependants. But it was held that if the bulk of the income is settled on the line of one's own descendants and need only go to charity on failure of any such line—an event which might be definitely postponed —and the settlor's real purpose is to make a family settlement, there can be no substantial dedication of the property to charity and the *wakf* would in consequence be invalid. In consequence of the passing of Act VI of 1913 and Act XXXII of 1930 the last view is no longer law, but this case is an authority for the proposition that a 'substantial dedication to charity is sufficient to validate a *wakf*.'

The following principles seem to me to emerge from the above cases : the requirement of a valid *wakf* is a substantial dedication of the usufruct of the property to charitable, religious or good purposes as understood in the Muhammadan law ; no particular form is necessary; a *wakf* may be construed from Royal grants of properties made in favour of individual persons as long as it was for a perpetual, religious, charitable or good purposes. The dedicator need not use the word *wakf* at all or may not formally transfer the properties to the ownership of God. If there is a substantial dedication to a valid object, it will not cease to be a *wakf* because some objects are mentioned which are not legal objects of *wakf*.

This being the law let us examine whether the properties in question are *wakf*. The earliest document available is Ex. 50, a copy of a grant by Alivardi Khan to Ghulam Bhek, a servant of Shah Gholam Moula. At the top of this copy there are words the reading and meaning of which have been the subject-matter of controversy before us. The appellants would read

(5) 8 W. R. 313.

(6) 6 Ind. Cas. 1; 34 M. 12; (1910) M. W. N. 180; 20 M. L. J. 254; 8 M. L. T. 16.

(7) 39 Ind. Cas. 235; 40 M. 116; 32 M. L. J. 101; 15 A. L. J. 139; 5 L. W. 293; (1917) M. W. N. 180; 25 C. L. J. 224; 21 M. L. T. 215; 21 C. W. N. 521; 1 P. L. W. 394; 19 Bom. L. R. 401; 44 I. A. 21 (P. C.).

(8) 71 Ind. Cas. 646; 50 C. 329; A. I. R. 1923 P. C. 44; 50 I. A. 84; 17 L. W. 509; 32 M. L. T. 153; 44 M. L. J. 624; 25 Bom. L. R. 670; (1923) M. W. N. 441; 38 C. L. J. 242; 28 C. W. N. 121 (P. C.).

(9) 103 Ind. Cas. 518; 8 P. L. T. 699; A. I. R. 1927 P. C. 191; 53 M. L. J. 166; 4 C. W. N. 705; (1927) M. W. N. 581; 44 C. L. J. 188; 29 Bom. L. R. 1289; 31 C. W. N. 1092; 26 L. W. 170 (P. C.).

(10) 53 Ind. Cas. 677; (1919) M. W. N. 662.

them as '*naqul-Moula Karim*' and contend that the first word '*naqul*' means a copy. This according to the appellants is no part of the contents of the grant. They contend that the copyist started with this heading in order to indicate that it was a copy of a copy. They would take the subsequent two words '*Moula Karim*' to indicate the name of the grantee. The respondents contend that the words are "*Bafazal Moula Karim*" meaning "by the grace of the Master, the benefactor" and that as the Governor of Bengal was creating a *wakf*, and dedicating the property to God, he invoked His blessings. In my opinion it is not at all necessary to decide this controversial question. The reading of the first word may be either "*naqul*" or "*bafazal*". Most probably it is "*naqul*" (copy) indicating that it is being copied from a copy and the next words "*Moula Karim*" may be the invoking of God. It has been the practice even up till recent times (though now rarely) in writing anything even private letters, to begin with the name of God. This does not indicate anything. Muhammadans call the deity by various names which are about one hundred in number. They are called *isim safat* (the names of the attributes of God) as distinguished from *isim zat* (the name of the person of God). The word *Allah* meaning God is the name of the person of God. All other names are the names of His attributes: as for instance *Rahim* merciful, *Ghaffar* forgiver and so on. The word "*Moula Karim*" literally means 'Master the benefactor." Among other names the word "*Moula*" has particularly been used here having regard to the name of the man in whose favour the grant was being made. A similar thing will be found in Ex. 30. At the top of it is the word "*Howal quadir*" meaning 'He is the powerful' namely the Deity. But this particular attribute of God (that is, *Quadir* Powerful) has obviously been used in consideration of the name of the saint in whose sipiritual line the writer of the document was *i. e*, Sheikh Abdur Quadir Jilani, the famous saint of Bagdad: (see the evidence of the defendant Shah Muhammad Kazim). This choosing of a particular attribute of God to indicate God Himself is sometimes done according to the occasion when that name is being used. I am, therefore, of opinion that the word "*Moula Karim*" at the top of the document refers to God but is merely formal, the epithet being chosen in consideration of the name of the man who was the ostensible grantee. This does not help either the plaintiff or the defendant. There are, however, later on the words, '*nazar Moula Karim*' which mean offering or present to *Moula Karim*. The official translator has not translated the word '*Moula Karim* and their translation was again a subject-matter of controversy between the parties. The appellant contends that it is the name of the grantee in whose favour the grant was being made and according to the respondent it means God. Its literal meaning is "Master the benefactor." I shall discuss this later on. Leaving aside these controversial meanings of some words the grant says:—

"Whereas the entire *pargana* aforesaid (*Pargana* Abhaipur) has been from before granted revenue-free as *nazar* (present) (torn) for defraying the expenses of the drum-beaters appointed by the *Huzur* (*i e*. the Governor himself) and of the casual visitors to the Moulanagar *khankah* and *madad mash* (help for livelihood) to the only saint Hazrat Shah Najimuddin Ali deceased, now having regard to the rights (or claims) of the Great Divine Shah Gholam Moula *Sajjadanashin* (successor) of the deceased saint, the grant as per detail is confirmed in the name of the Great Sheikh Muhammad Bhek, a servant of the said Shah."

Having found the translation of this grant in the paper book to be unsatisfactory, we directed a re-translation by the Head translator. Copies of this were supplied to the parties and one is attached to this judgment and the case has been argued on its basis. The word torn was obviously "*Moula Karim*". This is clear from the use of this word later on in the description and in some subsequent *rubkars* The grant is addressed to the Revenue Officers of the *Pargana* Abhaipur. It is obvious by reading the grant as a whole that before this grant this very *pargana* had been given in revenue-free grant to Shah Najimuddin Ali. It is immaterial whether the words used in the description '*nazar Moula Karim*', refer to Shah Najimuddin, who was admittedly called Shah Moula also, or indicate a present to God. As I have said, to constitute a *wakf* it is not necessary that the property should specifically be made over to God. On the other hand a grant to a person may be *wakf*. The learned District Judge thought that an epithet applicable to the Deity could not have been applied to a human being however saintly he might be and that view is in accord with strict Islamic ideas, but the fact is that in course of time these exclusive attributes of God have come to be applied to human beings of high and saintly characters for instance Hazrat Ali, son-in

law of the Prophet is called Moula Ali indicating that he is the master of all. In my opinion the words '*nazar Moula Karim*' are not used in respect of the grant which was then being made by this document to Shah Gholam Moula. It says that the property was from before "*nazar Moula Karim*" *i. e.*, a present to Moula Karim. The grant in question (Ex. 50) is a confirmation or renewal of a grant which had been made previously to the predecessor of Shah Gholam Moula, namely, to Shah Najimuddin. As I have said it is not of much importance as the case-law indicates in whose name the grant is made. The question always is, for what purpose the grant is made? This document shows that prior to this grant there was a *khankah* at Moulanagar that drum-beaters were deputed by the Governor at that *khankah* and that the grant was made to Shah Najimuddin for the purposes of maintaining these drum-beaters who were deputed by the Governor and for the expenses of the casual visitors to the *khankah* and for the maintenance of the saint himself. The question arises, whether a grant like this is or is not a *wakf*?

The points for consideration are:

(1) Was this a grant to the institution namely, to the *khankah* of Moulanagar, or was it a grant to Shah Gholam Moula personally?

(2) Is the expenditure mentioned in the grant simply a recital of the motive for making the grant or is it the object of the grant?

(3) Are the objects fit ones for a valid *wakf* under the Muhammadan Law?

(4) Does the grant fulfil the requirements of a valid *wakf* under the Muhammadan Law.

1. Whether the grant is to the institution or personal to Shah Gholam Moula.

I have already mentioned that the grant starts with a recital that *Pargana* Abhaipur had been from before a revenue-free grant as *nazar* (torn) and I have held that the portion torn was certainly '*Moula Karim*'. I have no doubt also that the property in question has been described as '*Nazar Moula Karim*' that is, a present to Moula Karim. It is to be noted that the *sanad* recites that at the time of this grant Shah Najimuddin was dead. If the words refer to him, then it means that the property was being presented to the deceased saint. Now a present to a dead man cannot by any stretch of imagination be construed to mean a personal grant to the successor of the saint. In the case of *Sujjada Muhamad Yusuf* v. *Shaw Habit* (10), there was a grant to a living saint Hazrat Khaja Rahamtulla as a present to the Prophet Muhammad for the purpose of feeding the poor and it was never contended that it was not a valid *wakf* or that it was a personal grant to the saint. Therefore in my opinion whether the words '*Moula Karim*' refer to Shah Najimuddin who was then dead or to God, they in no way indicate a personal grant to Shah Gholam Moula. As to the nature of a *khankah* and the position of a *sajjadanashin* they have been referred to in various decisions: see *Vidya Varuthi Thirtha* v. *Balusami Aiyar* (11), *Piran Bibi* v. *Abdool Karim* (12) and *Mohiuddin* v. *Sayiaudlin* (13) and are fully described in Amir Ali's Muhammadan Law Vol. I.

In *Muhammad Hamid* v. *Mean Mahmud* (14), Lord Cave, in delivering the judgment of their Lordships of the Privy Council, observed that the *khankah* is a monastery or religious institution where *darveshes* and seekers of truth congregate for religious instructions and devotional exercises. It has generally been founded by a *darvesh* or a *sufi* professing esoteric belief whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrine. After his death he is often revered as a saint. A *khankah* is usually under the governance of a *sajjadanashin* (the one seated on the prayer mat) who not only acts as *mutawalli* or manager of the institution and of the adjoining mosques, but also as the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin* and after his death the spiritual line (*sil silla*) is extended by succession of *sajjadanashins*. Generally members of his family chosen by him or according to the directions given by him in his life-time or selected by the *faqirs* and *murids* are formally installed.

Now it will be noticed that the grant now in question was made to Shah Gholam Moula describing him as *sajjadanashin* of the deceased saint Shah Najimuddin. In

(11) 65 Ind. Cas. 161; 3 P. L. T. 245; (1921) M. W. N. 449; 41 M. L. J. 316; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; A. I. R. 1922 P. C. 123 (P. C.).

(12) 19 C. 203.

(13) 20 C. 810.

(14) 77 Ind. Cas. 1009; 50 I. A. 92; A. I. R. 1922 P. C. 384; 44 M. L. J. 149; 32 M. L. T. 52; 27 C. W. N. 701; 4 L. 15; 25 Bom. L. R. 660; 38 C. L. J. 231; 1 P. W. R. 1923 (P. C.).

fact it is a renewal of the grant which had already been made to Shah Najimuddin; the property is the same, the purposes of the grant are the same and the expenditures mentioned are the same. Under the circumstances on the grant itself it cannot but be held that the grant was being made to the institution and not the saint.

Then it should be noticed that though the grant being made to Shah Gholam Moula, the actual grant is in the name of his servant Sheikh Gholam Bhek. The compiler of the Gazetteer, basing his information on tradition says that Shah Gholam Moula did not like to take a grant for himself but agreed to take it if it was for charitable purposes. This tradition is certainly of some value and is admissible in evidence.

2. Is the expenditure mentioned in the grant simply a recital of the motive for making the grant, or is it the object of grant?

Now as to the expenses mentioned in the grant itself, the order in which they are mentioned are of no importance. The first is the item, drum-beaters deputed by *Huzur i. e*, the Governor himself. The translation of *Naubatnawaz* as drum-beaters is in a way correct but requires a little explanation. '*Naubat*' literally means 'turn' and *Nawaz* means one who plays a musical instrument. In days when striking clocks were not in vogue Kings and other big men used to employ drum-beaters to beat drum to mark the time. There was also *Naubat* played on ceremonial and festive occasions; it was a paraphernalia of the King. Saints are treated as Kings of the spiritual world. The appellation 'Shah' (which means King) is almost invariably used before their names as is borne out from the *sanad* itself where the grantee and the deceased saint were described as Shah Najimuddin and Shah Gholam Moula. The *khankahs* of these saints were treated by their successors and by the devotees as if they were King's Courts and devotees provided for these institutions the paraphernalia of a King's Court. The "*Urs*" *i e.*, the anniversary of the death of the saints took the place of the ceremonials of a Royal Court. Accordingly in this *sanad* we find the *Naubat Nawaz* or drum-beaters were deputed by Nawab Aliverdi Khan himself and naturally the Nawab had to make provisions for their maintenance. It cannot, therefore, be said that this was an expenditure which Shah Najimuddin or Shah Gholam Moula were incurring themselves and it was with a view to relieve them of this burden that this grant was made.

The next item of expenditure is '*warid sadir*'. *Warid* means incomer and *sadir* means outgoer. The two words taken together mean casual visitors or travellers. I have described a *khankah*. When a *khankah* is established and the reputation of the saint presiding at it spreads far and wide, large number of persons come to visit him and to receive from him religious and esoteric teachings. Apart from these the institution becomes a shelter for wayfarers and forlorn and indigent travellers. It is absolutely impossible for the saint to provide for their board and lodging. Ordinarily, unless there is a sufficient income attached to the institution such people have to make their own provisions or go away disappointed. Pious men with religious instincts have from time to time made provisions for these people. The word used in the *sanad* is "*jehet*" which means for the purpose of. It is the same word which has been used in the Sasaram grant which had been the subject-matter of various decisions referred to above. Clearly the grant was for the purpose of the expenditures on these casual visitors and travellers and not as a motive to relieve the grantee from the expenses which he had been incurring. The words are "*warid sadir khankah Moulanagar*" (casual visitors to the *khankah* at Moulanagar) and not casual visitors to the grantee.

The next item is "*madad mash*" to the grantee, namely, Shah Najimuddin or Shah Gholam Moula and his descendants. The question arises whether this was for the purpose of maintaining the grantee in his individual and private capacity or in his capacity as *sajjadanashin*. Provision for a *sajjadanashin* is not a provision for the man, but for the institution. A *khankah* cannot exist and continue without a *sajjadanashin*. In other systems the personal expenditure of the head of such an institution has been curtailed to almost nothing by enjoining celibacy as for instance in the case of Christian monasteries or Hindu *maths* and *sangats*. But Islam prohibits celibacy and a saint with a family is the rule rather than an exception. In these circumstances devotees and adherents of the *khankah* have always made provisions for the maintenance of the *sajjadanashin* and his family so that he may devote all his time to imparting religious and spiritual instructions to his disciples and be free from secular cares. A *sajjada-*

nashin is an integral part of the institution and the central figure so to speak therein. Its existence depends on his personality. In him is supposed to continue the spiritual line. Therefore, I would hold that the provision for the maintenance of Shah Gholam Moula and his descendants was a provision for him as the head of the institution which he was then occupying as a *sajjadanashin* of Shah Najimuddin. It was a trust and not a personal grant. In the case of *Mahomed Athar* v. *Ramjan Khan* (15) the grant was described as *madadmash* (for the maintenance) of the *mutawalli*. The learned Judges held that it was a public endowment. Their Lordships observed as follows :

"The expression *madadmash* has been defined in Mitra's Tagore Law Lectures (1885) on the Land Law of Bengal as follows : *madadmash* grants are not uncommon in Bengal. They were made for religious purposes and as such are inalienable. The grants were in perpetuity. The distinction between *madadmash* and grants of similar nature known by other names is very little except as to the origin and use of the land."

The grant in the case of *Kulb Ali Hussain* v. *Syf Ali* (1) was also described in the firman as the *madadmash* grant to Mullah Faquiruddin but it was nevertheless held to be a public endowment. This interpretation was put on the firman in the case of *Asheerooddeen* v. *Sreemutty Drobo Moyee* (2). In the case of *Abdullah Sahib* v. *Hyder Beg* (16) a grant to an individual who was servant of a mosque for the mosque was held to be public trust. I have already said that the grant was originally made to Shah Najimuddin. It was renewed not in favour of his natural heir but in favour of his successor-in-office as *sajjadanashin* of the Moulanagar *khankah*. Part of the expenditures (*Naubat Nawaz*) was imposed upon the *khankah* by the grantor himself and the grantee Shah Gholam Moula is being described not in his individual capacity but as a successor (*sajjadanashin*). There is nothing in the grant from which it can be inferred that the expenditure mentioned therein represents a mere pious wish. I therefore hold that the objects of expenditure mentioned are the objects for carrying out which this grant was made.

Sir Abdur Rahim has laid much stress upon the fact that a provision for *naubat nawaz* (drum-beaters) cannot be the subject-matter of a valid *wakf*. This is so if the drum-beaters are detached from the institution; such a provision by itself does not come within the scope of the Muhammadan Law. But I have shown that the drum-beaters in this case are the drum-beaters attached to the *khankah*, and I have shown the object of having them. They are the necessary paraphernalia of a *khankah* of some schools of *sufis* like an organ for a Christian Church. I have shown that according to the evidence of the defendant's witness himself the drum-beaters perform an important function. '*Naubat*' is played four times a day and on important occasions. Admittedly, "*warid sadir* " and "*madad mash*" for the *sajjadanashin* are valid objects of *waqf*, as well as maintenance of a *khankah*.

3. Are the objects fit ones for a valid *wakf* under the Muhammadan Law.

In *Jugatmoni Chowdrani* v. *Romjani Bibee* (17) the Calcutta High Court held the essentials of a valid *wakf* to be these; an appropriator must destine the ultimate application of the income to the objects not liable to become extinct; secondly the appropriation must be at once complete; thirdly, there must be no stipulation in the *wakf* for sale of the property and expenditure of the price on the appropriator's necessities; and fourthly, perpetuity must be a necessary condition. In my opinion all the conditions are fulfilled in the present case. Sir Abdur Rahim attacked this grant on the following grounds. He contended that in the grant in question there is no ultimate reversion to charity; the property has not been tied down and as the descendants of Shah Gholam Moula may become extinct or the *khankah* itself disappear the object is not a perpetual one. True it is that perpetuity is a necessary condition; but according to the acknowledged and accepted view it is not necessary to mention it at the time of the dedication: In other words, though all the jurists insist that the property should be dedicated permanently and the right of the donor therein parted with for ever, according to Abu Yusuf it is not necessary that the word '*abad*' (perpetual) should be mentioned or that the object in favour of which the dedication is primarily made should be of a continuing and permanent character. According to him when the dedicator has named a purpose liable to failure, even then the *wakf* is valid, and after failure of the object the property

4 Does the grant fulfil the requirements of a valid *wakf* under the Muhammadan Law.

(15) 34 C. 587.
(16) 51 Ind. Cas. 42; 10 L. W. 135.
(17) 10 C. 533.

will be for the poor though they are not named. Now in this particular case it is obvious that the grant was perpetual. The grant itself uses the word *'ba farzandan'* or 'generation after generation.' This being the law, I have no hesitation in overruling this contention raised on behalf of the appellants. I have already held that provisions for Shah Gholam Moula and his family are valid objects of *wakf* as they were provided for not as individuals but as persons connected with the *khankah*. But assuming that these provisions do not come within the purview of the legal objects of a *wakf*, even then such a *wakf* will not be invalid. I have referred to the case of *Abdur Rahim* v. *Narayan Das Aurora* (8) where a mixed *wakf* was held to be valid: see also *Bazlul Ghani Meah* v. *Adak Patari* (18) In *Muthu Kana Ana Ramanadhan Chettiar* v. *Vava Levvani Marakayar* (6) the High Court of Madras held that a gift by way of *wakf* partly for valid charitable purposes and partly for the donor's heirs will not be void because the letter is not a legal purpose of a *wakf*. The *wakf* will be valid and the whole income will be devoted for the valid purposes. When this case went up to the Privy Council in *Mutu K. A. Rama Nadan Chettiar* v. *Vava Leivai Marakayar* (7), the Lord Chancellor delivering the judgment of their Lordships of the Judicial Committee observed:—"The paramount purpose of the grantor was evidently to provide for all the needs of those charities up to the limit of the trust funds the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum that is given to the family." I shall show later that in this case it is the residue which has has been left for the family of Shah Gholam Moula. Sir Abdur Rahim, however, contends that no proportion between charity and non charity having been fixed either in the earlier grant of Aliverdi Khan or in the later confirmations of the East India Company, the *wakf* is void for uncertainty. I have said more than once that in my opinion the provisions for Shah Gholam Moula and his family are charitable and religious purposes; but assuming they are not, the fixing of a proportion is not necessary. It was considered in the two Madras cases above referred to, and both the High Court of Madras and the Privy Council decided that this did not militate against the property being a *wakf*. The Madras High Court held that the fact that the donor did not direct the proportion in which the income should be divided between charities and his heirs who were appointed trustees will not raise a presumption that he intended the heirs to take the whole. It must be presumed that charities and his heirs should benefit equally. The Privy Council did not go so far, but held that the trustees were bound within the limits of the funds to make reasonable and proper provision and if they failed to do so they would be set right by a proper tribunal. A *wakf* is not invalid if the proportion of appropriation between several objects is not specified; 35 Ind. Cas. 880 *Makhlachar Rahman* v. *Fazlur Rahman* (19). This is exactly according to the English law on charities. The law is thus laid down: "When a testator gives funds partly for objects which are charitable and partly for objects which either are not charitable or do not specify the proportion in which the funds are to be applied for the different objects, the Court will make an apportionment". Again where a fund is given for several objects—some charitable and some non-charitable or illegal, there being a clear intention to devote some part to the charitable objects, if it can be ascertained what are the proportions to be attributed to the several objects, the Court directs an enquiry, but if from the nature of the gift it appears impracticable to fix the proportion or the proportion were to be in the discretion of the trustees, the Court divides the funds equally between the different objects (Halsbury's Laws of England, Vol. 4 paras. 233, 237). I therefore hold that Ex. 30 creates a valid *wakf*.

Hitherto I have been dealing with the earliest grant that for *Pargana* Abhaipur. On the assumption of the *Diwani* by the East India Company this grant of Aliverdi Khan was confirmed by them under a *sanad* (Ex. U). This *sanad* also starts with the words *'Moula Karim'* discussed above. While giving the details of the property, it describes them almost in the same manner as the *sanad* (Ex. 30). Great stress is laid on the wording in this *sanad* which as usual is an order on the Revenue Officer of the *pargana*: 'You should regard them (the heirs of Shah Gholam Moulas) as *mukhtar* (*malik* of the said

(18) 19 Ind. Cas. 896; 17 C. W. N. 1018.

(19) 35 Ind. Cas. 880.

pargana)." The learned District Judge has rightly pointed out that the word used is *mukhtar* (one having power) and not *malik*. But apart from this for whatever purpose the grant is made, its holder for the time being is, for the purposes of the Revenue Officers, a *malik*. They must deal with him as such. At about the same time another grant of Mustafanagar and other villages was confirmed by Ex. W which shows that before this confirmation Mustafanagar etc., had also been granted by the Governor of Bengal to Shah Gholam Moula. The last few lines of this grant are important. They are :—

"The said persons—should make proper cultivation of the said villages and, after payment of the *istamrari mukarrari jama*, utilize the entire amount in defraying the expenses of the casual visitors and in meeting their own necessities and devote themselves to the prayer of God for the eternal welfare of the estate."

In the body of the *sanad* among the expenses mentioned are students, the *faqirs* (*beggars*), the casual visitors to the Moulanagar *khankah* I do not propose to discuss these two confirmatory grants (Exts. U and W) in detail What I have said above about Ex. 30 applies to these two grants with much more force and clearly indicates that the grants were *wakf* and not personal grants. In Ex. W the words 'devote themselves to the prayer of God' obviously refer to the necessity of relieving the *sajjadanashin* from secular burdens and thereby enabling him to devote himself to the works of a *sajjadanashin* which as head of the *khankah* he was expected to do. These three documents, namely, Exs. 50, U and W are the only grants relating to the property in question and they prove *wakf*.

Let us now examine the usage in respect of this property and contemporaneous expositions of the grants as established by evidence. Fortunately the parties are not at variance about the facts. The controversy is as to their effect. Shah Gholam Moula had obviously been in possession of *Pargana* Abhaipur in revenue free grant and Mustafanagar etc., as *istamrari mukarrari*. On the 18th *Ramzan* 1190 *A. H. Hizri* (7th November 1776) he executed what is described as a *werastnama* (Ex. 30). An old copy of this is before us and though damaged in places the operative clauses are clear. We found the original translation to be unsatisfactory and directed it to be retranslated. We have used it and a copy of it is attached to this judgment. The document describes the children and grand children the said Shah had and then goes on to say that the balance (of his property) remaining after spending the produce thereof on *sadabart* (daily alms) at Maulanagar *khankah* and on casual visitors and drum-beaters etc., should after him be divided into eight shares and then it describes who the recipients of these eight shares were to be. It should be noted that what he willed to be distributed was not the corpus of the property but the income thereof left after meeting the religious and charitable expenses. This document is relied upon by both the parties. The appellant contends that Shah Gholam Moula treated this property as his personal one and distributed it among his descendants. They rely upon the words "which are owned and possessed by me at present," while Mr. Khurshaid Husnain on behalf of the respondent contends that if the property was not *wakf* from before, Shah Gholam Moula created a *wakf* by this instrument. In my opinion neither of these contentions can be accepted. Shah Gholam Moula neither treated the property as his own or dealt with it as such nor is there any indication in this document that he was thereby creating a *wakf*. Had it been so it would have been a mixed *wakf* which I have shown is valid. Even if it were a *wakf* for his family alone it would have been valid now, but it would not have been a public trust. In this document there is however no indication that he was creating a *wakf*. He called this document a *werasatnama*. It is however clearly a trust and I shall deal with this aspect of the case later on. On the other hand the contention of the appellant that he was treating it as personal property is untenable. No doubt the words "owned and possessed" are mentioned, but they are loose expressions. It only means that the properties were in possession and control of Shah Gholam Moula. He was doing nothing more than ensuring that after his death the arrangement for the expenditure of the income of the property should be carried on as it was carried on in his life-time, namely, that the charitable expenses should be met first It seems that he had two grandsons from a predeceased son and he was anxious that after him they might not be left out from the maintenance and the *sajjadanashin* for the time being may not appropriate the whole thing himself. He says :

"The balance of the income thereof (after meeting the expenditure on *sadabarat* (daily alms) at Moulanagar and on *khankah* and on casual visitors and

on *naubat* players, establishment and Court (expenses) [will after me be divided into eight shares."

This is exactly what was indicated in the original grant (Ex 50) and the two confirmatory grants (Exs. U and W). Had the property been the private property of Shah Gholam Moula the property itself would have been divided and not the balance of the income which is left after meeting all the charges on religious and charitable heads Sir Abdur Rahim contends that the assignment of the income is tantamount to an assignment of the corpus. He relies upon the case of *Hemangini Dasi* v. *Nobin Chando Ghosh* (20) for the proposition that the gift of share of rents and profits amounts to a gift of the share in the corpus of the estate; but in the case before us there is no gift or devise of a specific share of the rent or profit of the property. What is devised and distributed is what remains after meeting the expenses enumerated. This can in no sense be taken to be a distribution of a specific share of the rents or profits of the property. The balance may dwindle down to nothing as the expenses on charity may increase. The proposition that an assignment of the income means an assignment of the corpus is not of a universal application. It depends upon the terms of the grant and its construction: see *Shookmoy Chundra Das* v. *Manohari Dassi* (21), which was upheld in *Shoomkoy Chandra Das* v. *Manohari Dassi* (22), and *Rameshwar Narain Singh* v. *Riknath Koeri* (23). It appears that after Shah Gholam Moula some trouble arose as to the manner in which the property was to be managed and as to the right of the descendants of Shah Gholam Moula in it. They executed an agreement dated the 9th of *Ramzan*, 1206 *Fasli*, corresponding to the 15th of February 1799; Shah Gholam Hussain son of Shah Moula, was at that time the *sajjadanashin*. He is described therein as *mukhtarkar* (manager) and not a sharer or proprietor (Ex. Z-44). This document is relied upon by the appellants, but there is nothing in it to indicate that the properties were dealt with as private properties, rather it shows that they were treated as endowed properties and an arrangement for their management was being arrived at by the various persons concerned. I have shown above that the two confirmatory grants of the East India Company were made one relating to *Pargana* Abhaipur in 1780 and the other relating to Mustafanagar in 1787 and this arrangement was arrived at shortly after the second one. The appellant's contention cannot be accepted. Gholam Hussain was a sharer to the extent of about a fourth because according to Ex. 30 he was to get two shares out of the eight shares in which Shah Gholam Moula divided the remainder of the income left after defraying all the charitable and religious expenses but still he is described as *mukhtarkar*.

Then there are various *rubkars* of the Collectorates of Bhagalpur and Monghyr. The learned District Judge has dealt with them in detail and I do not wish to traverse the same ground again Suffice it to say that in none of these proceedings was there ever any claim made that the properties were the personal properties of the maintenance-holders or 'share holders.' I may mention that much stress has been laid upon the use of the word 'share-holders'. To my mind this does not show anything. They were in fact share holders of the residue and this will not make them proprietors. However the result of the examination of the various *rubkars* referred to by the learned District Judge in his judgment is that from the time of the death of Shah Gholam Moula up till now the admitted position has been that the property was managed by a *sajjadanashin* and manager who was elected by the persons interested in the distribution of the remainder; and he managed the property, met the expenses on religious observances and charities and distributed the remainder among the descendants of Shah Gholam Moula *pro rata*. Reliance has been placed upon the fact that these alleged rights to receive the maintenance or the remainder have been the subject-matter of some transfers. I have examined these documents. Apart from the question of validity of such a transfer in none of them has a share of the property itself or of the corpus been transferred, but only the right to receive a share of the surplus. Mr. Khurshaid Husnain contends that such a transfer is illegal. This is beside the point. The question is whether these transfers in any way militate against the property being a *wakf*. The distribution of the remainder among the descendants of the *mutawalli* is not illegal and is permissible,

(20) 8 C. 788.
(21) 7 C. 269.
(22) 11 C. 684.
(23) 67 Ind. Cas. 451; A. I. R. 1923 Pat. 165.

Such cases have arisen in the past In Macnaghten's Principles and Precedents of Muhammadan Law, Chap. IX, we find that though the partition of the endowment itself is illegal, a partition of the profits arising therefrom is allowable (case 3). The profits also of endowment being of right to the heirs and should be distributed amongst them; but the law of inheritance does not obtain in this species of distribution, the heirs taking *per capita* Nor will the portion of one be greater than that of another supposing them to be of equal knowledge and piety. This doctrine is maintained in the Hedaya (case 7). The fact that in this case the division has been *per stirpes* and not *per capita* does not affect the question. This is a matter between them *inter se* and will not in any way prejudice the charitable and religious character of the endowment. As I have said before the *rubkars* show that the *sajjadanashin* and manager and the so-called share holders were before the Revenue Authorities several times and on every occasion they clearly admitted that the income of the properties was to be employed in the first instance in meeting the charitable and religious observances of the *khankah* and the balance to be utilized and enjoyed by them. Occasions have arisen in which outsiders, for instance, one Sham Singh, charged them with misappropriation and breaches of trust. The Collectors and other Revenue Authorities summoned them and investigated the matter and found that the charities were being properly looked after. In one of them (Ex. Z-3) it is clearly mentioned that the expenditure on charities was at that time found to be more than half of the net income.:

"From this it is (torn) clear that out of the entire proceeds of the said *pargana* after paying the village expenses and the salaries of the servants connected with the collection of rent (torn) which is one of the necessary expenses, more than half of it is applied towards meeting the expenses of the *khankah* as given in the *sanads* and the balance which is less than one-half according to the account is spent on meeting necessary expenses and *madad mash* of all the co-sharers whose number is very large."

The defendant's grand-father Shah Yasin was the *sajjadanashin*. When he died the defendants' father was an infant. So instead of him Shah Alay Ahmad was appointed *sajjadanashin* and manager. Shah Yasin's widow claimed that her infant son should be appointed the *sajjadanashin*. There was a civil suit which ultimately went up to the High Court; *vide Bibee Sayeedan* (on behalf of her infant son *Shah Mahomed Wasien* v. *Syud Allah Ahmed* (24); the case referred to the present *khankha*, *Musammat* Sayeedan admittedly being the grand-mother of the present defendant and Shah Alay Ahmed was the *de facto sajjadanashin* at that time. *Bibee* Sayeedan lost the case. The dispute there was a succession versus election. I am not using this judgment of the High Court as proof of any particular fact decided therein. But it is admissible in evidence to show that at that time the question of the private nature of the property could have been raised but was not raised. The dispute was about the office of the *sajjadanashin* and the managership of the property. The whole contention of Sir Abdur Rahim has been that the property is a private one liable to division among the heirs and the expenditure on charities is at the option and sweet will of the sharers; he contends that they may spend any amount they like or if they choose, they need not spend anything. It was, he explains, for the convenience of the management that they by a compromise (Ex. Z-44) mutually agreed to have a *sajjadnashin* or a manager appointed. This claim of the appellant is not supported by a word in the record. On no occasion has anybody barring the defendant ever thought fit to claim that the properties were private. All the documents show that the expenditure on charities was considered obligatory and that the keeping up of a *sajjadanashin* or manager did not depend upon the will of the share-holders.

Much stress has been laid upon the fact that the properties and the institution were not taken charge of under Regulation XIX of 1810. That Regulation was enacted with a view to the proper management of *wakfs*, *debuttars* etc, and the superintendence and control of the institution were vested in the Board of Revenue, the Collectors of the districts being appointed local agents Sir Abdur Rahim has contended that the authorities did not bring this institution under their control, as contemplated in the Regulation, and that therefore it should be presumed that there was no trust for religious and charitable purposes. On the other hand the respondent contends, relying upon the various *rubkars* exhibited in the case, that as a matter of fact the institution was brought under the control of the Board of Revenue under that

(24) (1864) W. R. 327 Gap.

Regulation. The Regulation, as I have said, vested the Board of Revenue with the powers of control and the Collector of the district was appointed the local agent. The Regulation was passed in 1810 and ceased to be in force after the passing of Act XX of 1863. The *rubkars* (Exs 32 to 39) filed on behalf of the plaintiff and (Exs. X, Y, Z to Z 7) filed on behalf of the defendant refer to the intervening period. They show that the *khankah* and the properties were on many occasions the subject-matter of investigation and enquiries by the Collector and his subordinates and on some occasions reports were sent even to the Board of Revenue. Mr. Khurshaid Husnain contends that all these indicate that though the authorities did not formally and directly assume the control of the estate, they from time to time looked into the management and satisfied themselves that everything was all right.

First of all no authority has been placed before us to show that if an institution was not taken charge of under the Regulation, it is to presumed that it was not a public endowment. Certainly if it was taken charge of, it will be almost conclusive proof of the fact that it was a public institution. But the converse is not correct. Secondly, as the learned District Judge has pointed out, the authorities were not very consistent in their interpretation of the Regulation. I find in the *rubkar* (Ex. X) that the Collector was of opinion that as the descendants of Shah Gholam Moula were receiving maintenance out of the surplus income of the properties, the Regulation did not apply. This *rubkar* shows that one Shyam Singh filed a petition informing the Collector that the income of the properties being misappropriated and on inquiry held, it was ascertained that the income was being applied to the expenditures provided for in the various *sanads*. The *sajjadanashin* was called upon to produce three years' account papers. The last portion of the *rubkar* runs thus:

"Accordingly on a perusal of the Council's *sanads* dated the 9th February, 1780, and the deposition of the said Shah it has been ascertained that the entire *pargana* aforesaid was granted for defraying the expenses of casual visitors, drum-beaters and meeting the necessary expenses, that is, the personal expenses of the aforesaid persons. In the circumstances I am of opinion that Regulation XIX of 1810 is not applicable to the said *pargana* and the allegations of Shyam Singh are quite false."

On the other hand I find from (Ex. Z-3) that the Deputy Collector of Monghyr was of opinion that the Regulation did apply to the estate in question. The report is in these terms:

"However, we are of opinion that the Regulation is applicable so far as the expenses of the *khankah* appertaining (torn) are concerned. But as the defendants are meeting the aforesaid expenses which fact has been proved as mentioned above, and as there is not the least doubt about it is not in any way liable for interference and reiterated inquiry on the part of the Government."

Thirdly it seems to me that on each occasion when the matter came up before the Collector who was a local agent under the Regulation and on inquiry it was found that the institution was being well managed and that there was no mismanagement or abuse, he did not like to interefere in the details of the management. But I fail to understand under what provisions of law these inquiries were being made if they were not under Regulation XIX of 1810. It also appears that on the occasion of the appointment of the *sajjadanashins* the Board of Revenue was informed and its orders were obtained. (Ex. 36) shows that under the orders of the Board of Revenue the Collector visited the institution, called for accounts and submitted a report to the Board. Exhibit. 39 shows that the Board of Revenue passed orders as to the *sajjadanashinship* of the estate. From all these my conclusions are that though the estate was not formally taken up under the Regulation some sort of control was being exercised, and that could only have been under the powers vested in the Board of Revenue and the local agent under that Regulation. I have said that the learned District Judge has pointed out and I agree with him, that from these proceedings it is quite clear that the action of the authorities was not very consistent. This will not in any way show that the property was not a public charitable institution at least so far as the expenses of the *khankah* were concerned. On the whole, therefore, I hold that the properties in dispute are *wakf* properties or, at any rate, they are properties burdened with obligation in favour of the public and, by usage, they have been treated and dealt with as such. The usage can be taken into consideration in deciding whether there is trust. A trust of public nature was decided on the basis of usage in the cases of *Kumaraswamy Asary* v. *Lakshmana Goundan* (25) and

(25) 128 Ind. Cas. 504; 53 M. 608; A. I. R. 1930 Mad. 549; 31 L. W. 499; 59 M. L. J. 974.

Court of Wards v. *Ilahi Bakhsh* (26): see also the observations of Chamier, J., in 11 Ind. Cas. 166 *Puran Atal* v. *Darshan Das* (27) which were upheld in *Purna Atal* v. *Darshan Das* (28).

Hitherto I have discussed whether the property is *wakf* under the Muhammadan Law and I have held that it is so; but for the purpose of the suit, however, it is only necessary to find whether the properties are trust for public, religious or charitable purpose and come within the purview of s. 92 of the Civil Proceedure Code. The words 'trust' and 'trustee' have not been defined in the Code and, in my opinion, the words as used in s. 92 have not been used in any technical sense of the term as used in English Law or in the technical sense in which the word '*wakf*' is used in Muhammadan Law. The words have been used in the ordinary sense "Trust" in the most enlarged sense in which that term is used in English jurisprudence may be defined to be an equitable right, title or interest in the property, real or personal, distinct from legal ownership thereof; and "trustee" is a person holding the legal title of property under an express or implied agreement to apply it and the income arising from it to the use and for the benefit of another person". (Story). Under the English conception of the term, trust conveys the idea of two estates and two parties: a legal estate vested in the trustee and an equitable estate vested in the *cesti que* trust or beneficiary. Obviously therefore had the word 'trust' been used in the Code in the technical sense of the English jurisprudence the section would have been inapplicable either to *wakfs* of the Muhammadan Law or to *debuttars* of the Hindu Law. But it has been held in a long series of decisions that this section does apply to Muhammadan *wakfs* and to Hindu *debuttars* where there is no conception of two estates and two ownerships. What is required for the purposes of s. 92 of the Civil Procedure Code is to find whether or not there is a property burdened with obligations for public purposes of a charitable or religious nature. It will apply in all cases, whether *wakf* or not, where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature. The word "trust" as used in Act XIV of 1920 was the subject-matter of judicial interpretation in *Syed Ali Hussain* v. *Bibi Akhtari Begam* (29) by Kulwant Sahay, and Macpherson, JJ. Their Lordships held that the word was not used in the technical sense of English jurisprudence and applies to *wakfs*. That Act is, if I may say so, a supplement to s. 92 of the Civil Procedure Code, and the procedure prescribed in the Act may be the foundation of a suit under this section of the Code. It has however, been contended that a trust apart from *wakf* is, unknown in Muhammadan Law, and that the grant in question having been made by a Muhammadan Ruler, if it is not *wakf* it cannot be held to be a trust. I am unable to uphold this contention. If this means that a trust in the technical sense of English Law (that is, a double estate: one legal and another equitable) is unknown in the Muhammadan Law, it is so. But a trust in the sense of being an obligation attached to the ownership of the property is known and recognized by the Muhammadan Law. Anglo-Muhammadan jurists have used the word 'trust' in respect of *wakf*. In his well-known treatise on Muhammadan Law, the Hon'ble Mr. Ameer Ali (latterly a member of the Judicial Committee) has freely applied the word 'trust' to a *wakf*. It is difficult of course for a technical term representing a very complex notion in one system of law to have an exactly equivalent connotation in another system of law. Muhammadan Law of course does not recognise the double ownership and the double estate; an equitable right enforceable by a particular Court is unknown in the Muhammadan Law. But devoid of this technicality, *wakf* is a trust in the wider meaning of the term. Trust, apart from *wakf*, is recognised by the Muhammadan Law and is known as '*amanat*'. Reliance has been placed on the *dictum* of Karamat Husain, J., in *Puran Atal* v. *Darshan Das* (27) for the proposition that trust apart from *wakf* is unknown in the Muhammadan Law. This view was however not accepted by his Lordship's colleague, Chamier, J., (afterwards Chief Justice of this Court) and it was the view of the latter which ultimately prevailed in the Court of Appeal in *Puran Atal* v. *Darshan Das* (28). With my profoundest respect to the former learned Judge, I must point out that

(26) 17 Ind. Cas. 744; 40 C. 297; 1 P. W. R. 1913; 11 A. L. J. 265; 13 M. L. T. 318; (1913) M. W. N. 270; 17 C. L. J 360; 27 P. R. 1913; 83 P. L. R. 1913; 15 Bom. L. R 436; 25 M. L. J. 61; 40 I. A. 18 (P. C.).

(27) 11 Ind. Cas. 166.

(28) 14 Ind. Cas. 698; 34 A. 468; 9 A. L. J. 709.

(29) 134 Ind. Cas. 417; 12 P. L. T. 793; A. I. R. 1931 Pat. 354; 10 Pat. 506; Ind. Rul. (1931) Pat. 449.

the view on the law of *wakf* as enunciated by him is opposed to a large number of judicial decisions of this country which I have referred to above. Reference has been made to the observations of their Lordships of the Privy Council in the case of *Vidya Varuthi Thirtha* v. *Baluswami Aiyar* (11). In my opinion their Lordships did not lay down that a trust apart from *wakf* was not recognised by the Muhammadan Law. That was a case in which the applicability of Art. 134 of the Indian Limitation Act was under consideration and their Lordships held that in Muhammadan *wakf* and Hindu *debuttars* the property is not transferred to a trustee and, therefore, the Article did not apply. No doubt their Lordships remarked that the charitable dispositions of Muhammadans and Hindus did not manifest themselves in creating trust but in creating *wakfs* and *debuttars*. Their Lordships were in that case using the word 'trust' in the English sense of the term and that judgment is no authority for the proposition that a trust is unknown to Muhammadan Law. On the other hand trusts apart from *wakf* even for charitable and religious purposes, have been recognised by our Court: *vide Futtoo Bibee* v. *Bhurrut Lall Bhukut* (30). In the case of *Bishen Chand* v. *Nazir Hosain* (31) their Lordships of the Privy Council applied the principles of *wakf* to a partial trust. There a property burdened with obligation in favour of religious and charitable objects was sought to be sold in execution of a decree. The High Court of Calcutta held that it could not be done. An argument was advanced from the Bar that the property could be sold subject to the obligation. The High Court observed as follows:—

"Nor is it essential to decide whether the property became what is known technically as *wakf*.....The Subordinate Judge finds, and we think rightly, that the deed created a trust for certain specific purposes. This implies the trustee for the time being entitled to hold the property subject to the performance of the duties charged upon it."

Their Lordships ultimately held that the property could not be sold. A trust for private purposes was upheld under the Muhammadan Law in the case of *Umjad Ali Khan* v. *Mohumdee Begum* (2). The distinction between an English trust for charitable and religious purposes and a Muhammadan *wakf* is more historical than legal. According to the accepted doctrine *wakf* signifies the extinction of the proprietor's ownership in the thing dedicated and the detention of the thing in the implied ownership of God in such manner that the profits may revert to and be applied for the benefit of mankind: (see Baillie and Grady's Hedaya). According to the English doctrine historically viewed a trust involves a double ownership and two estates. Practically it involves single ownership with an obligation annexed thereto. The English conception of trust is that while the legal ownership of the property vests in one person, the equitable ownership vests in the beneficiaries or what is called *cesti que* trust and this equitable right is enforced by the Courts of Equity. The conception of *wakf* according to the accepted doctrine that the property is vested in God is a later development. Right Honourable Mr. Ameer Ali in his Preface to the Second Edition of Muhammadan Law says as follows:—

"In some places I have rendered the term '*wakf*' as trust, in others, as dedication or consecration..... Properly analysed, it will be found that the word *wakf* combines all the ideas conveyed by these different expressions. The Mussalman Law holds that there can be no *milk* (property) without a *malik* (proprietor); that all property owned by human beings is God's free gift to them; and that when a man creates a *wakf*, he transfers the *milk* (the ownership in the substance of the thing) to the Almighty on the condition that the usufruct should be applied for the benefit of His creatures whoever they may be. It will thus be seen that the word combines the elements of trust, dedication and consecration. From one point of view God is the owner of the substance, the recipient of the benefaction being His creature. In another sense, He is the trustee on his behalf, the *mutawalli* being a mere manager."

The conception of property being vested in God was evolved a century or so after the death of the Prophet. A full discourse will be found in Abdur Rahim's Muhammadan Jurisprudence page 304. The jurists differed as to the ownership of the property. According to Imam Abu Haneefa the ownership of the property even after dedication continues with the *wakif* or appropriator, and the devoting or appropriating of its profits or usufruct in the charity, on the poor, or other good objects is in the manner of '*areeut*' or commodate loan but not so as to be obligatory on the appropriator and, therfore, according to him he may revoke the appropriation or sell the subject of it. There are two ways in which this may be made obligatory: one is by the words of bequest. According to Imam Muhammad the ownership remains with the dedicator till a trustee is appointed and then vests in God. According to Aboo Yusuf it becomes vested in God as soon as

(30) 10 W. R. 299.
(31) 15 C. 329.
(32) 11 M. I. A. 517; 10 W. R. 25; 2 Suther 98; 2 Sar 315.

a dedication is made. It is submitted that all this is nothing but a legal fiction. Ordinarily it looks rather strange that a mortal human being transfers a property to God. The legal fiction is brought into play in order to explain where the ownership of the property rests after once a dedication is made. However, the doctrine propounded by Aboo Yusuf is the Hanafi Law as is at present administered. The Hanafi jurists have not accepted the doctrine enunciated by Imam Abu Haneefa. The *Shia* lawyers hold that the corpus after dedication becomes vested in the beneficiaries themselves. It is again, I submit, a legal fiction; otherwise it cannot be said that the beneficiaries become the owners of the property in a sense in which the word ownership is used in law. A similar legal fiction has been introduced by the Hindu law-givers. According to them *debuttar* becomes the property of the idol, who has been held to be a juristic person under perpetual tutelage of the *shebait*.

From what I have said above it is clear that different systems of law have different explanations as to the legal ownership of a property dedicated for public, religious or charitable purposes. English Law recognizes two estates one legal and another equitable; Imam Abu Haneefa holds the ownership continuing in the appropriator; his two disciples hold the ownership to be in God, the *Shias* in the beneficiaries, and the Hindus in the idol. But whatever may be the difference in the conception of the legal ownership of the property, there is no difference whatsoever that the beneficiaries have a right in the property which the Courts of Law or Equity will enforce. The distinction of legal and equitable estate is of no importance now. The same Courts exercise both jurisdictions. The difference in the law of trust and *wakf* as to the transferability or otherwise of the property is also due to this difference in the conception of the ownership of the property. As under the English Law the legal ownership is vested in a human being, he can transfer it subject to the obligation placed upon it. Under the Muhammadan Law while the ownership is vested in God the *mutawalli* is His manager, he cannot transfer the corpus of the property. A *wakf* in the terms of the English Law is a trust and, if I may be permitted to say so, the legal ownership is vested in God and the equitable ownership in the *cesti que* trust, and, as nobody can transfer the property vested in God the *wakfs* are not transferable. Be that as it may, there is no question on the authorities that the properties in suit are trust properties in the wider sense of the term. Even if we assume that the grants of the rulers of Bengal did not create a *wakf* and that the properties were the personal properties of Shah Gholam Moula the *wasiatnama* (Ex. 30) obviously creates a trust in favour of charities. I have already shown that a transfer burdened with trust is recognised in the Muhammadan Law It has been contended that at the most the property can be taken as a private property burdened with certain obligations Reliance has been placed upon the case of *Dalrymple* v. *Khoondkar Azeezul Islam* (33). In that case the only question decided was that if the office of the *mutawalli* is hereditary, the *mutawalli* has power of granting even a perpetual lease. In this case we are not concerned with the power of the *mutawalli* or whether the office of the *sajjadanishin* is hereditary. In the case of *Shah Mahomed Wasien* v. *Syed Allah Ahmed* (24) it was held that the office was not hereditary but was based upon election; and it is not the defendant's case that the office is hereditary. Had it been, so, he would have been nowhere. Nor are we concerned in this case with the right or powers of the *sajjadanashin*. That case in no way affects the question of this property being a *wakf* or a public trust.

It was further contended that it was a conditional grant to Shah Gholam Moula and whether the condition of the grant is being fulfilled or not is a matter between the grantor and the grantee and the plaintiffs as representing the public have no right to interfere or claim the preparation of a scheme Mr. Hasan Jan, who gave the final reply on behalf of the appellant, contended that there was no privity of contract between the grantee and the public. The contract was between the grantor and the grantee and the public did not come in at all. In my opinion this argument is not entitled to any serious consideration. If this is to prevail, no public trust can come in within the purview of s. 92 of the Civil Procedure Code In any trust for the benefit of the public there is no privity of contract between the grantor and the grantee on the one hand and the beneficiaries on the other: the beneficiaries come in because they are beneficiaries.

It has been contended on behalf of the

(33) (1858) 14 S. D. A. 586.

respondents that the defendant having himself come in possession of the property as a trustee, cannot now take up the position that they are his private properties. Reliance has been placed upon the cases of *Srinivasa Moorthy* v. *Venkata Varada Aiyangar* (34) and *Vaidyanatha Ayyar* v. *Swaminatha Ayyar* (35). I agree that the plaintiff is estopped from taking up the position which he has taken in the present suit. The *khewat* of the Record of Rights and the Register D maintained under the Land Registration Act show the properties to be trust. The Record of Rights has a presumptive value and has not been rebutted.

I now take up the question of the maintainability of the suit. Sir Abdur Rahim's contentions are that (1) even if the property is *wakf* or trust, it is of a private nature and s 92 does not apply; and (2) if it is private property burdened with obligations in favour of the public, s. 92 has no application. After what I have said above, I do not think it is necessary to consider this point. It is settled law that the word 'public' means a section of the public, and it cannot be disputed that provisions for maintenance of *khankahs* and for distribution of alms and charities etc., are objects of a public nature, and s. 92 has full application in such cases. Most of the cases referred to above are cases of *khankahs* and shrines and no question was raised that they were not trusts of a public nature. Reliance has been placed upon the case of *Delrus Banoo Begam* v. *Asghar Ali Khan* (36) and the decision of their Lordships of the Privy Council on appeal reported as *Ashgar Ali* v. *Delroos Banoo Begum* (37). But there the *Imambara* in question was of a private character and the case has been distinguished in the case of *Ram Charan Lal* v. *Fatima Begam* (38). Reliance has also been placed upon the case of 25 Ind. Cas. 661 *Abul Hasan* v. *Saiyed Aziz Ahmad* (39). There their Lordships expressly refrained from deciding whether the property was or was not a *wakf*, but they held it was not a public trust. There is nothing in the report to show that any section of the public was in any way to be benefited by that institution. On these grounds I hold it is a *wakf* of a public nature and s. 92 is applicable.

Sir Abdur Rahim has further argued that the suit is bad for defect of parties. He contends that all the maintenance-holders (commonly known as share-holders) ought to have been impleaded in the suit. I see no force in this. First of all it is a suit of a representative character and on the findings which I have arrived at the share-holders are no more than beneficiaries under the trust, the plaintiff having instituted the suit on behalf of all the beneficiaries. But Sir Abdur Rahim contends that the decision of the question whether it is a trust of a public nature cannot be arrived at in the absence of the share-holders who claim the property to be a private one. In the first place there is nothing to show that any descendant of Shah Gholam Moula except the defendant has ever claimed the property to be a private one: rather, whenever any one of them appeared before any public authority the obligation of the trust was freely and ungrudgingly admitted. Apart from this in a suit under s. 92, Civil Procedure Code only the trustee is a necessary party and not those who may be in possession of trust properties even adverse to the trust. *Makhlachar Rahman* v. *Faizur Raman* (19). At any rate the plaintiff was not bound to implead those persons who do not put forward any claim adverse to the trust. The property is in possession of the defendant and the case in my opinion can proceed against him. I, therefore, hold that the suit is maintainable. Then it is contended that as there is a prayer for the declaration of the disputed properties to be a trust, s. 92 of the Civil Procedure Code does not apply. It is argued that the section only applies when the trust is admitted and not when the very existence of the trust is in dispute. There is no force in this contention either. When there is a breach of trust a suit for a declaration that there is a trust and for the preparation of a scheme or the removal of the trustee can only be instituted under s. 92 the Code. Such a suit will not be entertainable if instituted as an ordinary civil suit. The learned District Judge has rightly held that the suit is maintainable and I entirely agree with him.

(34) 11 Ind. Cas. 447; 34 M. 257; 15 C. W. N. 741; 8 A. L. J. 774; 13 Bom. L. R. 520; (1911) 2 M. W. N. 375; 14 C. L. J. 64; 21 M. L. J. 669; 10 M. L. T. 263 (P. C.).

(35) 32 Ind. Cas. 804; 22 A. L. J. 983; 47 M. L. J. 361; 35 M. L. T. 189; A. I. R. 1924 P. C. 221; (1924) M. W. N. 749; 10 C. & A. L. R. 1076; 26 Bom. L. R. 1121; 20 L. W. 803; 40 C. L. J. 454; 29 C. W. N. 15; 51 I. A. 282; 47 M. 884; 26 P. L. R. 1; L. R. 6 A. (P. C.). 17; 1 C. W. N. 617 (P. C.).

(36) 23 W. R. 453; 15 B. L. R. 167.

(37) 3 C. 324; 2 Sar. 749; 3 Suther 444; 2 Ind. Jur. 601 (P. C.).

(38) 27 Ind. Cas. 442; 42 C. 933; 19 C. W. N. 33.

(39) 25 Ind. Cas. 661.

I now take up the question of the removal of the *sajjadanashin*. It has been contended that the *sajjadanahin* as the spiritual head of the institution is not removable. Reliance has been placed upon the case of *Ishtiaq Ahmad* v. *Massood Ahmad* (40) and the observations of the learned Judge in the case of *Mohiuddin* v. *Sayiduddin* (13), *Secretary of State for India* v. *Mohiuddin Ahmad* (41), and *Piran Bibi* v. *Abdoor Karim* (12). Except in the case of *Ishtiaq Ahmad* v *Massood Ahmad* (40) it has nowhere been laid down that a *sajjadanashin* is not liable to be removed however wicked and undesirable he may be. With my profoundest respect to the learned Judges of the Allahabad High Court who decded that case, I am unable to agree with this view. Cases may be conceived in which a *sajjadanashin* or a spiritual head of a Hindu institution, say for instance, a *mohunt* of a *sangat*, may so behave himself that his very connection with the institution may be repulsive to the general public and may amount to desecration of the sacred places; I see no reason why the Courts cannot intefere in such cases On the other hand I entirely agree (if I may say so) with the observation of Abdur Rahim, J in the case of *Sujjada Mahamad Yusuf* v. *Shaw Habit* (10) that a *sajjadanashin* is removeable if a proper case be made out. Cases of the removal of the *mohunts* are very numerous: see *Subbaroya Chetti* v. *Subramania Iyer* (42), *Zemindar of Kalahasti* v *Ganapathi Iyer* (43) and *Raja Peary Mohan Mookerji* v. *Monohar Mukerji* (44). No doubt the Courts have not to apply the principle of a *mutawalli* to a *sajjadanashin*. By him the spiritual line of the founder is continued. People become his disciple mostly not so much an account of his personal qualifications but on account of the fact that by becoming his disciple they are connecting themselves in a spiritual link with the founder saint. Cases of mismanagement or incapacity will not ordinarily be sufficient to remove a *sajjadanashin* as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property but that he is of such a low morality that his continuance as the superior of the sacred shrines and institutions is repugnant and undesirable. I do not wish, however, to discuss this matter in detail as I propose to allow the defendant to continue as *sajjadanashin* of the institution and to deprive him only of the management of the property. I shall take up this matter later on.

Coming to the facts justifying the removal of the defendant I entirely agree with the findings of the learned District Judge. The alleged acts of mismanagement, immorality and dishonesty of the defendant have been enumerated in para. 22 of the plaint. They are eighteen in number. The learned District Judge has found some of them proved and some not proved. The acts of malfeasance and misfeasance which have been proved against the defendant and which have not been properly explained by the appellant's Advocates before us mostly, if not entirely, relate to the management of the property. There have been one or two instances of neglect of duty if not of positive dishonesty (as for instance, not contesting the suit instituted by his father against the *khankah* in connection with certain gardens) There are some acts of want of uprightness in maintaining accounts Apart from this the defendant has adopted an attitude of obstruction. He put forward a claim that the property is a private one which none of his predecessors ever thought of doing. He himself in the former suit did not go the length of claiming the property to be a purely private one. He has withheld accounts from the Courts and the learned District Judge has rightly declined to accept his reasons for doing so. On all these grounds I think that he has rendered himself unfit to be allowed to continue as a manager of the institution. On the other hand charges of immorality have not been proved and taking into consideration the circumstances of the case I do not think a case has been made out for his removal from the office of the *sajjadanashin*. It has not been proved that he is landing a wicked life. I do not for a moment wish to belittle the misdeeds of the defendant, but at the same time I must note that he was to some extent tempted to adopt the untenable position which he took in the trial of the suit and in this Court. He was elected a *sajjadanashin* in 1913. No-

(40) 3 Ind. Cas. 508; 6 A. L. J. 632.
(41) 27 C. 674.
(42) 48 Ind. Cas. 833; (1918) M W. N. 786.
(43) 48 Ind. Cas. 897; (1918) M. W. N. 555.
(44) 62 Ind. Cas. 76; 2 P. L. T. 725; 34 C. L. J. 86; 41 M. L. J. 68; 14 L. W. 101; 23 Bom. L R. 913; (1921) M. W. N. 554; 19 A. L. J. 773; 26 C. W. N. 133; 30 M. L. T. 24; 48 C. 1019; A. I, R. 1922 P. C. 235; 48 I. A. 258 (P. C.).

thing was alleged against him till 1922. In that year a suit under s. 92 of the Civil Procedure Code was instituted against him. His defence was that Shah Abdul Rasheed the son of the late *sajjadanashin* Shah Sami Ahmad, who was a minor in 1913 and could not be elected as *sajjadanashin* on his father's death, having come to age wanted to regain the position which his father held. Whatever might have been the misdeeds of the defendant, I have reason to believe that the suit of 1922 was instituted more in the interest of Shah Rasheed than in the interest of the public. The suit was withdrawn as soon as the defendant came into terms with him and executed the *ekrarnama* (Ex. I in the case). Paragraphs 5 and 14 of this *ekrarnama* have not been printed in the paper book. We got them translated and a copy is attached to this judgment. The term on which the case was allowed to be dismissed was in effect that Shah Abdul Rasheed would get Rs. 200 per month: Rs. 100 for the expenditure of maintaining the *madrassa* of which he would be placed in charge and another Rs. 100 by way of allowance and it was also stipulated that though Shah Abdul Rasheed would get these allowances, he would not be required to stay at Maulanagar. In fact the provision was that Rs. 200 per month would be handed over to Shah Abdul Rasheed to do whatever he liked with it. On the defendant agreeing to these terms the suit was dismissed. It is obvious that had the defendant been such a bad lot as he is painted now, the suit would not have been withdrawn on his executing the *ekrarnama* the main object of which was to benefit Shah Abdul Rasheed. The defendant's case is that as this *ekrarnama* contained new terms contrary to the usage prevailing in the institution he had to cancel it. I have no hesitation in holding that the defendant was justified in cancelling this *ekrarnama*, which in a way allowed Rs. 200 a month to a man holding no definite office in the institution. It seems to me that the *sajjadanashinship* of this *khankah* has been an apple of discord practically throughout the whole history of this institution Disputes and fights are apparent from some of the *rubkars* which have been filed in the suit. I have said that Shah Yasim, the grandfather of the defendant was the *sajjadanashin*. On his death his son Shah Wasim, the plaintiff's father being an infant, one Shah Ally Ahmad was elected a *sajjadanashin*. There was a litigation up to the High Court. Shah Ally Ahmad was succeeded by his grandson Shah Sami. His term of office seems to have been rather peaceful. On his death the family of Shah Wasim again managed to capture the office and the defendant was elected As soon as Shah Rasheed Ahmad, son of Shah Sami Ahmad, became of age, he wanted to get something out of the office which was formerly held by his father and managed to secure Rs 200 a month by the *ekrarnama* (Ex. 1). During the litigation it is apparent that some of the account-books of the defendant were stolen and then produced in Court to contradict the account filed by the defendant himself. In this litigation unfortunately there have been intrigues and counter-intrigues. The respondents have laid much stress upon the falsity of the accounts. No doubt there are contradictions between the two sets of accounts, Exs. 3, 3a and 4 on the one hand and Ex. 5 on the other. But these account papers exhibited on behalf of the plaintiff have a history behind them. They were stolen from the office of the defendant by some of the disloyal servants and then produced in the previous suit to contradict the accounts filed therein by the defendant. After the dismissal of the suit they were taken back and have again been filed in this suit. One of the sets bears the initial of the defendant (S. M. K). It is difficult to find out how far the defendant is responsible for it. The manner of this production makes one suspicious. The defendant is obviously an incompetent person so far as management of *zemindari* is concerned and knows very little of accounts. These papers may be the outcome of a deep planned design, as when one's subordinates are disloyal anything may happen. The clerks might have intentionally kept two sets of accounts to be used against the defendant. All this, however, can in no way be used as an excuse for the defendant for adopting the attitude which he has taken in this case for which I have held that he is unfit to continue as the manager of the property. But it has not been shown that he is a man of such a wicked character or loose morals as to necessitate his removal from the *sajjadanashinship* also. After all, the office is based to some extent on the belief of the people and I am of opinion that so far as the order of the removal of the defendant from the office of the *sajjadanashin* is concerned, it should be reversed. He was elected by the descendant of Shah Gholam Moula and there is nothing on the record to show that the majority wante

his removal. No doubt three of them have been examined as witnesses in the case, but in an institution like this there shall always be dissentient voices: all cannot agree to one man. In the documents the head of the institution has been described as *sajjadanashin* and manager and I see no objection in making provisions for separation of the offices. No doubt up till now both the offices were held by one and the same incumbent, but in preparing a scheme the Court is not bound to follow either the terms of the grant, if any, or even the usage which has been in force so far: see *Prayag Dass* v. *Tirumala Srirangacharlavaru* (45) and *Mohamad Ismail Arif* v. *Ahmed Moolla Dawood*(46). In the case of *Sujjada Muhamad Yusuf* v. *Shaw Habit* (10) cited above the Madras High Court did separate the office of the *sajjadanashin* from that of the manager. Therefore, while upholding the order of the learned District Judge so far as removing the defendant from the managership of the property is concerned, I am of opinion that it is neither necessary nor desirable to remove him from the office of the *sajjadanashin*. This will, however, in no way affect the rights of the share-holders to remove him if they choose to do so in conformity with the scheme to be prepared, nor will it in any way interfere with the powers of the learned District Judge if he for any future act of the defendant on a proper application made to him decide to remove him.

There is another matter in which the decree of the learned District Judge requires some modification. This is in respect of the order about the taking of the accounts from the defendant. As *sajjadanashin* by election the powers of the defendant were more than that of a *mutawalli* or trustee. The decisions which I have referred to above show that a *sajjadanashin* is not a *mutawalli* and his powers of expenditures are wide and as long as he keeps up the institutions in a fairly decent condition he is not accountable to anybody. No doubt those decisions do not apply to the present case where the surplus after meeting the necessary expenses is to be distributed among the maintenance-holders; but nevertheless directing him to render accounts for the previous year without some limit will be a very complicated affair especially when there are indications on the record to show that at the time of the previous suit the account papers of the defendants were stolen and there is reason to believe that the plaintiffs in that case were to some extent privy to it. This being the state of affairs it will not be in the interest of justice if the defendant be now called upon to render accounts without some limit being imposed upon it On the other hand I do not want in any way to jeopardise the interests of the maintenance-holders who have been depending upon the allowances for the last one hundred and fifty years or more. The decree of the learned District Judge should in my opinion be modified in such a way as would confine the rendering of accounts only to ensuring that a reasonable amount has been distributed among the maintenance-holders. If it is found that about half of the net income of the estate has been distributed among the maintenance holders no account of the remainder shall be taken from the defendant. This is the proportion roughly speaking which was being distributed among them. If on the other hand much less than that has been distributed, the District Judge will proceed to take accounts from the defendant for a period of three years prior to the institution of the suit and for the period of the pendency of the suit. The descendants of Shah Gholam Moula commonly called share-holders have been receiving the surplus of the income. I agree with the learned District Judge that these maintenance-holders should not be deprived of what they have been getting for the last 150 years A provision to this effect fixing a proportion between the two classes of expenditure should be embodied in the scheme. I am not unmindful of the fact that a time may come when the amount to be received by a particular individual is so small and insignificant that it will be of no use to the recipient to receive it and it will be contrary to the intention of the grantor to pay it: in other words it will be too small to be called a maintenance. In that case the recipient may himself refuse to take it or the Court on a proper application made modify the scheme and apply the doctrine of *cypres* to such an amount. It is also necessary that the broad principles of the scheme should be embodied in the decree.

In view of the remarks I have made it is necessary that in lieu of the decree of the learned District Judge a fresh

(45) 28 M. 319; 15 M. L. J. 133.

(46) 35 Ind. Cas. 30; A. I. R. 1916 P. C. 132; 43 I. A. 127; 43 C. 1085; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 4 L. W. 269; 9 Bur. L. T. 141; 8 L. B. R. 517 (P. C.)

decree be prepared in this Court in the following terms:

(1) That it be declared that the Maulanagar *khankah* is a public, religious and charitable institution and that the properties appertaining to it mentioned in schedules 1-A and 1-B to the plaint are public trust properties primarily intended for the maintenance of the said *khankah* and for the maintenance of the charitable, religious and educational institutions attached to it and a full discovery of the trust properties shall be made

(2) That a scheme be prepared for the management of the said *khankah* and the properties attached thereto; that it be declared that the religious, charitable and educational expenditures on the scale provided in the scheme are the first charge on the income of the said properties, and the balance left is to be distributed among the descendants of Shah Gholam Moula in the same manner in which it is being distributed up till now.

(3) That the defendant be removed from the office of the manager of the properties attached to the institution, but will continue as *sajjadanashin* of the *khankah* till he is removed either in the manner provided in the scheme aforesaid or by the District Judge for any act of misconduct committed by him subsequent to this date.

(4) That till such time as the defendant continues to be *sajjadanashin* of the *khankah* a manager or *mutawalli* shall be appointed in the manner provided in the scheme aforesaid.

(5) That if on account of death, resignation or otherwise the defendant ceases to be the *sajjadanashin*, the manager to be appointed under cl. (3) shall also vacate office and a joint *sajjadanashin* and manager or a separate *sajjadanashin* and a separate manager shall be appointed in the manner provided in the scheme aforesaid.

(6) That an enquiry shall be made in such manner as the learned District Judge directs as to the proportion of the net income of the estate that has been distributed by the defendant among the maintenance-holders during the period commencing from three years before the institution of the suit till the assumption of charge by the Receiver appointed by the Court. If on such enquiry the District Judge finds that the defendant has not distributed among the maintenance-holders one-half of the net income of the property or such lesser sum as the learned District Judge considers reasonable, an account of income and expenditure of the trust properties for the period aforesaid shall be taken from the defendant and a decree for a sum to exceeding the difference of the amount so distributed and half of the net income of the property shall be passed against the defendant. The court-fee required for the preparation of the decree shall be paid by the trust estate. The decretal amount realized shall be paid into the Court and distributed among the maintenance-holders in such proportion as the District Judge directs.

(7) The scheme shall provide for, among others, the following:

(*a*) Provision for a *sajjadanashin* and a manager, the posts being held either by one or by two different persons, and the manner of their election, appointment and removal.

(*b*) Provision for allowances to be paid to the *sajjadanashin* and the manager if the offices are held by one person and also when they are held by different persons.

(*c*) Proportion of income to be spent on the religious, educational and charitable objects and the proportion to be distributed among maintenance holders with due regard to the past usage.

(*d*) Distribution of duties between the *sajjadanashin* and manager when the offices are held by different persons so that the *sajjadanashin* may remain in charge of the religious duties and maintain them out of the funds provided by the manager.

(*e*) Provision for the appointment of a committee of supervision for the preparation of the budget and supervising the works of the *sajjadanashin* and the manager.

(*f*) Provision that the *sajjadanashin* and manager shall as far as practicable be from among the descendants of Shah Ghulam Moula.

(*g*) Provision for practical audit of accounts and their inspection.

(8) The scheme prepared shall be liable to be modified or altered as occasion arises on a proper application made to the District Judge.

The District Judge will now proceed to prepare a scheme for the management of the trust properties. At the time of the preparation fullest opportunity will be given to the descendants of Shah Gholam Moula to appear and represent their case before him. He will also consult and take the views of such persons interested in the institution as he thinks fit. Till the scheme

is prepared and given effect to the Receiver appointed by the Court will remain in office. He will pay to the *sajjadanashin* such sum for the performance of the religious ceremonies and his allowance as the District Judge directs.

The decree of the lower Court is varied but the appeal has in the main failed and with the modifications above indicated is dismissed with costs. The defendant-appellant shall personally pay the costs of the plaintiffs both of the Court below and this Court. The hearing-fee in this Court shall be calculated at the rate of Rs. 75 for each day of the hearing. A fresh decree will be drawn up in this Court.

Scroope, J.—I have had the advantage of reading the judgment of my learned brother and I agree with his findings and the decree he proposes to pass in this case.

In the written statement the defendant took the plea that the reference to religious and charitable purposes in the original grant was really not a condition attaching thereto and was not the operative part of the grant but was rather by way of recommendation and as expressing a pious wish of the grantor. We have in this case a number of documents in which the property is referred to, covering a period of almost two centuries from the original Moghal grant in 1748 down to the present time—I refer in particular to the orginal *sanad*, the *Warasatnama*, the confirmatory *sanads* of the East India Company, the *rubakaris* of the Collectors of Monghyr and Bhagalpur, the different land registration proceedings, the plaints and written statements in suits relating to this property and the finally published Record of Rights. In every one of them there is a reference either direct, incidental or inferential to the trusts attached to this property. Here and there from the different documents isolated words and sentences have been extracted by the appellants as indicating complete proprietary right in the property free from all trusts; but the documents must be read as a whole, and in my opinion applying the test of contemporaneous exposition no other conclusion whatsoever is possible than that the suit property is burdened with a public trust of a charitable or religious nature. Questions relating in one way or the other to this property had been frequently before the Courts both Revenue and Judicial; before the former in the early days of the last century when apparently one Shyam Singh called into question the nature of the grant, again with reference to the desirability of its being taken charge of under Regulation XIX of 1810; and later still in proceedings under the Land Registration Act; before the latter in the form of suits for the disputed *sajjadanashinship*, suits for accounts, suits for rents and so on; in truth until in the present case the defendant has done so, nobody ever set up a claim of complete proprietorship unburdened by any obligation of a public or private nature. As to defendant himself, in 1913 he applied for registration of his name in his capacity as as *sajjadanashin* and he was registered as *mutawalli* in respect of the property connected with the *khunkah*. In 1914 he defended a suit in respect of this property and stated that it was a *wakf* property and that nobody had any proprietary rights in it, *vide* Ex. 20. In 1916 he filed a suit for accounts on the footing that certain villages including the property now in suit were a *wakf* property of the Moulanagar *khankah* of which he was in possession; as *sajjadanashin*; in the previous *wakf* suit in 1922 he pleaded that the properties were burdened with the discharge of certain charitable and religious functions having been granted originally as "*madad mash*" to Shah Gholam Maula. There are abundant other instances on the record where litigation proceeded on the footing that these were trust properties.

Again ever since its creation, this estate has spent quite a considerable portion of its income in the charitable purposes enumerated in the original grants. I refer to defendant's own document Z (3) a *rubakari* of resumption proceedings in 1836 in the Court of the Deputy Collector of Monghyr, for settlement of the *pergana* under Regulation II of 1819 and III of 1828. The Deputy Collector found that the then holders of the estate had in the seven years from 1233 to 1239 *Fasli* spent more than half the income on the purposes of the *khankah*. Again in Ex. 42 a written statement by *sajjadanashin* Aley Ahmad runs as follows:

"the defendant admits the plaintiff's allegation in his plaint that the annual expenditure in connection with the *khankah* is Rs. 20,000".

Again the defendant himself in his evidence pleads annual expenditure of Rs. 8,000 to Rs. 9,000 on the upkeep of the *khankah* and the objects connected with it. Indeed he has never challenged the actual practice in this respect and he could not do so on the facts. Sir William Hunter in his Statistical Account of Bengal describing

the revenue-free tenures of the Monghyr District writes in 1876 as follows:—

"The largest revenue-free tenure in the District is the entire Abhaipur *Pergana* held by the *khankah* or monastery at Maulanagar, which was confirmed by *sanad* of Council, dated 9th February, 1786. The proceeds of the estate are expended in feeding travellers and beggars, in keeping a school and a mosque, and also in the personal expenses of the endowed family".

In face of this long course of contemporary exposition and usage and apart from there being a very clear case of estoppel against him it is in my opinion entirely idle for the defendant now for the first time to set up a claim to full proprietorship. As Lord Turner said in the *Attorney-General* v. *Rochester* (*Corporation of*) (47),

"Undoubtedly, if an instrument be doubtful in its terms, contemporaneous usage may be referred to; and if there has been a long usage in the application of funds to purposes which may be warranted upon one construction of the instrument, but which may not be warranted upon another construction of the instrument, the Court will lean to that construction of the instrument (provided it be doubtful) which will best correspond with the mode in which the funds have been for so long a period applied".

Applying the test laid down by this learned Judge the plaintiffs are in my opinion on practically unassailable ground in fact sufficient to conclude this part of the case; and my learned brother has shown the original *sanad* indicates very strongly that the grant to Shah Gholam Maula was not a personal grant but was a grant for the maintenance of the *khankah* founded by Shah Nizumuddin.

The really substantial contention in the appeal was that the property is not legally *wakf* and that if it is *wakf* the position of the defendant is not that of the trustee in respect of it and that therefore s. 92 of the Code of Civil Procedure has no application. There is a very great similarity between this case and the two grants referred to in *Kulb Ali Hussain* v. *Syf Ali* (1) and *Quadira* v. *Shah Kabeer Ooddeen Ahmed* (3); two grants were in question in the latter case and it is to the second grant commonly known as the *Alamshahi* grant that the grant in suit bears a very strong resemblance. Those two cases entirely dispose of the contention advanced for the appellant that the grants lack the essentials of *wakf* as no charitable intention is expressed in the document and as the characteristic of perpetuity is wanting. *Wakfs* in connection with *khankahs* are a very well-known feature of *Islamic* institutions and have been recognised in numerous decisions of which the two mentioned above bear the closest resemblance to the present case.

I would also refer to the decision of the Privy Council in *Jewan Das Sahoo* v. *Shah Kabirooddeen* (4) which follows these two decisions. I can see no substance at all in the contention that the objects in the *sanad* namely, meeting the expenses of the drumbeaters, travellers, the *madadmash* of *sajjadanashin* and the upkeep of the *khankah* are not valid objects of *wakf*. They seem to me when taken together to fulfil the requirements completely as indicated in the leading text-books on Muhammadan Law.

Indeed Sir Abdur Rahim has taken all what I may call the stock objections that can be taken against a claim of *wakf*: for instance another contention was that the original *sanad* constituted a family settlement in favour of Shah Golam Maula and that the distribution on religious objects was left entirely to the holder's discretion and that these incidents negative a valid *wakf*. Apart from the Wakf Validating Acts of 1913 and 1923 with which admittedly we are not concerned here, whatever uncertainty there might have been at one time regarding the legality of family settlements in the form of *wakf*, the law is more or less crystallised by reason of the decisions of their Lordships of the Privy Council, for instance in *Mahomed Ahsanulla Chowdhury* v. *Amarchand* (43) and *Mutu K. A. Ramanadan Chettiar* v. *Vana Levvai Marakayar* (7). As a result of these and other decisions an endowment is not vitiated as *wakf* by the fact of its containing provisions in favour of the founders of the family or in favour of a particular family and their descendants provided that the primary object appears to be a permanent application of the property to some public and unfailing purpose. As my learned brother has shown such permanent application is the result of the deed in question (Ex. 50) and, as I said above, it has not been disputed that ever since its foundation a considerable portion of the income has always been devoted to charitable purposes. Nor do I think can it be seriously contended that it is an illusory *wakf*; obviously the grantor could have had no object in creating a fictitious *wakf* in favour of the descendants of Shah Golam Maula. His purpose undoubtedly was a charitable one, namely to provide for the up-keep of the *khankah*.

Sir Abdur Rahim relies very strongly on the case of *Kaneez Fatima* v. *Saheba*

(47) (1854) 5 D. M. & G. 797; 104 R. R. 287.

(48) 17 C. 498; 17 I. A. 28; 5 Sar. 476 (P. C.).

Jan (5) as meeting the cases which I have followed. It is true that the *sanad* in that case is not at all unlike the *sanad* in the present case; but there the decision was very much influenced by the fact that the former proprietors had dealt with the estate in a manner wholly inconsistent with its being an endowment and the alleged endowment there had never come under the superintendence of the Board or the local agents established by Regulation XIX of 1810. As my learned brother has pointed out though the right to receive the maintenance from the residue after the necessary provision has been made for charity has been the subject-matter of transfer, there is no instance of any transfer of the corpus of this property and, as I said, there has been for well nigh two centuries consistent disposal of quite a considerable part of the funds on charitable purposes.

As regards the application of Regulation XIX of 1810, as has been shown in the judgment of my learned brother and of the first Court, the action of the Revenue Authorities at the time was seemingly inconsistent and the position is undoubtedly obscure. It must, however, be borne in mind that the object of this Regulation was to provide that all endowments for the support of mosques, temples etc., should be applied according to the real will and intention of the grantor, to use the words of the preamble. Government did not, under this Regulation, actually assume the management of these endowments; they only made themselves responsible for their due application; local agents were to be appointed for the discharge of these duties by the Board of Revenue and the Commissioners and they were to ascertain the necessary particulars regarding all endowments and report them to the Board of Revenue; my reading of the various *rubakaris* on this point is that as Government was satisfied as a result of their enquiries undertaken under this Act that the public trusts connected with the property were being duly provided for, they considered it unnecessary to interfere any further with the managemant of the property, more especially as it was a rent-free grant to Shah Golam Maula. Whatever doubt there may have been in the minds of the officers dealing with the question as to the applicability of the Regulation, they had no doubt at all, as far as I can see, that the property was burdened with a public trust of a charitable nature. Some cases of Government interference with the Trust must however be emphasized. In 1856 the Collector of Monghyr under instructions from the Board of Revenue made a personal investigation into charges against Shah Muhammad Yasin for "mismanagement of the Abhaypur trust". After investigation by calling for statement of five years receipts and expenditure, nothing was found to justify the allegation of mismanagement. In February, 1858, the Commissioner asks the Collector to report the name of an individual duly qualified to be *sajjadanashin* in place of the late Shah Muhammad Yasin and in May, 1858, he informs the Collector he has rejected objections against the nomination of Aley Ahmad. A letter of the Board of Revenue in September, 1858, confirms these proceedings of the Collector and Commissioner *vide* Exs. 36, 37, 38 and 39 where the property is referred to indifferently as the "Abhaipur Trust", "Abhaipur Endowment" "Abhaipur Institution".

This interference is irreconcilable on any other explanation than that it was a public trust of a charitable or religious nature. In my view of the matter, so far as the applicability of this Regulation goes, the history of the matter is decidedly against rather than for the defendant. Besides, another consideration which must be borne in mind is that we are here considering whether the property is a trust for a religious or charitable purpose as contemplated under s. 92 of the Code of Civil Procedure; and the learned District Judge rightly took the view that even if the *wakf* theory should fail for any reason we are not only entitled to presume but ought to presume the existence of a charitable and religious trust, as is said in *Purna Atal* v. *Darshan Das* (28). Sir Abdur Rahim argues that a public trust other than *wakf* is unknown to Muhammadan Law. The sole authority for this proposition seems to be the dictum of Karamat Husain, J., in *Puran Atal* v. *Darshan Das* (27) but as my learned brother has shown the view taken in that particular case by that learned Judge was not accepted in the Court of Appeal in *Puran Atal* v. *Darshan Das* (27). There were some old decisions to the effect that heritable property might under Muhammadan Law be burdened with a trust of a religious nature such as maintaining the tomb of a saint without becoming *wakf* and that it might then be alienated subject to that trust, see *Kuneez Fatima* v. *Sahiba Jan* (5) and *Futtoo Bibee*

v. *Bhurrut Lall Bhukut* (30). But these cases were overruled by the decision of the Privy Council in the case of *Bishen Chand Basawat* v. *Nadir Hossein* (49) in which a property burdened with a trust of this nature was held not to be attachable by personal creditors of the trustee as of course it would have been if he could have alienated it subject to the trust. This latter case does not go the length of saying that there cannot be a public trust without its being *wakf* but what it does say is that a property burdened with such a trust is inalienable which of course is the main characteristic of *wakf*. Similarly here the question is whether the property is trust property within the purview of s. 92 of the Civil Procedure Code and very clearly it is, and has that characteristic of *wakf*. As to whether it has all the other characteristics of *wakf* the question is really academic once the above finding is arrived at. What I wish to lay stress on is that assuming the correctness of Sir Abdur Rahim's proposition, he has not been able to show that there is any incident in this property foreign to a *wakf*. The learned Advocate in this connection also relied on the decision of their Lordships in the Privy Council in *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (11) for his contention that s. 92 had no application to the head and manager of a religious institution like a *wakf*. The short answer to this argument is that to accept it would mean holding that the provisions of s. 92 have been consistently misapplied by the Courts in India. Decisions after decisions can be cited where s. 92 has been applied to cases of *wakfs* and Hindu Endowments.

It was substantially on these lines that the finding of the learned District Judge as to the trust character of the property was challenged at very great length, but the argument left me entirely unconvinced. Whatever difficulties there might be in the interpretation of the original *sanad*, after that the way is clear, and for its time a plainer case of a public trust for religous purposes so far as the practice of nearly two centuries goes it would be difficult to find in this country. Indeed I think that the defendant in view of his own previous admissions was very ill-advised to deny his public obligations in respect of this Estate.

As to his removal from the managership, that is inevitable on the findings of the learned District Judge, which passed unchallenged in Sir Abdur Rahim's argument. In his final reply to the respondents Mr. Hassan Jan for the appellant challenged them all, and thus took the respondents and ourselves rather unawares by this unusual procedure. It is perfectly clear that the trust property is being grossly mismanaged; proper accounts are not kept, Government demands are not paid in time, with the result that penalties are incurred; and the defendant has been treating the trust money as his own. Another very serious act of misbehavior is a nominal lease of 24 *bighas* of *kasht* land to his brother-in-law, which the learned District Judge has really found to be a conversion to his own use. It is clear that he cannot be allowed to continue in the management. As regards personal misbehaviour rendering him unfit to hold the *sajjadanashinship* I agree with my learned brother that the charges are not so well established as to justify his removal from his spiritual duties.

R. L. *Decree modified.*

(49) 15 I. A. 1; 15 C. 329; 5 Sar. 113 (P. C.).

PATNA HIGH COURT.

Appeal from Original Decree No. 258 of 1928.

May 4, 1931.

MUHAMMAD NOOR AND SCROOPE, JJ.

PARMESHWAR SAHU—DEFENDANT—APPELLANT

versus

NANDKISHORE LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 167—Service of notice—Onus of proof—Certificate in Collector's order sheet, effect of.

A certificate in the order sheet of the Collector in a proceeding under s. 167 of the Bengal Tenancy Act, that a notice has been properly served is *prima facie* evidence that such a notice has been served, though it is not conclusive and it is open to the opposite party to challenge it and show that the notice was not served in time. *Kuldip Narain Tewari* v. *Ram Lal Mandal* (2), *Nandkishore Chowdhury* v. *Sir Rameshwar Singh Bahadur* (3) and *Ram Protap Marwari* v. *Jhoomak Jha* (4), followed. *Hitnarayan Singh* v. *Rambarai Rai* (1), dissented from. [p. 444, col. 1.]

Appeal from a decision of the Subordinate Judge, Purnea, dated the 20th September, 1928.

Mr. *P. C. Manuk* (with him Messrs. *S. C. Bose* and *K. M. Moitra*), for the Appellant.

Messrs. *S. Saran* and *C. P. Sinha*, for the Respondents.

Muhammad Noor, J.—This appeal arises out of a suit instituted on 14th November, 1927, to enforce a simple mortgage executed on 17th June, 1921, by defendant No. 1 in favour of the plaintiff-respondents for a sum of Rs. 1,000, the due date being *Kartick*, 1329, corresponding to 15th November, 1921. The mortgaged

property is 59 *bighas* and 5 *cottahs* of land forming part of the occupancy holding of defendant first party It appears that on 17th April, 1923, subsequent to this mortgage, the occupancy holding was sold in execution of a rent decree of the landlord and purchased by the appellant, the defendant No. 3. After the institution of the present suit that defendant (defendant 2nd party) proceeded under s. 167 of the Bengal Tenancy Act to annul the encumbrances of the plaintiffs and contested the suit so far as the passing of the mortgage-decree was concerned. The mortgagor-defendant did not enter appearance either in the suit or in the appeal before us. The question to be decided by the Court below was (1) whether the application before the Collector filed by defendant No. 3 for the issue of notices under s. 167 was within one year of his having come to know of the encumbrances and (2) whether the said notices were properly served upon the plaintiffs. The lower Court has decided both these points against the defendant No. 3 and has passed a decree for sale in the usual terms. He has held that the defendant No. 3 came to know of the mortgage at the time of the sale or soon after it and that the notices were not properly served. The defendant No. 3 has appealed.

On his behalf it has been contended by Mr. Manuk that the notices were properly served and the view of the law taken by the Court below about the onus of proof, effect of the order of Collector and the sufficiency of service is wrong and that it has not been proved that defendant No. 3 came to know of the encumbrances prior to the date of knowledge alleged by him. In my opinion these contentions are well founded and must prevail.

I take up the question of knowledge. The plaintiffs' first contention is that defendant No. 3 came to know of the mortgage at the time of the sale itself. The only evidence on this point is that of Puran Lal Dutt, witness No. 3 for the plaintiffs. This witness says that he was one of the bidders at the sale and having been informed by defendant No. 3 that the property was encumbered he did not bid high. This story is obviously unreliable. In a sale held in execution of a rent decree the question of encumbrances is not a factor which a bidder takes into his consideration. A holding is sold with a right to the purchaser to annul the encumbrances by taking steps under s. 167 of the Bengal Tenancy Act, Then looking at the bid-sheet (Ex. 2) it appears that this witness did bid up to Rs. 1,025. The bids were as follows:—

			Rs.
Puran Lal Dutt	...	...	700
Decree-holder—	...	...	800
Defendant No. 3	...	...	1,000
Decree-holder...	...	...	1,020
Puran Lal Dutt	...	..	1,025
Defendant No. 3	...	...	1,041

From this it is clear that Puran Lal Dutt did bid up to Rs. 1,025 and the property was knocked down to the defendant No. 3 at Rs. 1,041. Therefore, the story that he refrained from bidding high on the ground of there being an encumbrance on the property cannot be believed. His bid was almost as high as that of the defendant No. 3. Then again it is strange that having seen the defendant No. 3 outbidding him he still acted upon his information. The story is obviously a got-up one and I do not believe it.

The next contention of the plaintiffs is that at any rate the defendant No. 3 came to know of the mortgage soon after the sale.

[His Lordship referred to the evidence and continued as follows.]

I, therefore, hold that it has not been proved that the defendant No. 3 came to know of the mortgage prior to the date of knowledge alleged by him.

Coming to the question of the service of notices upon the plaintiffs, it appears that the notices were taken to them on two occasions, once on the 3rd January, 1928, and then again on the 24th January, 1928. On both the occasions the plaintiffs were not found and there were, what is called, substituted services. Afterwards defendant No. 3 sent a notice by registered post which was returned unserved and the postal peon, Prayagdat Missir (witness No. 2) swears that he took the notice to the plaintiffs and they refused to take it. I see no reason to disbelieve this witness. Though this postal notice is not a legal notice, it proves that the plaintiffs were avoiding the services of the notices on them. The story put forward by the plaintiff is that Nandkishore Lal, one of the plaintiffs, had been during this period ill at Bhagalpur and it is argued that no step was taken to have the notice served upon him there; but on this point the evidence of the witnesses is contradictory. Plaintiffs' Witness No. 2 (Sundar Lal) deposed that Nandkishore the plaintiff was ill at home while the plaintiffs' Witness No. 4 (Mukti Narain Prasad) deposed as follows:

"My uncle Nandkishore is ill at Bhagalpur. He is there from December last."

It is impossible to believe these contradictory statements of the plaintiffs'

witnesses. It is clear from the record that defendant No. 3 was anxious to have the notice served upon the plaintiffs: he took all possible steps which he could. When on the first occasion the notice was returned after a substituted service the Collector directed their re-issue and to have them served again. Defendant No. 3 took steps to do so and to be on the safe side sent a notice by post and this also the plaintiffs refused to accept. The peon who went to serve the first notice has been examined but the one who took out the notices on the second occasion was not available. The Collector was, however, satisfied as to the proper serving of this notice and there is a note to this effect in his order-sheet.

The learned Advocate for the respondents has, however, relied upon the case of *Hitnarayan Singh* v. *Rambarai Rai* (1) and argued that an entry in an order-sheet of the Collector in a proceeding under s. 167 of the Bengal Tenancy Act to the effect that notice has been served is no proof of the service of the notice. In this case referring to the order-sheet of the Collector, Das, J. observed as follows:—

"The order-sheet in this case merely records an opinion of the Collector that the notices were served but the opinion of the Collector is in no way binding upon the Civil Court and the Civil Court has a right to determine for itself the question whether the notices were in fact served or not." No doubt the observation is on somewhat wide terms; but this view of the law is contrary to what has been laid down in various decisions of the Division Bench of this Court. In *Kuldip Narain Tewari* v. *Ram Lal Mandal* (2), Das, J. himself, relying upon the decision of *Nandkishore Chowdhury* v. *Sir Rameshwar Singh Bahadur* (3), held that once the notice was issued the onus is upon the person questioning the validity of the notice to establish that the notice under s. 167 was not served in accordance with law, and held that it was for the plaintiff to establish that notice was not served upon him within the period of limitation. It will thus appear that one of the learned Judges who was a party to the decision of *Hitnarayan Singh* v. *Rambarai Rai* (1) held otherwise in an earlier case and Kulwant Sahay, J., agreed with this view which is supported by the decision of Sir Dawson Miller, C. J. and Mullick, J., in the case of *Nandkishore Chowdhury* v. *Sir Rameshwar Singh Bahadur* (3) referred to above and the case of *Ram Protap Marwari* v. *Jhoomak Jha* (4) decided by Roe and Jwala Prasad, JJ. Mr. Shambhu Saran has relied upon some Calcutta cases: they have been referred to in *Hitnarayan Singh's case* (1). I do not, however, propose to discuss them in detail. In my opinion the weight of the judicial decisions of this Court is in favour of the view that a certificate in the order-sheet of the Collector that the notice has properly been served is *prima facie* evidence that such a notice has been served but it is not conclusive. It is open to the other party to challenge it and show that the notices were not served in time, but in the absence of any evidence to the contrary, such a service must be presumed. As I have said the case of *Hitnarayan Singh* v. *Rambarai Rai* (1) seems to lay down otherwise but the weight of authority is against this view.

I am satisfied on the evidence adduced that the notices were properly served. Under the rules of the Government of Bengal the notice under s. 167, Bengal Tenancy Act is to be served in a manner provided for the service of summons under the Civil Procedure Code. Mr. Sambhu Saran has relied upon a number of decisions as to the sufficiency or otherwise of a substituted service. I do not propose to deal with them. I am satisfied that the plaintiffs were avoiding the service of notices upon them.

The result is that the appeal must be allowed; the decree of the lower Court for the sale of the mortgaged properties should be set aside and the plaintiffs' suit as against defendant No. 3 must be dismissed; but under the circumstances the said defendant should bear his own cost throughout. Plaintiffs are, however, entitled to a simple money decree against defendants Nos. 1 and 2. Simple mortgage *prima facie* carries with it a stipulation to pay the debt. In the bond in suit there is a clear promise of payment. The bond is a registered one and the suit is within six years of the due date. There is a cross-objection on behalf of the plaintiffs as to the amount of interest. I see no reason to interfere with the discretion exercised by the lower Court and would dismiss it. There will, therefore, be a simple money decree in favour of the plaintiffs against defendants Nos. 1 and 2 with costs and interest at the rate ordered by the Court below till the institution of the suit and

(1) 115 Ind. Cas. 196; 7 Pat. 733; A. I. R. 1928 Pat. 45; 9 P. L. T. 484.

(2) 107 Ind. Cas. 821; 7 Pat. 260; A. I. R. 1928 Pat. 312.

(3) 78 Ind Cas. 476; A. I. R. 1924 Pat. 515; 2 Pat. L. R. 819.

(4) 39 Ind. Cas. 943; 1 P. L. W. 440.

thereafter at 6 per cent. per annum. The plaintiffs will bear their own costs of this appeal. The suit as against defendant No. 3 is dismissed but without costs.

Scroope, J.—I agree. The weight of judicial decisions in this Court is in favour of the view that once there has been a proceeding before a Collector under s. 167 of the Bengal Tenancy Act with a view to annulling an encumbrance and the Collector had certified the due services of notice in such a proceeding the onus of establishing non-service is on the person who alleges it: I refer to the decision in *Kuldip Narain Tewari* v. *Ram Lal Mandal* (2) which followed two previous decisions of this Court, *Dhunmun Singh* v. *Lachmilal* (5) and *Nandkishore Chowdhury* v. *Sir Rameshwar Singh Bahadur* (3). It is difficult to reconcile the decision in *Hitnarayan Singh* v. *Rambarai Rai* (1) relied on for the respondents in which it was held in effect that the Collector's certificate in such a proceeding was merely a record of his opinion and left the matter completely open for the Civil Court with the decision in *Kuldip Narain Tewari* v. *Ram Lal Mandal* (2) to which one of the learned Judges who decided *Hinarayan Singh* v. *Rambarai Rai* (1) was a party. In *Kuldip Narain Singh* v. *Ram Lal Mandal* (2) that learned Judge in dealing with this question observed: "The decisions of this Court are perfectly clear. It was held by this Court in *Nandkishore Chowdhury* v. *Sir Rameshwar Singh Bahadur* (3) that the onus is upon the person questioning the validity of notice to establish that the notice under s. 167 was not served in accordance with law." The only dissenting decision of this Court is the subsequent decision of the same learned Judge in the later Patna case.

N. K. & A. *Appeal allowed.*
Cross-objection dismissed.

(5) 57 Ind. Cas. 492.

PATNA HIGH COURT.

Civil Revision Application No. 382 of 1931.
February 12, 1932.
SCROOPE, J.

RUPLAL AGARWALA—PETITIONER
versus
DHANSAR COAL Co. AND OTHERS—OPPOSITE PARTY.

Companies Act (VII of 1913), s. 152—Arbitration Act (IX of 1899), ss. 2, 3—Arbitration between Companies—Applicability of Arbitration Act—Civil Procedure Code (Act V of 1908), s. 80—Notice to Secretary of State—Waiver by Secretary of State, effect of.

Section 152, Companies Act, is not restricted by s. 2 of the Arbitration Act which limits the application of the latter Act to cases where the subject-matter could be the subject of a suit in a Presidency Town. [p. 446, col. 2.]

Arbitrations between companies in Bihar and Orissa under s. 152, Companies Act, are therefore governed by the Arbitration Act and not by Sch. II, of the Civil Procedure Code; *Sundar Mal Lakhu Mal* v. *Paris Business Corporation Ltd.* (2), dissented from. *Attock Oil Co. Ltd.* v. *Abdul Majid* (3), followed. [p. 447, col. 1.]

A third party is not entitled to raise the plea of want of notice under s. 80, Civil Procedure Code. *Bhola Nath Roy* v. *The Secretary of State for India* (1), followed. [p. 446, col. 1.]

Application against an order of the District Judge, Manbhum-Sambalpur, dated the 4th June, 1931, confirming that of the Subordinate Judge, Dhanbad, dated the 27th November, 1930.

Messrs. *A. B. Mukharji* and *U. N. Banerji* for the Petitioner.

Messrs. *S. M. Mullick*, *S. C. Mazumdar* and *Nitai Chandra Ghosh* for the Opposite Party.

Judgment.—This application under s. 115 of the Code of Civil Procedure is against the order of the District Judge of Manbhum-Sambalpur dismissing an appeal from the decision of the Subordinate Judge of Dhanbad directing under para. 20, Sch. II, of the Code of Civil Procedure that an award be filed.

The Dhansar Coal Company and the East Indian Railway Company had a difference of opinion regarding the rates to be levied from the petitioner Mr. Ruplal Agarwala, who is a colliery proprietor, for the use of the assisted siding, constructed at the expense of the Dhansar Coal Company. The terms and conditions relating to the siding are to be found in the memorandum of agreement usually known as the Assisted Sidings Agreement between the Dhansar Coal Company, and the Railway Company. It would appear that the Railway Company under cl. 14 of this agreement fixed the rate of tollage for the use of the siding payable by Mr. Ruplal Agarwala, petitioner, at two annas per ton; but the Dhansar Coal Company were not agreeable to this rate and in accordance with cl. 22 of the agreement both parties agreed to submit the dispute to arbitration. The question referred was what would be chargeable by the Railway Company to Mr. Ruplal Agarwala for using the siding, and there was also another matter about loading space which does not concern us here. The arbitration proceeded and an award was made to the effect that the tollage should be at the rate of 3 annas 6 pies per ton of coal subject to a minimum tollage of Rs. 1,800 per year. Then the Coal Com-

pany made an application in the Court of the Sub-Judge, Dhanbad, for filing the award under para. 20 of Sch. II of the Code of Civil Procedure making the East Indian Railway Company only a party; but Mr. Ruplal Agarwala intervened and was made a party by the order of the High Court. The Subordinate Judge allowed the application and directed the award to be filed. Mr. Ruplal Agarwala appealed to the District Judge and his appeal was dismissed and now he has come to this Court under s. 115 of the Code of Civil Procedure.

As regards the first two contentions pressed on his behalf, there is no substance in them and they can be disposed of without any difficulty. The first was that the arbitrators had no right to fix a minimum tollage and went outside the scope of the reference in doing so. Clearly as found by both the Courts below there is nothing in this point. The arbitrators struck a mean rate between the proposals of Dhansar Coal Company and the East Indian Railway Company and it is perfectly natural that they should further fix a minimum flat rate, as the learned Subordinate Judge has shown, this is a customary method of fixing tollage for the use of an assisted siding.

As regards the absence of notice under s. 80 on the Secretary of State, the defect on this score has been waived by the Secretary of State. The Railway have no objection to urge on the score of waiver when the case went on appeal to the District Judge though they had taken it before the Subordinate Judge, nor do they raise the objection now in this Court and a third party is not competent to raise the question of notice when the Secretary of State has waived it, *vide Bhola Nath Ray* v. *The Secretary of State for India* (1).

The substantial contention was that the Court of Subordinate Judge acted without jurisdiction in entertaining the application to file the award under para. 20 of Sch. II of the Code of Civil Procedure, because the agreement embodied in para. 22 of the Assisted Sidings Agreement being one under s. 152 of the Indian Companies Act of 1899 in accordance with the Indian Arbitration Act, under s. 3 of this latter Act, para. 20 of Sch. II of the Code of Civil Procedure can have no application. There can be no doubt that the agreement in question to submit future differences to arbitration was made under s. 152 of the Companies Act "in accordance with the Indian Arbitration Act", the award itself is described as an award "in the matter of the Indian Arbitration Act." The learned Advocates for the opposite parties, the Railway Company and the Dhansar Coal Company, contend however that the Indian Arbitration Act has not been extended by the Local Government under the proviso of s. 2 of the Act to this province at all and that, therefore, the Act has no application. But according to s. 1 this Act extends to the whole of British India though its application is limited by s. 2 to cases where the suits relating to the subject matter of the arbitration could be instituted in a Presidency Town or in local areas declared by the Local Government to be deemed to be a Presidency Town; and the answer to the contention is to be found in cl. (3) of s. 152 of the Companies Act which runs as follows:—

"The provisions of the Indian Arbitration Act, 1899, other than those restricting the application of the Act in respect of the subject-matter of the arbitration, shall apply to all arbitrations between companies and persons in pursuance of this Act."

In other words the facilities in the matter of arbitration which the Indian Companies Act VI of 1882 gave to Companies so that the reference may be the act of the corporate body are not to be restricted by s. 2 of the Arbitration Act which limits its application to cases where the subject-matter could be the subject of a suit in a Presidency Town. In 1899 the Indian Arbitration Act was passed and the second proviso to s. 3, as it then stood, expressly exempted arbitrations under the Indian Companies Act from its operation; the position has not been altered by the passing of the new Indian Companies Act (VII of 1913) because the third sub-section of s. 152 has rendered unnecessary the second proviso to s. 3 of the Indian Arbitration Act which has accordingly been repealed by s. 290 of Act VII of 1913.

The learned Advocates for the opposite parties also relied on a Punjab case, *Sundar Mal Lakhu Mal* v. *Paris Business Corporation Ltd.* (2) which lays down that s. 152 of the Companies Act is subject to the applicability of the Arbitration Act to the local area in which the suit has been instituted. For the reasons given above I cannot agree with this decision. In my view the award ought to have been filed in "the Court" as defined in s. 4 of the Arbitration Act. The Court of a Sub-Judge is not such a Court. Examination of ss. 96 123 of the Companies Act of 1882, which was passed before there was an Indian Arbitration Act at all, makes

(1) 16 Ind. Cas. 849; 40 C. 503; 17 C. W. N. 64.

(2) 132 Ind. Cas. 399; 32 P. L. R. 444; Ind. Rul. (1931) Lah. 591; A. I. R. 1931 Lah. 555.

the position clear still. Section 119 of the old Act laid down that:

"full effect shall be given by the Courts according to their respective jurisdictions to all agreements, references, arbitrations and awards in accordance with this Act; and the performance thereof may, where the Courts think fit, be compelled by any process against the companies respectively or their respective property thal the Courts or any Judge thereof shall direct and, where requisite, frame for the purpose."

I cannot, therefore, agree with the view of Jai Lal, J., in the above case [*Sunder Mal Lakhu Mal* v. *Paris Business Corporation, Ltd.*] (2) when he states that the last clause of s. 152 appears to to be intended to extend the operation of the Arbitration Act even to cases where the subject-matter of dispute could not be the subject of an arbitration under that Act. I have shown that the object of the relevant sections of the Companies Act of 1882 was to give facilities to companies for arbitration so as to bind the corporate body and it was never one of the purposes of the Arbitration Act to restrict these facilities to Presidency Towns or local areas notified as such. In my view the law has been correctly stated in *Attock Oil Co., Ltd.* v. *Abdul Majid* (3). The Court of the Subordinate Judge of Dhanbad not being a "Court" as defined in the Arbitration Act, the reference to him was without jurisdiction and this vitiates the whole proceeding. His decree, therefore, must be quashed and the application must be allowed with costs. Hearing fee 2 gold *mohurs*.

A. *Application allowed.*

(3) 118 Ind. Cas. 533; A. I. R. 1929 Lah. 246; Ind. Rul (1929) Lah. 789.

PATNA HIGH COURT.

Criminal Revision Application No. 512 of 1931.

November 14, 1931.

WORT, J.

MOSAFIR SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 182—Giving false information to Police about missing of animal, whether an offence.

Where the accused reported to the Police that his buffalo was missing, and the Police directed a case in the matter and it was subsequently established that he had sold the animal to a person against whom the accused wanted to get up a case:

Held, that the report, not being the report of a cognizable or non-cognizable offence, did not in itself call for any action on the part of the Police Officer to whom it was made, and hence fell short of fulfilling the conditions necessary to justify a conviction under s. 182 of the Penal Code. *Algoo Lal* v. *Emperor* (1), followed.

Application against a decision of the Magistrate, Gaya, exercising appellate powers, dated the 15th September, 1931, affirming an order of the Magistrate of the Second Class, Jehanabad, dated the 24th August, 1931.

Mr. *Safdar Imam*, for the Petitioner.

Judgment.—This Rule is directed against the conviction of the petitioner under s. 182 of the Indian Penal Code. He appears to have gone to the *thana* and informed the Police that a bull buffalo was missing. This was quite false because it was subsequently established that he had already sold the animal to one Shiba Dusadh for a sum of Rs. 30. The Police, however, suspecting that an offence had been committed proceeded to inquire into the matter and the Inspector of Police directed a case under s. 379 of the Indian Penal Code.

From the judgments of the Courts below it would appear that what was suspected in the case was that the petitioner had a mind to eventually get up a case against Shiba Dusadh for some reason or other and that his visit to the *thana*, stating the fact of the missing buffalo, was the first link in the chain of his scheme. However the facts which were stated to the Police disclosed no offence either cognizable or non-cognizable and, therefore, it did not come within the mischief of s. 182 of the Indian Penal Code. Reliance is placed upon the case of *Algoo Lal* v. *Emperor* (1) decided by Mr. Justice Piggott. There the learned Judge states;—

"The report alleging the disappearance of a bullock not being the report of a cognizable offence and not in itself calling for any action on the part of the Police Officer to whom it was made, falls short of fulfilling the conditions necessary to justify a conviction under s. 182 of the Indian Penal Code."

I feel constrained in the circumstances of this case to follow the decision given in the case just cited, and that being so the conviction must be set aside and the Rule made absolute.

N. K. & A. *Rule made absolute.*

(1) 57 Ind Cas. 96; 18 A. L. J. 636; 2 U. P. L. R. (A) 296; 21 Cr. L. J. 576.

PATNA HIGH COURT.

Miscellaneous Civil Appeal No. 51 of 1931.

August 13, 1931.

JWALA PRASAD, ACTG. C. J., AND JAMES, J.

Rai Bahadur DALIP NARAYAN SINGH AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

RAGHUNANDAN PRASAD—JUDGMENT-DEBTOR—RESPONDENT.

Hindu Law—Debts—Debt incurred by father for contract business—Decree against father and sons—Whether can be executed against sons personally

Where the father of a Hindu family for himself and as the guardian of his minor sons executed a mortgage for a debt incurred in carrying on a contract business of the family and the mortgagee obtained a simple money decree against the father and the sons :

Held, that the decree could be executed personally against the sons in the absence of evidence to show that the debt was not a family debt and did not go to benefit the sons. *Nathuni Sahu* v. *Baijnath Prasad* (1), distinguished.

Appeal against an order of the District Judge, Monghyr, dated the 2nd February, 1931, reversing that of the Subordinate Judge, Monghyr, dated the 5th August, 1930.

Messrs. *S. M. Naimatullah* and *Roy B. B. Saran*, for the Appellants.

Messrs. *P. B. Ganguly* and *M. K. Mukharji*, for the Respondents.

Judgment.—This is an appeal against an order of the District Judge of Monghyr who in disagreement with the view of the Subordinate Judge allowed the objection of the judgment-debtor under s. 47 of the Code of Civil Procedure with the consequence that the decree-holder is limited in the execution of his decree to proceed against the family property of the judgment-debtors and not against their person and property,

Defendant No. 1 for self and as guardian of his minor sons defendants Nos. 2 to 4 executed a mortgage bond on the 7th March, 1928. The plaintiff sued on the bond but claimed only a simple money decree giving up his lien over the mortgaged property. Defendant No. 1 is the father of defendants Nos. 2 to 4. Defendant No. 2 is his major son and defendants Nos. 3 and 4 are minors. Defendant No. 1 did not contest the suit. Defendants Nos. 2 to 4, the sons of defendant No. 1, only contested the suit and they denied the genuineness of the bond and the passing of consideration and pleaded that they were not liable to pay, as the loan was not contracted for the benefit of the joint family. The plaintiff's case was that the bond was executed for carrying on a contract business of the family and by the loan all the members of the family were benefited including the defendants Nos. 2 to 4. The Court held that the bond was genuine and for consideration and that the defendants Nos. 2 to 4, the sons of defendant No. 1, were liable inasmuch as they were benefited by it The Court observed:

"At present it is enough to hold that the debt in suit is also binding on defendants Nos. 2 to 4 not only because they are the sons of the defendant No. 1 living jointly with him but also because the debt was contracted for the conduct of the contractor's business which the family carried on for its living.

Upon this finding the Court passed a decree against all the defendants. It, however, did not decide whether the defendants were liable personally or only their interest in the joint family property was liable. The Court said:—

"This is not the time for the consideration of this question."

Obviously the Court was wrong for it ought to have decided that point at that stage and in fact by its finding that the debt was contracted for the benefit of the family the Court practically held that the defendants Nos. 2 to 4 were also personally liable for the debt. Upon this judgment a decree was passed making all the defendants liable for the debt.

An Executing Court is bound to execute the decree as it stands and cannot go behind it. As such all the defendants including defendants Nos. 2 to 4 are personally liable to pay up the decretal amount. Defendant No. 2 whose salary was sought to be attached in execution of the decree raised the contention that he was not personally liable but that the family property should have been proceeded against. His contention is that the Court which passed the decree left the question open. At best he is entitled to show that he is not personally liable. He has not shown that. On the other hand the judgment shows that he was liable to pay the debt not only upon the ground that as a son it was his pious duty to pay the debt of his father but as a matter of fact he was benefited by the loan. He does not show that the debt was not a family debt and did not go to benefit him. The decision relied upon in the case of *Nathuni Sahu* v. *Baijnath Prasad* (1) does not help defendant No. 2 inasmuch as in that case it was found as a fact that the debt was not incurred for the benefit of the sons and they were made liable only upon the ground of their pious duty to pay the father's debt unless they could show that it was immoral or illegal. In that very case a distinction was drawn between the case where the debt is proved to be actually for the benefit of the sons and a debt which is shown not to be for their benefit but that they are made liable only under the doctrine of pious duty.

We, therefore, set aside the decision of the Court below and restore that of the Subordinate Judge. The appeal is decreed with costs.

James, J.—I agree.

A. *Appeal allowed.*

(1) 39 Ind. Cas. 352; 2 P. L. J. 212; 1 P. L. W. 300.

PRIVY COUNCIL.

Appeal from the Allahabad High Court.

February 29, 1932.

LORD RUSSELL OF KILLOWEN,
LORD SALVESEN AND
SIR DINSHAH MULLA.

PRAG NARAIN—APPELLANT

versus

THE COLLECTOR OF AGRA—RESPONDENT.

Land Acquisition Act (I of 1894), s. 11—Award —Duty of Collector to decide matter of apportionment —Separate awards in respect of same land—Legality —Land acquisition appeals—Privy Council—Interference on question of valuation.

In appeals from land acquisition cases the Judicial Committee will not review the decree of an Indian Appellate Court merely upon questions of valuation of property, unless the judgment is vitiated by wrong application of principle or some important point in evidence has been overlooked or misapplied. *Narsingh Das* v. *Secretary of State for India in Council* (1), followed. [p 450, col. 2.]

Under s. 11 of the Land Acquisition Act it is the duty of the Collector to make an award in regard to three matters, *viz*, (1) the area of the land included in the award; (2) the total compensation to be allowed for that land, and (3) the apportionment of that compensation among all the persons interested in that land. Any one piece of land forming part of a whole in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. Each award should contain within its four corners the fixing of the value of the land with which it deals, and the apportionment of that value between the various persons interested in that land. [p. 450, col. 2; p. 451, col. 1.]

But under proper circumstances, if there are two awards in respect of the same piece of land, they may be read together and treated as one. [p. 451, col. 1.]

Messrs. *Dunne, K. C.*, and *K. V. L. Narasimham*, for the Appellants.

Messrs. *DeGruyther, K. C*, and *Jardine*, for the Respondent.

Lord Russell of Killowen.—This appeal is brought from a judgment of the High Court of Judicature at Allahabad relating to the compensation payable to the appellant under or by virtue of the Land Acquisition Act (I of 1894), which will be referred to as the Act.

The facts require to be stated in some detail for the proper appreciation of the points which are involved.

On the 9th July, 1923, the land acquisition officer of Agra (called hereafter the officer) issued a general notice under the Act for the acquisition of a block of land in the city for the purposes of a new Police station. The block measured just over 1 acre, and included certain land and houses belonging to the appellant, which were known by the name Katra Nandram, and which amounted in area to some 4,103 sq. yards.

There were 18 claimants to compensation in respect of the entire block of lands, including the appellant and one Dau Dayal. The appellant's claim (as finally amended) was for Rs. 3,34,598 made up of Rs. 2,46-780 for the land (*i. e.*, at the rate of Rs. 60 per sq. yard) and Rs. 87,818 for the buildings.

The officer considered the cases of the 18 claimants and heard evidence, the hearing of which ended on the 23rd December, 1923. As to the 16 claimants other than the appellant and Dau Dayal, an agreement was come to as to the amount of compensation payable to each for his interest; but for the purpose of acquiring a title under the Act the officer seems to have drawn up a formal award (dated the 31st December, 1923,) relating to the compensation payable to those 16 applicants.

On the 10th January, 1924, he made his award, dealing with the claims of the appellant and Dau Dayal. In it he states that agreement had since the hearing been reached with the other claimants, that an award statement regarding them had been drawn up and the amounts paid, and that the present award related to the cases of the appellant and Dau Dayal only. By that award he divided the appellant's land into three zones, to which he attributed different figures, as follows:—1°. Four hundred square yards of land with a street frontage of 120 feet he put at Rs. 13 per square yard. 2°. Four hundred and ninety-five square yards, "spotted over with the houses of permanent tenure holders" he put at Rs. 6 per square yard; and 3°. the remaining 3,214 square yards, which consisted of the non-frontage land upon which there were no permanent tenure-holders, he put at Rs. 8 per square yard. These figures worked out at Rs. 33,882 for land. For buildings he fixed a figure of Rs. 34,537, making a total figure of Rs. 68,419. To this sum had to be added the 15 per cent. provided for by s. 23 (2) of the Act so that the total compensation awarded by the officer to the appellant for his interest was Rs. 78,682.

It would appear that, so far as concerned the 495 square yards, the sum to be paid to the appellant was reduced from Rs. 8 per square yard (the full value of the non-frontage land) to Rs. 6 per square yard owing to the interest therein of the permanent tenure-holders.

Both the appellant and Dau Dayal were dissatisfied with the award and

applied for a reference to the District Judge under s. 18 of the Act. In the case of the appellant the District Judge affirmed the award of the officer as to the buildings and allowed Rs. 34,537. In regard to the land he allowed Rs. 20 per square yard for all except the 495 square yards over which the permanent tenrue-holders and rights had rights, making a further sum of Rs. 72,280. As regards the 495 square yards, he only allowed Rs. 220 as the capitalised value of the rents (Rs. 5 or thereabouts) of which the appellant was in receipt. In addition he allowed a sum of Rs. 1,200 in respect of a claim for loss of rents, making a total sum of Rs 1,08,237 in respect of buildings and land, which with the 15 per cent. above mentioned, resulted in a total sum of Rs. 1,24,292 fixed as compenstation for the appellant.

From that decision the appellant appealed to the High Court at Allahabad, asking that the full amount of compensation claimed by him be allowed. The High Court allowed the appeal in part and modified the decree of the District Judge to the extent now to be mentioned. As regards the valuation of the land at Rs. 20 per square yard, they agreed with the District Judge. As to his valuation of the buildings they increased the rate per 100 cubic feet allowed by him. As regards the 495 square yards, the High Court considered that the District Judge was not justified in assuming that the appellant's rights in this land were limited to the receipt of Rs. 5 per annum. The learned Judges considered that since the appeal to the District Judge only related to amount and not to apportionment, he ought to have accepted the officer's rates of apportionment, *viz.*, one-fourth to the tenants and three-fourths to the appellant. Applying these proportions to the 495 square yards, the result would be that the appellant would be entitled to Rs. 15 per square yard in respect thereof. The appellant in the High Court claimed to be entitled to the whole Rs. 20 less only the sums which by agreement had been paid to the tenants and accepted by them, but this contention was disallowed by the High Court. As a result it appeared that the judgment of the High Court involved an addition of Rs. 11,231-15 to the amount allowed by the decree of the District Judge.

Encouraged no doubt by the knowledge that each of his previous applications has resulted in an increase in his compensation, the appellant has now appealed to His Majesty in Council.

In his case lodged here the only point taken was that the compensation awarded was too low, the valuations placed upon the land and buildings respectively being insufficient in amount. An appeal confined to these contentions had obviously small hope of success. It is well settled that this Board will not review the decree of an Indian Appellate Court merely upon questions of value; and in this connection it will be sufficient to cite the words used by Lord Buckmaster in delivering the judgment of the Board in the case of *Narsingh Das* v. *Secretary of State for India in Council* (1):

"……it has been repeatedly laid down by the Board that in such cases they will not interfere with judgments of the courts in India as to matters involving valuation of property and similar questions where knowledge of the circumstances and of the district may have an important bearing on the conclusion reached, unless there is something to show, not merely that, on the balance of evidence, it would be possible to reach a different conclusion, but that the judgment cannot be supported as it stands, either by reason of a wrong application of principle or because some important point in the evidence has been overlooked or misapplied."

Counsel for the appellant concentrated upon a different point. He contended that since the High Court had valued the 495 square yards at Rs. 20 per square yard, the whole of the resultant sum of Rs. 9,900 belonged to the appellant subject only to the payment thereout of what might be necessary to satisfy the claims of the tenants; and that since the tenants had by agreement accepted a sum amounting to Rs. 990 (or Rs. 2 per square yard), the appellant was entitled to the whole difference between these two sums (*viz*, Rs. 8,910), and not merely to three-quarters of Rs. 9,900.

Their Lordships are unable to take this view. Indeed, it appears to them that the possibility of raising such a contention has only arisen from a failure to observe strictly the provisions of the Act.

As their Lordships read the Act, the duty of the Collector under s 11 of the Act is to make an award in regard to three matters, *viz.*, (1) the area of the land included in the award; (2) the total compensation to be allowed for that land, and (3) the apportionment of that compensation among all the persons interested in that land.

(1) 86 Ind. Cas. 556; 52 I. A. 133 at p. 135; 23 A. L. J. 113; 2 O. W. N. 137; 48 M. L. J. 386; A. I. R. 1925 P. C. 91; L. R 6 A. (P. C.) 64; 27 Bom. L. R. 783; 6 Lah. 69; 29 C. W. N. 822 (P. C.)

The Act does not appear to contemplate that where more than one person is interested in a parcel of land there should be more than one award relating thereto.

Their Lordships do not by this mean that the whole of the land at any one time to be acquired under the Act must necessarily be dealt with in one award; but only that any one piece of land (forming part of the whole) in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. Each award should contain within its four corners the fixing of the value of the land with which it deals, and the apportionment of that value between the various persons interested in that land.

In the present case the difficulty has arisen from the fact that the officer has dealt with the land by two documents, and, so far as the 495 square yards are concerned, that particular parcel of land figures in both. Their Lordships, however, think that the two documents (the later of which specifically refers to the earlier) must be read together as constituting one award in relation to that parcel of land, by which the officer awards the compensation to be allowed for that land at a figure of Rs. 8 per square yard and awards the apportionment of that compensation in the proportion of one-fourth to the appellant and three-fourths to the tenants.

The only objection ever taken by the appellant was to the amount awarded as compensation. No objection was ever made to the award as to apportionment; the apportionment accordingly stands and the appellant must be held bound thereby. There can, therefore, be no foundation for the appellant's claim to be entitled to the extra amount which the tenants might have received if they had not by agreement accepted three-quarters of a lower valuation. All that the appellant can claim is his awarded proportion of the Rs. 20 per square yard. The gain is a gain of the Municipality which acquired the land, as it was held to be in the case of *Rohan Lal* v. *The Collector of Etah* (2).

The appellant further contended that he had been hardly dealt with in the courts below as to costs, but their Lordships see no reason for suggesting any alteration of the decrees in this regard.

In the result this appeal fails and should be dismissed with costs. Their Lordships will humbly advise His Majesty accordingly.

A. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Barrow Rogers & Nevill.*

Solicitor for the Respondent—*The Solicitor, India Office.*

(2) 117 Ind. Cas. 612; 51 A. 765; 13 R. D. 496; A. I. R. 1929 All. 525; (1929) A. L. J. 522.

PRIVY COUNCIL.

Appeal from the Supreme Court. of Mauritius.

February 16, 1932.

LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND LORD MACMILLAN.

RAYMOND LINCOLN—APPELLANT

versus

MRS. ALICE POUPINEL DE VALENCE, RESPONDENT.

Negligence—Pleadings—New case in appeal—Permissibility—Evidence—Taking advantage of opponents' evidence which has been disbelieved—Propriety.

In a suit based on negligence the plaintiff is not entitled to throw over the case of negligence which he has alleged and spoken to in evidence and ask the Court of appeal to find negligence established on a quite different *species facti*. [p. 453, col. 1.]

A litigant cannot be allowed to avail himself in support of his case, his opponent's evidence directed to a different story which has not been believed by the court. [p. 454, col. 1.]

Messrs. *Charles Doughty*, K. C., *F. Mathen* and *Gerald Johsntone*, for the Appellant.

Mr. *H. I. P. Hallett*, for the Respondent.

Lord Macmillan.—Their Lordships on this occasion find themselves in the unusual position of being the first Court of Appeal from the trial tribunal. Any disadvantage, however, which might otherwise have arisen from the absence of any intermediate review is compensated by the fact that the court of first instance was composed of three Judges of the Supreme Court of Mauritius, at whose hands the case has manifestly received prolonged and careful consideration.

The action is one of damages for personal injuries sustained by the plaintiff in a motor accident, such as is commonly tried in this country by a Judge and jury, and resulted in a unanimous judgment for the defendant. Inasmuch as the appeal is not from the verdict of a jury, their Lordships have conceived it to be their duty to review the whole case on its merits and not merely to consider whether there was evidence before the court below on which the judgment pronounced could proceed. At the

same time, in a case such as this, in which the issues are entirely confined to questions of fact and credibility, their Lordships recognise that the Judges in Mauritius, who not only saw and heard the witnesses, but also twice viewed the locus of the accident, possessed advantages in weighing the evidence which are denied to their Lordships.

The accident occurred about 5.30 in the afternoon of the 25th December, 1928, in broad daylight, in the Rule Royale, an important thoroughfare in Port Louis, at a spot close to the entrance to the house and grounds of a Mr. d'Unienville. The road is here on a rising gradient from the direction of L'Eau Coulee towards the Curepipe Road Station, and is about 27½ feet broad, with a ditch on each side, and apparently no regular footpath on either side. The entrance to Mr. d'Unienville's house and grounds is by a drive leading off at right angles from the road on the left side as it ascends, and the ditch is at this point covered over in order to give access for foot passengers and vehicles to his premises. The church of Ste. Helene is on the same side of the road as Mr. d'Unienville's property, about fifty or sixty yards away in the downhill direction.

On the occasion of the accident the plaintiff was proceeding up the road on a motor-bicycle towards Curepipe Road Station on his own, the left-hand, side of the road. The defendant's motor-car was being driven by the defendant's chauffeur, who was its sole occupant, in the opposite direction and was on its way to Mr. d'Unienville's house.

The plaintiff alleges that the defendant's chauffeur so negligently managed and drove his motor-car that it collided with the plaintiff's motor-bicycle, with the result that the plaintiff and his motor-bicycle were thrown into the ditch and the plaintiff so seriously injured that his right leg had to be amputated. He avers in his statement of claim that "the negligence of the defendant's chauffeur consisted in driving the said motor-car at a speed and in a manner dangerous to the public, having regard to the nature, condition and use of the highway, and in turning the said motor-car without warning and suddenly across the said highway towards the entrance to the drive of an adjoining house, when the said motor car collided with the said motorcycle." The defendant denies that the accident was due to the negligence of her chauffeur and avers that the collision was the direct result of the plaintiff's reckless driving of his motor-cycle at an excessive speed, that her chauffeur did all he could to avoid the accident and that the plaintiff was alone to blame.

The plaintiff gave evidence which conformed generally with the allegations in his statement of claim. He said that he was proceeding up the Rue Royale at a normal speed on the extreme left of the roadway and was near the church of Ste. Helene when he observed the defendant's motor-car approaching from the opposite direction. It was then abreast of the entrance to Mr. d'Unienville's house. As he had, he said, a perfectly clear course in front of him he continued on his way till he had got almost past Mr. d'Unienville's entrance, when the defendant's motor-car turned "*brusquement et rapidement*" across the road, with the result that the plaintiff's motor-cycle collided with it about four feet from the ditch. Up to the moment when the motor car suddenly turned upon him he had no warning and saw no indication that it was going to cross over to Mr. d'Unienville's entrance. When he saw it, it was parallel with the direction of the road, and if it had started across the road before he came up he would have noticed it. If he had seen it slanting across to enter Mr. d'Unienville's drive he could probably have passed behind it if it had not suddenly turned upon him. The plaintiff is not able to say whether before the collision the motor car had stopped on the other side of the road before turning across. It may be added that the plaintiff in his evidence made a point of the clearness and accuracy of his recollection of the events immediately preceding the collision. He had also, as the Acting Chief Judge Nairac points out, the unusual advantage, owing to the course which the proceedings took, of being afforded an opportunity of adding to or correcting his evidence after it was first given.

Such being the account of the facts put forward by the plaintiff in the court below and adhered to by him in his printed case to this Board, it is manifest that were it accepted he would be well on the way to establishing his claim. Unfortunately for him, the Judges in Mauritius unanimously rejected his story, and when the appeal was opened at their Lordships' bar the plaintiff's Counsel candidly admitted that he could not rely on his client's account of the matter. This circumstance of itself would in the ordinary case be enough to

justify the dismissed of the appeal, for, the burden of proof being upon the plaintiff, if he is unsuccessful in proving the case which both in averment and in evidence he sets out to make, he must inevitably fail. Mr. Doughty, however, submitted on his client's behalf that, accepting in almost all material respects the very different account of the facts which the Judges below found proved and praying in aid portions of the evidence of the defendant's chauffeur, he was still entitled to succeed, as on this different presentment of the facts he was still able to show that the defendant's chauffeur had been guilty of negligence. Their Lordships heard Counsel's argument in full, but they must observe that they cannot lend any countenance to the view that a plaintiff is entitled to throw over the case of negligence which he has alleged and spoken to in evidence and then ask their Lordships to find negligence established on a quite different *species facti*. To permit this might work grave injustice to a defendant who had properly directed his evidence to the case which he had been told he had to meet This is illustrated in the present instance by the fact that neither in the evidence nor in the judgments below was attention directed to the elucidation of the case as now presented at their Lordships' bar, and matters are left uncertain which would doubtless have been cleared up had the case now sought to be made been advanced below. It is true that the story told by the defendant's chauffeur also failed to find acceptance at the hands of the Judges, and their Lordships had the remarkable experience of hearing Counsel on each side declining to rely upon the testimony of his leading witness. But the circumstance that the evidence of the two participants in the accident, the plaintiff and the defendant's chauffuer, has not been accepted by the Judges who heard the case, and is not put forward by either side before their Lordships as reliable, certainly does not advance the appellant's case or entitle him to avail himself of coincidences in their inaccuracies.

Fortunately, in the interests of truth, the court in Mauritius had the advantage of hearing the testimony of two independent eye witnesses of the accident, whose evidence the court accepted and whose account of the matter their Lordships are satisfied is accurate.

One of these witnesses is Mr. Houdet, who with his wife and two daughters was on his way up the road from the church. He says that a little before he reached Mr. d'Unienville's entrance he saw a motor-car coming in the opposite direction and heard the chauffeur sound his horn and saw him make a signal by holding out his arm. As he saw that the car was about to enter Mr. d'Unienville's drive he and his family stopped, and the chauffeur observing them brought his car to a stand to allow them to pass. "I am certain," he says, "that when I crossed Mr. d'Unienville's entrance the car had already slanted across and had stopped in an oblique position relatively to Mr. d'Unienville's entrance. The distance between the outer edge of the culvert at Mr. d'Unienville's and the place where the car was standing was about five to seven feet; the distance could not have been more as we had to pass in Indian file."

The other independent eye-witness was Mr. Le Meme, who at the time of the accident was walking up the road on the opposite side; that is, on the side on which the defendant's car approached. His evidence is not so precise as that of Mr. Houdet, but he speaks to seeing the defendant's motor-car turning slowly to its right to enter Mr. d'Unienville's drive before the accident occurred. He is not sure, but is "under the impression that the car had practically stopped to let some people go by." "The car," he says, "looked stationary at the moment when it was making the curve; it was going so slowly that I thought it had stopped". The only other witness who actually saw the accident was a cake-seller, Dawood Bheekhoo, who was coming down the road on Mr. d'Unienville's side, and who stopped, on a signal from the defendant's chauffeur, to let the car enter the drive, but as he is characterised by one of the Judges as a "downright liar" and no one believes him his contribution may be disregarded.

It will have been observed that in Mr. Houdet's testimony there is an item of what may be termed real evidence, namely, that he and his family had to fall into Indian file in order to pass between the defendant's car and the edge of the culvert covering the ditch at Mr. d'Unienville's entrance. The plaintiff himself seems to admit that the Houdets passed in single file in front of the car, for, when asked if he did not think that they and two other persons occupied a space of four feet from the ditch, his answer was, "*Non. Il me semble que ces personnes etaient a la file indienne, l'une derriere*

l'autre; je n'ai pas vu que ces personnes occupaient la largeur du chemin." Now the fact that the Houdet family had to go in Indian file in order to pass between the defendant's car and the side of the road is conclusive of two things: first, that the car must have been, as Mr. Houdet said, stationary at the time, and, second, that the front of the car must have been only a short distance from the edge of the road.

Accepting the fact, contrary to the appellant's evidence, that the car had pulled upon the slant at a distance of from five to seven feet from the ditch to allow the Houdets to pass, and admitting that up to this point there was no negligence on the part of the defendant's chauffeur, the appellant's Counsel submitted that it was negligent on the part of the defendant's chauffeur to set his car in motion after the Houdets had passed and to proceed towards Mr. d'Unienville's drive without looking round to see if any other traffic was coming up on his left between him and the ditch; if he had looked, it was urged, he must have seen the plaintiff approaching and about to pass through the space between the car and the culvert. But it is not proved that the defendant's chauffeur did in fact restart before the collision. On this point the appellant's Counsel sought to avail himself of the evidence of the defendant's chauffeur but the appellant cannot legitimately invoke for this purpose evidence directed to another and quite different story which has not been believed. This belated attempt to establish a new ground of negligence against the defendant's chauffeur on the reconstituted facts as found by the court below and accepted by their Lordships demonstrates the danger of allowing a new case to be put forward at this late stage, for what is now sought to be made the crisis of the case is a point to which neither the evidence nor the attention of the Judges below was directed. Their Lordships are in consequence unable to ascertain whether or not the Judges below were of opinion that this defendant's car was restarted after the Houdets passed in front of it, while the evidence on the subject is left quite inconclusive. In such a state of matters it would be out of the question for their Lordships to find that negligence on the part of the defendant's chauffeur had been proved.

As the plaintiff's evidence was that his side of the road was clear ahead and that the defendant's car was on the other side of the road until it suddenly turned in upon him, he has, of course, given no explanation of how he did not see the defendant's car standing at rest aslant across the road, and of why he came on in these circumstances without slackening his speed—which was certainly not less than 15 miles an hour, and may well have been more, for after the collision his cycle went on for some 42 feet before it collapsed into the ditch, incidentally striking Mr. Houdet and the cake-seller on its way. The plaintiff himself says that if he had seen the car in such a position as that in which it is now found to have been he could have passed behind it. If it is necessary to reach any conclusion as to what really happened, it is most probable either that the plaintiff never observed the car standing athwart the road at all or if he did that he thought he could pass between the standing car and the culvert, and by an unhappy miscalculation just hit the side of the defendant's car.

As their Lordships have indicated, the complete failure of the appellant to establish the case of negligence averred in his pleadings and spoken to in his evidence would have justified the dismissal of the appeal on this ground alone, but their Lordships, recognising the seriousness of the matter to the appellant, have re-examined the whole case on its merits and, having done so, they find themselves in complete agreement with the result reached by the court below.

Their Lordships will, therefore, humbly advise His Majesty that the appeal be dismissed The defendant will have her costs of the appeal.

A. *Appeal dismissed.*

Solicitors for the Appellants. Messrs. *Ranger Burton & Frost.*

Solicitors for the Respondent. Messrs. *White & Co.*

PRIVY COUNCIL.

Appeal from the Allahabad High Court.

December 14, 1931.

LORD THANKERTON, LORD SALVESEN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

GHULAM MOHAMMAD—PLAINTIFF—APPELLANT

versus

GHULAM HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Will in favour of one heir—Minority of other heirs—Consent by guardian, suffici-

ency of—Inheritance—Surrender by heirs in exchange for annuities—Interest in whole estate, if enures for benefit of other heirs—Limitation Act (IX of 1908), Sch. I, Art. 123—Applicability—Suit against executor, administrator or person legally charged with duty of distributing estate.

A will made by a Muhammadan in favour of one of his heirs is invalid unless consented to by the other heirs after the testator's death. If the other heirs happen to be minors at the time of the testator's death, consent must be given by them after attaining majority. No validity attaches to a consent given by their guardian during minority, in which case they are free to dispute the validity of the will and to claim their shares according to Muhammadan Law.

Where the widow and daughters of a deceased Muhammadan have surrendered their rights to a certain property in exchange for certain annuities charged upon the whole property, their interests in the whole property enure for the benefit of the other heirs irrespective of their rights *inter se*, and the whole property, subject to the annuities and the debts, become divisible between the remaining heirs. [p. 459, col. 1.]

Article 123, Limitation Act, only applies to a suit brought against an executor or administrator or some person legally charged with the duty of distributing the estate. *Issur Chunder Doss* v. *Juggut Chunder Saha* (4), *Keshav Jagannath* v *Narayan Sakharam* (5), *Umardaraz Ali Khan* v. *Wilayat Ali Khan* (6), *Khandersa Hajee Bappu* v. *Puthen Veettil Ayissa* (7) and *Mahomed Riasat Ali* v. *Hasin Banu* (8), referred to. [p. 460, col. 1.]

Mr. *Dube*, K. C., for the Appellant.

Messrs. *L. De'Grwyther*, K. C., and *A. Majid*, for the Respondents.

Sir George Lowndes.—One Khadim Husain, a Muhammadan governed by the law of the Hanafi School, died on August 21, 1901. Two days before his death he made a will in the following terms:

I, Shaikh Khadim Husain, son of Munshi Aman Ullah, deceased resident, *jagirdar* and *taluqadar* of Ganeshpur, District Basit, declare as follows:—

I own and possess movable and immovable property of every description (such as) houses, groves, etc., in the district of Basti, Gorakhpur and Fyzabad, and it is in my possession and enjoyment as a proprietor without the participation of anyone else. The immovable property consists of three kinds of property: One is that which is meant for maintenance of disciples and female slaves (under a will, dated November 2, 1866, my father *Maulvi* Shaikh Aman Ullah, deceased, gave (this property) to me alone. This property which he had, under a will, dated June 13, 1837, got from his father for maintenance of the disciples and the female slaves as proprietor, is the *panchmi* share in the entire *taaluqa* of Ganeshpur. My father, having included a *panchmi* share in his self-acquired property to that property, conferred it on me as proprietor under the said will. Accordingly, after the death of my father, I, the executant, entered in possession and occupation thereof under the said will. The second kind of the immovable property is that which has devolved upon me from my deceased father and the other persons; the third is that which I, the executant, myself have acquired. I have two sons, Shaikh Ghulam Husain and Shaikh Ghulam Muhammad, minors, three daughters *Musammat* Roshanun-nisa, *Musammat* Khair-un-nisa and *Musammat* Mumtaz-un nisa, and one wife, *Musammat* Amna Bibi who is now alive. As there is no certainty of life, I, the executant, also think it proper to make a will in conformity with the custom of my family in order that no dispute may arise in future among my heirs. My elder son, Ghulam Husain, minor, shall remain in proprietary possession of the *panchmi* share in *taaluqa* Ganeshpur, together with *panchmi* property acquired by my deceased father given to me under the will, dated November 25, 1866, for maintenance of the disciples and the female slaves in accordance with the conditions laid down in the will made by my father and a one-fifth share acquired by me, the executant. Shaikh Ghulam Husain aforesaid, should, from the income thereof, maintain the disciples and the female slaves, who are alive now, or in future those who may be increased in their generations. (Paper torn). The disciples and the female slaves have no proprietary right in the said property. They are entitled to food and clothing only. If any of them disobey or refuse to render service or take up service at another place, then Shaikh Ghulam Husain aforesaid is empowered to discontinue his maintenance. Both my sons, Shaikh Ghulam Husain aforesaid and Shaikh Ghulam Muhammad aforesaid, who is born now, shall after me be the owners in possession of all the property which I have, by right of inheritance, received from my deceased father, *Maulvi* Shaikh Aman ullah, and the other persons, and which I have myself acquired and out of which property four fifth share has been saved. So long as they live jointly, they shall appropriate the profits jointly, and after separation they should divide the profits of the said property in half and half. Both the sons should, out of the profits of the same property, pay Rs. 600 a year to their mother, *Musammat* Amna Bibi, and Rs. 300 a year to each of my daughters, namely, *Musammat* Roshan-un-nisa, Khair-un-nisa

and Mumtaz-un-nisa, after their marriage, generation after generation. The said *Musammots* have no proprietary power in the property. If Shaikh Ghulam Husain and Shaikh Ghulam Muhammad fail to pay the fixed amount to the said *Musammats*, the latter are empowered to recover their annual amount by bringing a suit. When both the brothers become separate, they should, out of the profits of the property in their respective possession, continue to make payment to my wife and daughters. Both my sons are still minors. God forbid, if I die before they attain majority, their mother, *Musammat* Amna Bibi, shall be their guardian during their minority. After attaining majority my both sons shall themselves be the owners in possession and abide by the conditions of the will and make management. This will shall come into force after me, the executant. As long as I am alive, no one has power to cause interference. Both the sons shall be the owners of the movable property and the houses in half and half.

In line 15 the word *milkiatan* written above the line is correct.

Hence I have executed these few presents by way of a will in order that it may serve as evidence. Dated August 19, 1901.

Signature of Shaikh Khadim Husain.

(The will executed by me is correct, in autograph).

The principal question in this appeal is as to the construction of the will so far as regards what is referred to therein as the "*panchmi*" property. The appellant, the younger of the two sons of the testator, sued to establish his right, under the events which had happened since his father's death, to a moiety of this property. The first respondent denied his brother's right to any share at all, though it is not clear how far he claimed the property for himself. The trial Judge decided in favour of the appellant, but gave him a quarter share only. Both parties appealed to the High Court (their appeals being numbered respectively 132 and 164 of 1925), with the result that the suit was dismissed. These appeals were heard jointly with two other appeals in suits instituted by one of the daughters of Khadim Husain, but in which no appeal has been taken to His Majesty in Council, and with which, therefore, the Board are not concerned. The other respondents are alienees from the first respondent and have taken no part in the proceedings.

It is not disputed that under the Hanafi law, if the effect of the will was to confer a beneficial interest in the *panchmi* property upon the first respondent, it was invalid unless consented to by the other heirs after the testator's death. The first question, therefore, is whether this was the true effect of the will. The Trial Judge held that it was: the High Court, on the other hand, took the view that the first respondent was a mere trustee with no beneficial interest in the property.

The decision no doubt concerns directly only the will of Khadim Husain, but the references by the testator to the will of his father Aman Ullah, and the trend of the arguments in the case, make it necessary to consider the terms of his will also, and this in turn brings in the will of Kadir Baksh, the grandfather of Khadim Husain, under which the *panchmi* property originated.

The will of Kadir Baksh is dated June 13, 1837. He in effect divided his estate into five shares, bequeathing one fifth to each of his four sons, and setting aside the remaining fifth "for the expenses of the male and female slaves and the other defendants, etc., who are at present in addition to the sons and who may survive hereafter." This share he made over to his youngest son, Aman Ullah. The slaves and dependants were to remain in his control; they were to get from him their necessary expenses for food and clothing, but were not to be in possession of the land, and if they were disobedient they were to get nothing. It is admitted by Counsel for the first respondent that this bequest was, as, indeed, the terms of the will show, confined to slaves and dependants living at the testator's death. It is also clear, their Lordships think, that they took no interest in the *corpus* of the share, and that the will made no express disposition of it as such.

The will of Aman Ullah followed much the same lines. It is dated September 25, 1866. It recites the will of Kadir Baksh, and after referring to the one-fifth made over to him (Aman Ullah) for the maintenance of the slaves and dependants, continues, 'Under the terms of the will executed by the ancestor and admitted by his heirs, two-fifths of the whole of the *taaluqa* (meaning evidently the one-fifth) for the slaves and his own personal one-fifth was settled to be my own share and property, of which I am in possession and occupation by virtue of private partition." He goes on to state that he also has four sons who are "heirs and owners of my estate and property," and that following the ways of his ancestor, he has made "a will regarding

and division of, my estate." He then makes over to Khadim Husain, his eldest son, "the one-fifth share which my ancestor has given to me for the maintenance of the dependent slave boys and girls, as well as one-fifth of all my self-acquired villages (subject to all the conditions laid down in the will of my ancestor, dated June 13, 1837), together with the slave boys and girls that are alive at present and that may be born hereafter." He repeats that the slaves are to be entitled to maintenance only; that they are to have "no concern with the possession of the lands"; and that if disobedient they will forfeit their rights. The balance of his estate he divides equally among his sons.

It appears that some years before the date of this will there had been litigation between the brothers, Miran Baksh the second son of Kadir Baksh, suing for partition, and claiming that the *panchmi* share was divisible with the rest of the property left by his father. The principal Sadar Amir of Gorakhpur, by a judgment dated 28th August, 1860, held against the plaintiff's claim in respect of the *panchmi* villages, and gave him a decree for partition of his share only in the other property. The issues raised the question directly whether Kadir Baksh's will established that the *panchmi* villages "solely belonged to the contesting defendant," *i. e.*, Aman Ullah and their Lordships think that the decision must be regarded as having answered this question in the affirmative. They have very little doubt that Aman Ullah's will was based upon this decision, and that he regarded himself as the owner of the *panchmi* villages, subject only to the obligation of maintaining the slaves.

The construction of Kadir Baksh's will was again raised in 1898, after the death of the last of the slaves, the claimant on this second occasion being Karamat Bibi, a daughter of Zahur Uddin, the eldest son of Kadir Baksh. Aman Ullah was then dead, and Khadim Baksh was the principal defendant to the suit. The case went up to the High Court on second appeal, the sole question for decision being the construction of the will with reference to the *panchmi* share. The learned Judges, by their judgment dated 8th August, 1901, held that there was a gift of this share to Aman Ullah, "but a gift burdened for the time being with the necessity of making provision, suitable and lifelong, for the slaves and slave-girls who might survive the testator." They thought that the assignment of the share "was as regards time unconditional" and they accordingly affirmed the dismissal of the suit which the District Judge had decreed It will be observed that this decision was in substantial accord with that of the Sadar Amir in 1860

Turning now to the will of Khadim Husain, with which the present appeal is more directly concerned, their Lordships note that it was made very shortly after the decision of the High Court above referred to, and they think that its terms must have been influenced by that decision. The testator begins by stating that he is "in possession and enjoyment as a proprietor without the participation of anyone else," of immoveble properties which include both the original and increased *panchmi* shares. He affirms that these shares were conferred upon him "as proprietor" under his father's will and that he had been in possession and occupation of them since his father's death. He then proceeds to declare that the first respondent "shall remain in proprietary possession of the *panchmi* share in the *taaluqa*, Ganeshpur together with the *panchmi* property acquired by my deceased father given to me under his will."

Apart from any question of a *wakf* which has been put forward for the first time on the argument of this appeal, and with which their Lordships will presently deal, they think that Aman Ullah took under the will of his father Kadir Baksh a beneficial interest in the original *panchmi* share, subject to the maintenance of the slaves during their lives. The slaves clearly took no interest in the *corpus* of the share, or in the surplus income as the life interests dropped out, and the only reasonable construction of the will would seem to be that arrived at by the High Court in 1901, which as between the parties to that suit was clearly *res judicata*.

Whether Khadim Husain took a similar interest under Aman Ullah's will may be more doubtful, but reading the will as a whole in the light of the surrounding circumstances, their Lordships think that the intention of Aman Ullah was to pass on to his son the same quality of interest in the now increased *panchmi* share as that which he himself had taken under his father's will. The exact date of Aman Ullah's death seems to be uncertain. It was probably not long after the date of his

will, and must in any event have occurred before July, 1871, as is shown by the proceedings in a suit which went up to the Hight Court in 1872. Khadim Husain was therefore in possession of the villages for at least 30 years, and their Lordships have no doubt that he regarded himself as the owner, subject only to the maintenance, at his discretion, of the slaves. The only persons interested to deny his proprietorship would be the other heirs of Aman Ullah, who seem to have taken no steps to assert a claim, and they are not parties to or in any way represented in the present litigation.

Khadim Husain's will, in their Lordships' opinion, clearly purported to pass on to the first respondent a proprietory interest in the *panchmi* property, now again increased by the addition of one-fifth of the other estate of the testator, subject to similar obligations. The learned Judges of the High Court would attach little, if any, weight to the references in the will to "proprietorship" and "proprietory" rights. Their Lordships are unable to take this view of the expressions employed by the testator. They regard them as used in their ordinary acceptance, and as intended to make it clear that the first respondent was to be the owner of the villages, subject to provision for the slaves. The latter were to be maintained out of the income only and were to have no proprietory interest in the property: whatever surplus income there might be and the reversionary interest in the *corpus* was to go to the first respondent.

Their Lordships take no exception to the view of the High Court that there was a trust for the slaves. They think that this is probably a more correct way of looking at the bequest than to refer to it as an onerous *gift:* it would, they think, clearly come within the definition of a trust under the Indian Trusts Act, 1882, by which the will of Khadim Husain would be governed. But in the view their Lordships take, the learned Judges were wrong in thinking that the proprietorship conferred upon the first respondent by the will was a bare trusteeship accompanied by no interest of a beneficial nature.

In their Lordships' opinion, therefore, the will of Khadim Husain did purport to confer a beneficial interest in a part of his estate upon the first respondent; who was one of his heirs, and it would seem to follow that (apart from any question of consent by the appellant) the will was invalid under the Muhammadan Law.

But it has been contended before the Board that the setting apart of the *panchmi* share under each of the three wills, to which reference has been made, was in reality the creation of a *wakf*, and that so considered it must be presumed that there was a dedication of the whole interest of the testator in each case to charitable purposes, leaving nothing to which the devisee could be beneficially entitled, his position being that merely of the *mutawalli* or manager of the charity.

No case of *wakf* was made by the first respondent in his defence to the suit, nor was it suggested in his memorandum of appeal to the High Court, and there is no trace of such a contention having been raised in the judgments. No one of the three wills purports to create a *wakf*, nor is there in any of them anything that could be regarded as a gift of the ultimate residue to charitable purposes, and no suggestion of *wakf* was made in any of the previous suits. It is admitted that a trust for slaves and dependants is not within the terms of the *Wakf* Validating Act, VI of 1913, and it is, therefore, unnecessary to consider the effect of Act XXXII of 1930, which purports to give retrospective effect to the Act of 1913 The argument which has been addressed to their Lordships on this point is in reality only an attempt to reopen the controversy which was finally settled by decision of this Board nearly forty years ago: see *Mohamad Ihsanulla* v. *Amarchand Kundu* (1), *Abdul Gufur* v. *Nizam-ud Din* (2), *Abdul Fata Mahomed Ishak* v. *Russumoy Dhur Chowdhry* (3). Under these circumstances their Lordships think it sufficient to say that the contentions of the first respondent on this part of the case must necessarily fail.

Unless, therefore, the appellant can be shown to have consented to the terms of his father's will it cannot be binding upon him.

At the time of Khadim Husain's death both the first respondent and the appellant were minors The former attained his majority in 1915 and the latter in 1919. Before the trial Judge an attempt was made to prove that the appellant upon attaining majority consented to the terms of the will. It was held that his consent

(1) 17 I. A. 28; 17 C. 498; 5 Sar. 476 (P. C.).
(2) 19 I. A. 170; 17 B. 1; 6 Sar. 238 (P. C.).
(3) 22 I. A. 76; 22 C. 619; 6 Sar. 572 (P. C.).

was not proved. The High Court makes no reference to this contention, and before their Lordships no serious attempt has been made to support it.

In the High Court, however, it was contended for the first respondent that the appellant was in effect bound to the terms of the will by what was said to be a "family arrangement" embodied in a registered instrument dated March 11, 1910. The learned Judges accepted this contention, and their finding has been supported before the Board, if it is correct, the appellant necessarily fails.

The document in question was executed, during the minority of the contesting parties to this appeal, by their mother on her own behalf and purporting to act as guardian of her sons. The other parties were their sisters, the three daughters of Khadim Husain, who disputed the validity of his will. Shortly put, the effect of this arrangement was that the mother gave up, in favour of her sons, a claim to dower amounting to about a *lakh* of rupees, taking for herself only a life annuity of Rs. 600, out of the estate, while the sisters accepted perpetual annuities of Rs. 460, each charged upon specified immovable properties. Elaborate schedules of the various properties were annexed to the document, the first of which, referring to the *panchmi* properties, was headed "List of property which belongs exclusively to Shaikh Ghulam Hussin (*i.e*, the first respondent), and with the income of which the slaves and slave girls will be maintained according to the conditions and restrictions laid down in the wills of the ancestors."

The learned Judges of the High Court thought that this should be read as an agreement made by the mother, acting on behalf of the younger son, with herself, acting on behalf of the elder son, that the latter should be the owner of the *panchmi* properties, and that it was binding upon the appellant. But quite apart from the question whether the mother could legally bind the appellant by such an agreement, their Lordships are unable to hold that this was either the intention or the effect of the document. The only object of the arrangement was, they think, to get rid of the daughter's claims, leaving the landed estates for the sons. Apart from the heading to the schedule of the *panchmi* properties, there is nothing to suggest that the rights of the sons *inter se* were considered. There was, and indeed could be, no dispute between them at their then ages, and the mother was evidently upon the terms of the document acting for them both jointly. Their Lordships must accordingly hold that the appellant was, when he came of age, free to dispute the validity of Khadim Husain's will, and to claim his share according to the Muhammadan Law in the *panchmi* properties.

The last line of the first respondent's defence was limitation; it was contended first that the deed of March, 1910, should be read as having effected a transfer of the *panchmi* properties by the mother, acting on behalf of the appellant, to the first respondent, and that therefore the suit fell under Art. 44 of Sch. I, of the Limitation Act, which runs as follows:—

Description of Suit.	Period of Limitation.	Time from which period began to run.
44.—By a ward who has attained majority, to set aside a transfer of property by his guardian.	Three years.	When the ward attains majority

The trial Judge held that this article had no application on the ground that there was no transfer by the deed: the High Court took the opposite view. It is manifest, on the construction which their Lordships have put upon the deed, that the trial Judge was right

Alternatively, it was argued that the suit was barred by twelve years' adverse possession under Art 144. Both the courts in India have negatived this contention, and their Lordships have no doubt that they were right. The first respondent only attained majority in 1913, and the suit was instituted in July, 1924. Until 1915 the mother was in possession of all the immovable properties of the estate on behalf of both her sons, and it would be impossible to hold that her possession was adverse to the appellant.

Before the Board it was for the first time suggested that the suit in reality falls under Art. 123, which applies to a suit "for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of a intestate." The period of limitation in such a case is twelve years from the date "when the legacy or share became payable or deliverable." It is said that on the contentions of the appellant, Khadim Husain must be deemed to have died intestate, and that what the appellant is claiming is a distri-

butive share in his estate. There is, however, a long series of decisions in India dating at least from 1882, that this article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate: *Issur Chunder Doss* v. *Juggut Chunder Saha* ( ), *Keshav Jagannath* v. *Narayan Sakharam* (5), *Umardraz Ali Khan* v. *Wilayat Ali Khan* (6), *Khandersa Hajee Bappu* v. *Puthen Veettil Ayissa* (7) and *Mahomed Riasat* v. *Hasin Banu* (8).

Counsel for the first respondent drew their Lordships' attention to a decision of this Board reported as *Maung Tun Tha* v. *Ma Thit* (9), where Art. 123 was apparently applied in a suit by a Burmese Buddhist son for his share in the paternal estate. No reference was made to the Indian case law on the subject, and the main question debated was as to whether the son was bound under the Burmese Law to elect within a reasonable time after his father's death.

Their Lordships have referred to the record of this case, and they find that in the Courts of Burma no issue was raised as to limitation, and that there was no discussion as to the article of the Act which should be applied. There had been at least one previous decision in the Lower Burma Court that Art. 123 was applicable to such a case, and it seems to have been assumed on all hands that it must equally apply in the case then under consideration. After the decision in *Maung Tun Tha* v. *Ma Thit* (9), it appears to have have been considered in one case in the Bombay High Court that the Indian authorities had been overruled *Shrinbai* v. *Ratnabai* (10), but in two later cases the same High Court refused to apply Art. 123 to claims by Muhammadan heirs: see *Nurdin Najbudin* v. *Umrao Bu* (11). The specific question was considered by a Full Bench of the Allahabad High Court in 1928, *Rustam Khan* v. *Janki* (12), another case between Muhammadan heirs, when the same conclusion was come to as in *Nurdin Najbudin* v. *Umrao Bu* (11), the article applicable being held to be Art. 144 and not 123.

Their Lordships have no doubt that it was not intended by the judgment in *Maung Tun Tha* v. *Ma Thit* (9), to overrule the decisions to which they have referred, and they think, that at all events in cases from the Indian Courts, these authorities should be followed. They are therefore of opinion that the present case does not fall within Art. 123, and that the appellant's suit was not barred by limitation.

It only remains to consider whether the trial Judge was right in holding that the appellant was entitled to recover a quarter share only, and not a half of the *panchmi* property, and it is to be noted that upon this point the learned Judges of the High Court were in agreement with him.

The appellant's share in his father's estate under the Muhammadan Law would be one-quarter only, but he contends that the widow and daughters having surrendered their rights in exchange for annuities which were charged upon the whole estate he was entitled to share equally with his brother in all the residue.

The view taken by the Indian Courts was that the allocation of the *panchmi* property to the first respondent was an integral term of the arrangement under which the surrenders were made, and that if the appellant refused to be bound by this allocation he could claim no benefit from the surrenders.

In their Lordships' opinion, this view is based upon a misinterpretation of the deed of March, 1910. They think that the rights of the widow and daughters, being in effect bought out by payments from the general estate, their interests enured for the benefit of the other heirs irrespective of their rights *inter se*, and that the whole subject to the annuities so charged and the debts (which were considerable), became divisible equally between the two sons. If the annuities and the debts had been made payable out of the first respondent's share only, and in consideration of this the *panchmi* property had been allotted to him, the position would have been different but this was not the effect of the deed.

(4) 9 C. 79.
(5) 14 B. 236.
(6) 19 A. 169; A. W. N. (1897), 34.
(7) 6 Ind. Cas. 50; 34 M. 511; 20 M. L. J. 288; 8 M. L. T. 4; (1910) M. W. N. 447.
(8) 20 I. A. 155; 21 C. 157; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique and Jackson's P. C. No. 133 (P. C.).
(9) 38 Ind. Cas. 809; 41 I. A. 42; 44 C 379; 19 Bom. L. R. 294; 15 A. L. J. 96; 32 M. L. J. 71; 21 M. L. T. 97; 21 C. W. N. 527; 26 C. L. J. 169; 9 L. B. R. 56; 10 Bur. L. T. 138 (P. C.).
(10) 51 Ind. Cas. 209; 43 B. 815; 21 Bom L. R. 384.
(11) 59 Ind. Cas. 780; B. 519; 22 Bom. L. R. 1429.
(12) 111 Ind. Cas. 809; 51 A. 101; A. I. R. 1928 All. 467; 26 A. L J. 1041 (F. B.).

Their Lordships are therefore, of opinion that the appellant is entitled to share equally with the first respondent in the *panchmi* properties, and that a decree should have been entered in his favour for possession of a moiety thereof. This would of course be without prejudice to the rights of any persons claiming as slaves or disciples under the will of Khadim Husain. They are not parties to the present litigation, and such rights as they may be entitled to assert are not affected by it.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of the High Court in Appeals No. 132 and No. 164 of 1925 should be set aside and that in lieu thereof a decree should be made in favour of the appellant for the shares in the several *panchmi* villages claimed by him in his plaint. The first respondent must pay the costs of the appellant in the High Court and before this Board, but having regard to the order for costs made by the trial Judge, and to the fact that the appellant had raised issues on which he failed, their Lordships think that justice will be met by ordering the first respondent to pay only half of the appellant's costs in the Court of first instance.

A. *Appeal allowed.*

Solicitor for the Appellant.—Mr. *Hy. S. L. Polak.*

Solicitors for the Respondents.—Messrs. *Francis* and *Harker.*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

November 30, 1931.

LORD THANKERTON, LORD SALVESEN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES.

PREM NARAIN—APPELLANT

versus

RAM CHARAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 92, 93—Suit under s. 92 with sanction of Legal Remembrancer—Sanction of Local Government not obtained—Maintainability of suit—Scope of s. 93

Section 93, Civil Procedure Code, provides for two distinct matters, the appointment of an officer to exercise the powers conferred by ss. 91 and 92 on the Advocate-General, and the 'previous sanction' of the Local Government to the exercise of such powers. In each case both the appointment and the previous sanction of the Local Government to the exercise of the powers are necessary before the provisions of s. 93 can be utilised. [p 463, col. 2; p. 464, col. 1.]

A suit under s. 92 brought with the consent of the Legal Remembrancer but without the previous sanction of the Local Government as required by s. 93, is not maintainable. *Gulzari Lal* v. *The Collector of Etah* (1), distinguished. [p. 463, col. 1.]

Appeal against a decree of the High Court of Judicature at Allahabad, dated the 12th April, 1927, varying that of the District Judge, Aligarh, dated the 15th March, 1924.

Messrs. *F. B. Raikes, K. C.* and *W. Wallach*, for the Appellant.

Messrs. *A. M. Dunne, K. C.* and *S. Hyam*, for the Respondents.

Sir Lancelot Sanderson.—This is an appeal, by special leave, by Prem Narain, a minor, through his mother, *Musammat* Chameli, against a decree of the High Court of Judicature at Allahabad, dated the 12th of April, 1927, which varied a decree of the District Judge of Aligarh dated the 15th of March, 1924, and decreed the major part of the plaintiffs' claim.

The suit was brought in pursuance of the provisions of s 92 of the Code of Civil Procedure, by five persons, who were alleged to have an interest in certain property which was specified in the plaint, and which was stated to be endowed property and the subject-matter of a trust created for public purposes of a charitable or religious nature.

Prem Narain, the appellant, was the first of five defendants.

The reliefs asked for in the plaint were as follows: a declaration that the property was an endowed property; that the defendants should be dismissed from the managership and trusteeship thereof; that a scheme for the management of the property should be drawn up by the court; and that an order for the rendering of accounts by the defendants should be made.

The learned District Judge who tried the suit, dismissed it on the ground that there was no public trust.

The plaintiffs appealed to the High Court which allowed the appeal. The learned Judges held that the property, with the exception of a specified portion, was the subject of a public trust within the meaning of s. 92, and they made a decree that the defendants Nos. 1, 3 and 4 should be removed from the possession of such property. A direction was made that the case should be sent back to the District Judge for the framing of a scheme of management of the property.

The claim for accounts was disallowed. The appellant, Prem Narain, was directed to pay the plaintiffs' costs in the Appeal Court and in the lower Court.

From this decree the appellant, Prem Narain has appealed.

The learned Counsel who appeared for the appellant, in the first instance relied upon the grounds, referred to in the first and second reasons of the appellant's case, which relate to the competence of the suit, and which are as follows :

(1) Because the plaintiffs were not entitled to bring a suit under s. 92 of the Code of Civil Procedure.

(2) Because the previous sanction of the local Government had not been obtained authorizing the Legal Remembrancer to exercise the powers of an Advocate-General in respect to this suit as provided by s. 93 of the Code of Civil Procedure."

This part of the case, therefore, was argued by learned Counsel on both sides, since it was obvious that if the appellant were to succeed on the above-mentioned point, it would not be necessary to consider the other questions which arose in the appeal.

It may be stated at once, that the above-mentioned point was not taken by the appellant-defendant until the presentation of his case in this appeal.

It is true that the appellant-defendant had pleaded that the plaintiff had no right to maintain the suit under s. 92 of the Code of Civil Procedure for certain reasons specified in the written statement.

But there is no doubt that, as already stated, the point on which reliance is now placed, was not taken in the written statement or in either of the courts in India. It was alleged by the learned Counsel for the appellant defendant that it was in consequence of the decision of this Board in *Gulzari Lal* v. *The Collector of Etah* (1), which was given on the 9th March, 1931 that the appellant-defendant has raised the above-mentioned contention.

The matter is vital to the question whether the plaintiffs had the right to bring the suit, and therefore, the Board must consider and decide the point, even though it was not raised in the Courts in India.

The facts which are relevant to this part of the appeal are as follows :

The property, which is the subject-matter of the suit, is situated in the District of Etah, in the United Provinces.

In these provinces there is no Advocate-General who could act under s. 92 of the Code of Civil Procedure.

It appears, however, that on the 6th December, 1912, the Government of the United Provinces appointed the Legal Remembrancer to exercise the powers conferred on the Advocate-General by ss. 91 and 92 of the Code.

The appointment was in the following terms:—

No. 1622. VII-447.

"In exercise of the powers conferred by s. 93 of the Code of Civil Procedure, 1908, and in supersession of Notification No. 1307—V. 11-25—21. VI, dated 9th December, 1884, the Lieutenant Governor has been pleased to appoint the Legal Remembrancer to Government, United Provinces of Agra and Oudh, to exercise within the limits of the United Provinces of Agra and Oudh the powers conferred on the Advocate-General by ss. 91 and 92 of the Code of Civil Procedure.

"By Order of the Hon'ble the Lieutenant-Governor United Provinces.

"S. P. O'Donnell,
"Secretary to Government, United Provinces.
"6th December, 1912."

(1) 132 Ind. Cas. 745; A. I. R. 1931 P. C. 121; (1931) A. L. J. 369; 35 C. W. N. 699; 53 C. L. J. 537; 33 Bom. L. R. 968; (1931) M. W. N. 662; Ind. Rul. (1931) P. C. 233; 34 L. W. 63; 61 M. L. J. 402; 53 I. A. 910 (P. C.).

On the 2nd February, 1923, the Legal Remembrancer, acting in pursuance of the above-mentioned order of the Government granted sanction to the plaintiffs to institute the suit, in which this appeal arises.

The terms of the sanction are as follows:—

"With reference to their application, dated the 13th November, 1922, and acting under the powers conferred on the undersigned by s. 1-93, Code of Civil Procedure and Government order No. 1622, VII-447, dated the 6th December, 1912, he accords sanction to the institution by them of a suit with respect to the alleged trust specified in the margin against such persons and for such relief as the nature of the case may require.

"(Sd.) C. M. KING,
LOCAL REMEMBRANCER,
"United Provinces."

Section 93 is as follows:—

"The powers conferred by ss. 91 and 92 on the Advocate-General may, outside the Presidency towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf."

The argument of the learned Counsel for the appellant-defendant was to the effect that the above-mentioned sanction of the Legal Remembrancer was not sufficient by itself to comply with the provisions of s. 93 of the Code of Civil Procedure: that the order of the 6th December, 1912, was no more than an appointment of the Legal Remembrancer to exercise the powers conferred upon the Advocate General by ss. 91 and 92 of the Code, and that on the true construction of s. 93 the previous sanction of the Government was necessary in every suit before the Legal Remembrancer could exercise such powers: that no such sanction was obtained in this case, and, therefore, the suit was not maintainable by the plaintiffs. He relied upon the decision in the above-mentioned case of *Gulzari Lal* v. *Collector of Etah* (1).

The learned Counsel for the respondents contended that the previous sanction of the Government was not necessary in every suit, and that if it was, such sanction was sufficiently shown by the terms of the Government's order of the 6th December, 1912.

In their Lordships' opinion, the actual decision in *Gulzari Lal* v. *The Collector of Etah* (1), does not govern this appeal.

For, in the cited case, the suit was brought by the Collector, and there was express authority given by the Government of the United Provinces to the Collector of Etah to institute the suit under s. 92 of the Code.

This fact is not stated in the judgment in the cited case, although having regard to the terms of the judgment it was obviously assumed. Their Lordships have referred to the record in the cited case, and the fact was as already stated.

That part of the decision in the cited case, which dealt with the question relating to s. 93 of the Code, was to the effect that the fact that the Government had, by the order of the 6th December, 1912, appointed in general terms the Legal Remembrancer to exercise the powers conferred on the Advocate General by ss. 92 and 93 of the Code, did not prevent the Government from giving an express sanction to the Collector to institute the suit in that case, that the Legal Remembrancer was not the only official who could maintain the suit, that the sanction, in fact, given to the Collector was a valid sanction, and that the suit was competent.

It is clear, therefore, that the point which now arises was not decided in that case. There are, however, passages in the judgment which support the argument of the learned Counsel for the appellant-defendant.

Lord Blanesburgh delivered the judgment of the Board, and when dealing with the construction of s. 93 of the Code, he said as follows:

"The effect of that section as it seems to the Board is that no suit like the present, being one outside the Presidency towns, may be brought without the previous sanction of the Local Government, whether by the Collector or by any officer whom that Government may appoint for the purpose: so that the fact that the Legal Remembrancer is in the United Provinces invested as a rule with the duties elsewhere discharged by the Advocate General in this behalf is no reason why for the purposes of a particular suit the Local Government may not appoint the Collector or any other officer to prosecute it. The fact that there must be a previous sanction by the Local Government to every suit makes it impossible that two suits by separate officials will ever be concurrently instituted. Accordingly no inconvenience results from this construction of the section."

Their Lordships agree with and adopt the construction put upon s. 93 in the above-mentioned case. In their Lordships' opinion s. 93 provides for two distinct matters, the appointment of an officer to exercise the powers conferred by ss. 91 and 92 on the Advocate General, and the "previous sanction" of the Local Government to the exercise of such powers

in each case both the appointment and the previous sanction of the Local Government to the exercise of the powers are necessary before the provisions of s. 93 can be utilised. The Legislature, no doubt, considered that there were good reasons for imposing more stringent provisions when the powers conferred upon the Advocate General, by ss. 91 and 92 of the Code were to be exercised outside the Presidency towns, not by an Advocate General, but by a Collector or by some other officer to be appointed by the Local Government.

Section 92 provides for a suit being instituted by the Advocate General or by two or more persons having an interest in the trust and having obtained the consent in writing of the Advocate-General

In the above-mentioned cited case the suit was instituted by the Collector with the sanction of the Local Government. In the present case the suit was instituted by the plaintiffs having an interest in the trust and having obtained the consent in writing of the Legal Remembrancer.

It is clear, however, that, having regard to the terms of s. 93, the previous sanction of the Local Government is necessary, whether the suit is instituted by a Collector or by an officer appointed by the Local Government, or whether the suit is instituted by two or more persons with the consent in writing of such Collector or officer.

For these reasons their Lordships are of opinion that the point relied upon by the appellant defendant is a good one, and that, inasmuch as the previous sanction of the Local Government to the suit had not been obtained, the objection to the competence of the suit must be upheld.

The result is that the appeal must be lowed on the above-mentioned grounds, and it is not necessary to consider the other reasons in the appellant's case which have not been argued.

The point on which the appeal has been decided could have been and ought to have been raised in the courts in India, and the failure to raise it may have given rise to unnecessary proceedings and costs.

The proper order, therefore, in their Lordships' opinion, is that the appeal be allowed that the decree of the High Court dated the 12th April, 1927, be set aside and the decree of the District Judge dated the 15th March, 1924, be restored in so far as it dismissed the suit.

The direction of the District Judge as to costs must be set aside, and the plaintiffs and the defendants must pay their own costs in both the Courts in India.

The plaintiffs must pay the appellant-defendant his costs of this appeal. Any costs which may have been paid in accordance with the orders of the courts in India must be returned.

For the above reasons, their Lordships have humbly advised His Majesty accordingly.

A. *Appeal allowed.*

Solicitors for the Appellant :—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent:—Messrs. *Barrow, Rogers & Nevill*

CALCUTTA HIGH COURT.

Criminal Revision Nos 1187, 1215, 1216, and 1217 of 1930.
February 9, 1931.
Cuming, J.

U. K. MITRA—Petitioner
versus
CORPORATION OF CALCUTTA
—Opposite Party

Calcutta Municipal Act (III of 1923), ss. 391, 498 (2) —Lease of theatre—Lessee's liability to take out license—Power of Corporation to charge fees—Sentence of imprisonment in default of fine, legality of—Penal Code (Act XLV of 1860), s. 64—Bengal General Clauses Act (I of 1899), s. 26.

Where a theatre has been leased by its owner, the lessee is the person who 'keeps it open' and who is, therefore, liable to take out a license under s. 391, Calcutta Municipal Act.

Under s. 498 (2) of the said Act the Corporation may charge a fee for such license, though s. 391 is silent about fees.

Where a person is convicted under s. 391, it is open to the Court to impose a sentence of imprisonment in default of payment of fine under the provisions of s. 64, Penal Code, and s. 26, Bengal General Clauses Act.

Criminal Revision against an order of the Municipal Magistrate, Calcutta, dated the 25th September, 1930.

Messrs. *Bipin Chandra Mallik*, *Gobinda Chandra Dutta* and *Debendra Nath Bhattacharya*, for the Petitioner.

Messrs. *Probodh Chandra Chatterjee* and *Pashupati Ghose*, for the Opposite Party.

Judgment—In these four cases one U. K. Mitra who is the lessee of the building known as the Minerva Theatre has been prosecuted and convicted under s. 391, Calcutta Municipal Act, for keeping open a theatre without a license.

The first point which has been argued by the petitioner is that it is the owner of the theatre and not the lessee who is obliged to take out the license under s. 391.

The decision on this point depends entirely on who can be said to keep the theatre open. As to the meaning of the expression certain English decisions have been cited to me. They are of no assistance whatever. In the first place the wording of the English Act is different for the expression in the English Act is "keep" and obviously "keep" and "keep open" are entirely different things. Secondly, they are in no way binding on me and so have no more value than any other opinion as to the meaning of an expression.

The practice of citing English decisions to interpret Indian Statutes is seldom a profitable one. The expression used is "keep open". Who keeps the theatre open? Obviously the lessee. Once leased to him the building is in his control and it is he who keeps it open or shuts it. Whether any theatrical performances take place in the building is a matter decided by the lessee. If the Legislature had intended that it was to be the owner who should take out a license nothing would be easier than to have said plainly that the owner should take out the license The section uses more general terms and makes the person keeping it open liable. The lessee is obviously a person who keeps the theatre open.

He is, therefore, liable under s 391 to take out a license.

The next point urged is that though he may be made to take out a license he cannot be ordered to pay any fee for the license. Section 391 is silent about fees. So no fee can be charged.

Section 498 (2), Calcutta Municipal Act, makes it quite clear that the corporation may charge a fee. Then it has been argued that it is illegal to impose any sentence of imprisonment in default of payment of fine. Section 64, Indian Penal Code, read with s 26, General Clauses Act, make it quite clear that such imprisonment in default is legal. The next point urged is that the corporation cannot levy an annual license-fee. They can only levy a license fee once and for all and that the section does not contemplate an annual license-fee.

I do not think that the point arises at present. The petitioner has not taken out any license at all. The point may arise after the petitioner has taken out a license and he is asked to renew it at the end of some period.

The result is, therefore, that the rules must be discharged.

There is in these cases the same complaint that I have had to make in Rule 1261* and other connected Rules. The records are untidy and slovenly and the proceedings have been allowed to drag on indefinitely.

No attempt is made to comply with the provisions of s. 370, Civil Procedure Code.

The Magistrate apparently has no control over the proceedings in his Court but the parties appear or not as it suits their convenience. I would invite the attention of Government and the Chief Presidency Magistrate to the way business is apparently conducted in this Court.

A. *Rule discharged*

*See 136 Ind Cas 135—[*Ed.*]

CALCUTTA HIGH COURT,

Civil Appeal No. 443 of 1929.
December 11, 1930.
MUKERJI AND GUHA, JJ.

RABINDRA NATH CHAKRAVARTHI—APPELLANT

versus

JNANENDRA MOHAN BHADURI AND OTHERS—RESPONDENTS.

Execution—Executing Court's power to question validity of decree—Award under Arbitration Act—Judgment and decree based on award—Legality—Execution of award—Application for execution of decree treated as one for execution of award—Decree in excess of jurisdiction.

Where an award is made under the Arbitration Act, the Court after satisfying itself as to its validity will order it to be filed and execution can be taken on it as though it were a decree but the Court can pronounce no judgment on it and make no decree. But if a judgment is pronounced and a decree is made, it is merely a superimposition, unnecessary and void. But the award being executable, an application for execution of decree may be treated as application for execution of award. *Jnanendra Mohan Bhaduri* v. *Annopurna Devi* (1), and *Ganindra Mohan Bhaduri* v. *Bhavani Charan Chakravarti* (6), followed. [p 467, col 2.]

Where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction and it is only within these narrow limits that the executing Court is authorised to question the validity of the decree. *Gora Chand Haldar* v. *Profulla Kumar Roy* (2), followed [p 466, col. 2; p. 467, col. 1.]

A decree passed in excess of the limits prescribed may also be regarded as void on the ground of lack of inherent jurisdiction [p 467, col 1]

Once a cause is converted into a matter under the Arbitration Act, the inherent jurisdiction which the Court of general jurisdiction possessed over it, is curtailed, and the Court retains a limited jurisdiction only for the purposes and control over the proceedings of arbitration It has no jurisdiction to treat the cause as a suit pending before it as one on which it can pass a judgment or make a decree If it does so the decree passed is in excess of the limits and as such void. [p. 467, cols. 1 & 2.]

Appeal against original order of the Sub-Judge, Third Court, Hooghly, dated the 29th June, 1929.

Messrs. *Kupendra Kumar Mitter* and *Manilal Bhattacharjee*, for the Appellant.

Messrs. *Bijan Kumar Mukerji* and *Apurba Dhan Mookerjee*, for the Respondents.

Judgment.—This is an appeal by a decree-holder from an order upholding the judgment-debtors' objection under s. 47, Civil Procedure Code, and dismissing the application for execution. The Court below has held that the decree sought to be executed was passed without jurisdiction and was, therefore, a nullity.

Disputes having arisen over the provisions of a will left by one Rajendra Lal Goswami, which was proved on 19th December, 1917, there was an arbitration held by the late Mr. B. Chakravarti under the Arbitration Act, and Mr. Chakravarti made his award on 29th July, 1918. On the award being filed there were two petitions filed by the parties before the Court, the original side of the High Court, containing certain terms of settlement amongst themselves, in accordance with which the parties wanted the award to be varied. The learned Judge sitting on the original side thereupon mad a decree in which it was declared that,

"the said award as modified by the terms of settlement ought to be carried into effect," and he "ordered and decreed accordingly."

This is the decree which forms the subject matter of the present execution.

The decree holder is one Rabindra Nath Chakravati who at the date of the decree was an infant under the age of 18 years but has now attained majority. The contesting judgment-debtors are Jnanendra Mohan Bhaduri and Grindra Mohan Bhaduri who were executors to the Will and beneficiaries under it, and also parties to the award and the decree. In the case of *Jnanendra Mohan Bhaduri* v. *Annopurna Devi* (1), which also arose from the same decree, it has been pointed out that when an award is made under the Arbitration Act, the Court after satisfying itself as to its validity, will order it to be filed and execution can be taken on it as though it were a decree, but the Court can pronounce no judgment on it and make no decree. The question, therefore, which arises at the outset is whether the executing Court is competent to go behind the decree and question its validity. Connected with this question is the question as to what is the true character of the decree; in other words, is the decree a nullity?

In the Full Bench decision of this Court in the case of *Gora Chand Haldar* v. *Profulla Kumar Roy* (2), it was pointed out that the correct view to take of the aforesaid question was to hold that where a decree presented for execution was made by a a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without juris-

(1) 102 Ind. Cas. 108; A. I. R. 1927 Cal. 562; 31 C. W. N 517; 45 C. L. J. 597.

(2) 89 Ind. Cas. 685; A. I. R. 1925 Cal. 907; 53 C. 166; 29 C. W. N. 94; 42 C. L. J. 1 (F. B.).

diction; and that within these narrow limits, the executing Court is authorized to question the validity of the decree. In laying down the limits as aforesaid the learned Judges were emphasizing the distinction between the absolute lack of what may be said to be the inherent jurisdiction of a Court and the irregular or illegal exercise of that jurisdiction. This distinction has been clearly pointed out in several decisions of this Court, amongst which may be referred the cases of *Ashutosh Sikdar* v. *Bihare Lal Kirtania* (3), *Hiranay Nath Dey* v. *Ram Chandra* (4), and *Ishan Chandra Banikya* v. *Moomraj Khan* (5). The limits prescribed in *Gorachand's case* (2) would, in the case of a Court of general jurisdiction, exclude all but cases of absolute lack of inherent jurisdiction. There may, however, be cases where the Court is not a Court of general jurisdiction or where being a Court of general jurisdiction is limited to special purposes only.

In those cases also it may be rightly said that the Court has no inherent jurisdiction over a particular cause though it has jurisdiction, pecuniary, territorial as well as over the parties, or that the jurisdiction of the Court is limited in a particular way. A decree passed in excess of the limits prescribed may also be regarded as void on the ground of lack of inherent jurisdiction. If a decree for money is passed against an infant in a guardianship matter, or if a foreclosure decree is made on an application for probate—though such things will hardly ever come to pass—it would be an instance of the former kind of lack of inherent jurisdiction. Similarly once a cause is converted into a matter under the Arbitration Act, the inherent jurisdiction which the Court of general jurisdiction possessed over it is curtailed and the Court retains only a limited jurisdiction only for the purposes of supervision and control over the proceedings of the arbitration, *e. g*, of appointing an arbitrator, umpire or third abitrator; of enlarging the line for an award; of remitting the award or of setting it aside, and so on; and it is this limited jurisdiction only that it exercises so long as the matter remains as one under the said Act. It has no jurisdiction to treat the cause as a suit pending before it, as one on which it can pass a judgment or make a decree. In this view it may not unreasonably be held that the decree under execution was not the result of a mere irregular or illegal exercise of the Court's jurisdiction in the shape of the adoption of a wrong procedure, but was one made in excess of the inherent jurisdiction of the Court. The executing Court, in our judgment was competent to treat the decree as a nullity, and in doing so was well within the spirit of the Full Bench decision in *Gora Chand's case* (2) referred to above.

Treating the decree as a nullity, the question arises as to whether the decree-holder is entitled to proceed with the execution as on the award. It appears that in the case of another decree-holder against the same executors, execution as upon the award has been permitted by this Court : see *Ganendra Mohan Bhaduri* v. *Bhavani Charan Chakravati* (6). The decree being merely a superimposition, unecessary and void, and the award being under s 15 of the Act enforceable as a decree, and having been referred to in the petition for execution itself, the application may, in substance, be regarded as an application for execution of the award. The facts have to be investigated a little further in order to decide whether this should be permitted.

The provisions in respect of which execution has been applied for are said in the application for execution to be contained in paras. 6 and 10 of the award. Connected therewith is a further provision contained in cl. (5) of the terms of settlement which are annexure, schedule B, to the decree. The decree being void the said provision cannot be executed as a provision contained in a decree, but on the other hand may be pleaded as an agreement in bar of the execution. The prayers in the execution petition were for delivery of possession of certain immovable properties and a life policy and documents relating to the said properties, for adjustment of accounts by appointment of a Commissioner and for enforcement of such delivery and rendering of accounts by arrest of the judgment debtors if necessary. It was also prayed that leave might be reserved to the decree-holder for fresh execution for the purpose of realization of the money which would be found due on the taking of accounts.

(3) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320 (F. B).

(4) 58 Ind. Cas. 806; A. I. R. 1921 Cal. 34; 48 C. 138; 31 C. L. J. 482; 24 C. W. N. 723 (F B).

(5) 97 Ind. Cas. 770; A. I. R. 1926 Cal. 1101; 30 C. W N. 940; 45 C. L. J. 24.

(6) 127 Ind. Cas. 60; A. I. R. 1930 Cal. 468, 34 C. W. N. 268; Ind. Rul. (1930) Cal. 812.

Now, para. 6 of the award directed the executors and executrix to make over to Bhawani Charan Chakravarti the father and natural guardian of Rabindra Nath Charkavarti who was then a minor, or such other guardian as might be appointed for him by the Court the properties in schedule *Ga* attached to the award together with all accounts from the date of the testator's death until the date when the accounts are rendered, and also the documents and papers relating to the said properties, subject to certain reservation. Similar directions were also given in that paragraph with regard to the life policy. There are directions in that paragraph as well as in para. 10 of the award as to how the accounts were to be adjusted and the liabilities of the executors were to be ascertained. In para. 6 it was further provided that Bhawani Charan Chakravarti or any other guardian whom the Court might appoint would make over the properties with proper accounts to Rabindra Nath Chakravarti on the latter attaining majority. The directions, therefore, were substantially for delivery of the said properties and accounts to Rabindra Nath Chakravarti and such delivery was to be taken on his behalf, because of his minority, by his father and natural guardian Bhawani Charan Chakravarti or by the person, if any who might be appointed as his guardian by the Court. We did not see why, on attaining majority, Rabindra Nath Chakravarti should not be entitled to have what the award directed for his benefit, provided of course that the directions have not been already carried out. As regards the provision contained in cl. (5), of the Terms of Settlement mentioned above that the properties in schedule *Ga* as directed in para. 6 of the award were to be made over to Bhawani Charan Chakravarti, the father and natural guardian of Rabindra Nath Chakravarti on his giving security for Rs. 12,000, we do not see how this agreement can stand in the way of the decree-holder if in point of fact the properties have not been so made over.

The result is that, in our opinion the view taken by the Court below is not correct. We accordingly allow the appeal, and setting aside the order appealed from direct that the execution petition be entertained as an application for execution of the award and that the proceedings be allowed to be carried on and be dealt with on their merits. The appellant will be entitled to his costs in the appeal, hearing fee being assessed at five gold *mohurs*.

E. L. *Appeal allowed.*

CALCUTTA HIGH COURT.

Civil Revision No. 303 of 1931.

April 27, 1931.

SUHRAWARDY AND GRAHAM, JJ.

(*Kumar*) PASHUPATI NATH MALIAH AND ANOTHER—JUDGMENT DEBTORS—PETITIONERS

versus

BANK OF BEHAR—DECREE-HOLDER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 66 (2) (e)—Proclamation of sale—Duty of Court to ascertain value and state it.

If the Court does not consider that the value of the property should be mentioned in the proclamation, on account of the peculiar nature of the property, it may not do it. But if on the other hand it considers that the value is a material piece of information for an intending purchaser it should be put "as fairly and accurately as possible." Except in exceptional cases where it is not possible to ascertain the value or where it may be found that in the circumstances of the case the value need not be ascertained, the Court is bound to put a fair and accurate value in the proclamation. The enquiry by Court should be a summary one and need not be elaborate. [p. 469, col. 2]

Where the decree-holder stated that the value of the property (3 *bighas* of land with a bungalow) was Rs. 2,000 and the judgment-debtor stated it was worth Rs. 40,000:

Held, that the case was one in which the Court should hold an enquiry and state its own valuation. *Daulat Bhuiya* v. *Rahisa Banu* (2), *Saddatmand Khan* v. *Phul Kuar* (3), referred to. *Lachira* v. *Rameswar Singh* (1), *Debendra Nath Sadhu Khan* v. *Radhikissen Chamaria* (4), *Bejoy Chand Mahatab* v. *Ashutosh Chakravarty* (5), followed. *Thiruvengadaswamy Ayyangar* v. *Govindaswamy Udayar* (6), disapproved. [p. 470, col. 1.]

Civil Revision against an order of the Sub-Judge, Burdwan, dated the 31st January, 1931.

Mr. *Shyamadas Bhattacharji*, for the Petitioners.

Messrs. *Upendranarayan Bagchi* and *Amarendranarayan Bagchi* for the Opposite Party.

Suhrawardy, J.—This Rule is directed against an order of the Subordinate Judge of Burdwan, by which he has directed that in the sale proclamation to be issued for sale of the property in dispute, valuations given by the decree-holder and the judgment-debtor be both inserted. The judgment-debtor objects that the Court should have inquired into the value of the

property and should have given it in the sale proclamation. The property, we are told, consists of 3 *bighas* of land with a bungalow standing on it near the Burdwan Railway Station. The decree-holder valued it at Rs. 2,000, whereas the judgment-debtor said that it was worth Rs. 40,000. The learned Subordinate Judge has directed both the valuations to be inserted in the sale proclamation on the ground that an elaborate investigation should be necessary in order to ascertain its value roughly by an engineer, and the evidence on both sides should be taken as to the price of the land. We think that in the circumstances of the case the order of the Subordinate Judge cannot be maintained.

On the question as to whether in the sale proclamation valuations given by the parties should be inserted without an enquiry by the Court, I have expressed myself at some length in our judgment in *Lachira* v. *Rameswar Singh* in Civil Rule No. 370 of 1928, decided on 4th April, 1928, which is to be found reported as *Lachira* v. *Rameswar Singh* (1). The matter has again been placed before us and I like to say a few more words in support of the view I am inclined to take in this connexion.

No doubt the law does not make it obligatory upon the Court to put in the value of the property to be sold under O. XXI, r. 66, Civil Procedure Code, and if the Court does not consider it necessary to ascertain the value of the property and does not put it in the sale proclamation, it may be said that the omission does not amount to material irregularity; *Daulat Bhuiya* v. *Rahisa Banu* (2). On the other hand, we have the pronouncement of the Judicial Committee in *Saddatmand Khan* v. *Phul Kuar* (3) that value of the property to be sold is a very material fact, and if the Court in cases where it ought to be mentioned fails to mention it, it may be argued that the omission amounts to irregularity.

Under O. XXI, r. 66 (2) (e) sale proclamation

"shall specify as fairly and accurately as possible every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property."

If under this head, the Court considers that information about the value of the property is material in order to enable the purchaser to judge of its nature and value, it should in terms of that rule specify "as fairly and accurately as possible" what such value is; and that is what their Lordships of the Judicial Committee laid stress upon in *Saadatmand Khan's case* (3), where they observed :

"whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things "which the Court considers material for the purchaser to know," and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible."

The position, therefore, is this : if the Court does not consider that the value of the property should be mentioned in the proclamation, on account of the peculiar nature of the property, it may not do it. But if on the other hand it considers that the value is a material piece of information for an intending purchaser it should be put "as fairly and accurately at possible". Except in exceptional cases where it is not possible to ascertain the value or where it may be found that in the circumstances of the case the value need not be ascertained, the Court is bound to put a fair and accurate value in the proclamation. We have expressed this view in the case above referred to and it has since been accepted in *Debendra Nath Sadhu Khan* v *Radhikissen Chamaria* (4). In *Bejoy Chand Mahatab* v. *Ashutosh Chakravarty* (5) the nature of the property was not mentioned, but it is said there that it was difficult to ascertain the value of the property. Reference has been made to a decision of the Madras High Court in *Thiruvengadaswamy Ayyangar* v. *Govindaswamy Udayar* (6). The facts of that case are quite different. There the Court had inserted the valuation put by the judgment-creditor and judgment-debtor and it had also inserted the valuation arrived at by the commissioner, and their Lordships observed :

"Having regard to the fact that in this case the commissioner's calculation has also been set out in the proclamation, the criticism based on the ground of possible confusion is not open."

I am however unable to agree with the general observation made in that case that their Lordships are

(1) 127 Ind. Cas. 257; A. I. R. 1930 Cal. 781; 52 C. L. J. 145; Ind. Rul. (1930) Cal. 833.

(2) 131 Ind. Cas. 853; A. I. R. 1931 Cal. 490; 58 C 813; 35 C. W. N. 75; Ind. Rul. (1931) Cal. 501; 53 C. L. J. 575.

(3) 20 A. 412; 25 I. A. 146; 7 Sar. 380; 2 C. W. N. 550 (P. C.)

(4) 132 Ind. Cas. 687; A. I. R. 1931 Cal. 520; 58 C. 577; 35 C. W. N. 142.

(5) 62 Ind. Cas. 73; A. I. R. 1921 Cal. 494; 48 C. 554; 25 C. W. N. 42.

(6) 109 Ind. Cas. 698; A. I. R. 1928 Mad. 503; 51 M. 655.

"unable to see why it should be necessary for the Court to fix the valuation more especially when the reserve price is also generally fixed by the Court and the price fetched at a sale often depends upon not on what may be called the intrinsic value of the property but on the demand for the property at the time of the sale".

In the circumstances of this case we may adopt the remark made by the Judicial Committee in *Saddatmand Khan's case* (3) above referred to:

"It must have been possible to state the value of this property with very much greater approach to fairness and accuracy than was done in the proclamation."

The property is situated near the Burdwan Railway Station. It can safely be said that the valuation put by the decree-holder of Rs 2,000 of a property, 3 *bighas* in area with a building on it is grossly inadequate. It is also possible, on the other hand, that the valuation put by the judgment-debtor in a fanciful price. But it should not be very difficult for the Court to come to an approximate value. The inquiry must be a summary one and need not be very elaborate. In order to ascertain the exact value of the property, as for the purpose of land acquisition, it may be necessary to engage an engineer to hold a local investigation. But in order to form a rough opinion as to the approximate value of the property, it may be done in a much simpler way.

We accordingly make the Rule absolute, set aside the order of the lower Court dated 24th January, 1931, and remit the matter to that Court for proceeding according to law.

The petitioner is entitled to his costs in this Court hearing-fee being assessed at two gold *mohurs*.

Graham, J.—I agree. The question involved in the Rule is whether we should hold that this is one of those exceptional cases in which it was open to the Court to specify in the sale proclamation the value given both by the judgment-debtor and the decree-holder respectively, or whether the Court should have made an inquiry and formed its own independent conclusion on the point. The authorities go to show that it is not an infallible rule that such an enquiry should be made especially where it appears that such an inquiry will involve considerable delay or expense, or again where the value may for some reason or other be difficult to ascertain. The learned Subordinate Judge has given some reasons for not making any enquiry. But those reasons do not appear to be very pertinent. Such an enquiry need not necessarily be a long and expensive proceeding. What is contemplated is a summary inquiry and that the Court should upon the materials placed before it form its own estimate of the approximate value of the property to be sold. This duty ought not to be shirked as was held by my learned brother and myself in the case of *Lachira* v. *Rameswar Prosad Singh* (1). There may be exceptional cases where such an inquiry may be dispensed with and where the value set upon the property by the parties may be properly inserted in the sale proclamation. This however does not seem to be a case of that description. A fact which has influenced me in taking this view of the present case is that the decree-holder has fixed what appears *prima facie* to be a manifestly inadequate price as the value of the property, namely Rs. 2,000 only. The judgment-debtor on the other hand has estimated the value of the property at Rs. 40,000. So that there is a very great divergence in the two estimates. Having regard to the description of the property involved, Rs 2,000 seems manifestly to be an under-valuation and when such a low value is stated in the sale proclamation it is not unlikely that prospective purchasers may be misled thereby and the result may be prejudicial to the interest of judgment debtor.

A. *Rule made absolute.*

CALCUTTA HIGH COURT.

Civil Revision No. 611 of 1930.
July 29, 1930.
S. K GHOSE, J.

DABIRUDDIN—PETITIONER
versus
KRISHTO CHANDRA MUKHOPADHAYA AND OTHERS—OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), ss. 26-C, 26-F, 174—Rent sale—Landlord consenting to setting aside after transfer—Application to pre-empt—Sustainability—Slight discrepancies in description, effect of

Where the landlord obtained a rent decree and purchased the holding and subsequently the defaulting tenant conveyed the holding and certain other lands to a third party and the tenant and the transferee deposited the decree amount under s 174, Bengal Tenancy Act, and the landlord withdrew the amount and the sale was set aside:

Held, that the landlord was not precluded from claiming pre-emption under s 26-F by reason of his agreeing to have the rent sale set aside, even though he had received notice of transfer under s. 26-C before the sale was set aside.

Slight discrepancies regarding the description of property in the application for pre-emption under s. 26-F as compared with the notice under s. 26-C cannot invalidate the application.

Civil Revision against an order of the Munsif Fourth Court, Tamluk (Midnapore), dated the 17th March, 1930.

Messrs. *N. C. Sen Gupta* and *Akram*, for the Petitioner.

Messrs *Peary Mohan Chatterjee*, *Benoy Krishna Mukherjee* and *Bankim Chandra Roy*, for the Opposite Party.

Judgment.—The petitioner in this Rule is a transferee of an occupancy holding and he moves against the order of the lower Court granting the application of the landlords under s. 26 F, Bengal Tenancy Act. It appears that the landlords who are opposite parties Nos. 1 and 2, obtained a rent decree on 18th December, 1928, against their tenant, opposite party No. 3, for arrears of rent of the period of 1924-1927. In execution of that decree the landlords purchased the disputed holding on 18th May, 1929. On 14th July, 1929, the petitioner purchased the disputed holding along with other lands by a private transfer from the defaulting tenant-opposite party No. 3. On 2nd September, 1929, opposite party No. 3 along with the petitioner deposited the decretal amount under s. 174, Bengal Tenancy Act. Opposite parties Nos. 1 and 2, the decree-holders did not oppose the application for setting aside the sale and they withdrew the amount deposited and the sale was set aside on 18th January, 1930. In the meanwhile on 12th December, 1929, opposite parties Nos. 1 and 2 were served with notice of the transfer to the petitioner under s. 26-C, Bengal Tenancy Act. Thereupon opposite parties Nos. 1 and 2 filed an application for pre-emption under s. 26-F.

It is contended in support of this rule that as the landlors had agreed to have the rent sale set aside and accepted the deposit of decretal amount from the petitioner, they were estopped from applying for pre-emption as against the petitioner. It is however not correct that the deposit under s. 174 of the Act was made by the petitioner alone. As mentioned already the judgment-debtor was also a party and sub-s. (4), s. 170, expressly provides that the withdrawal by the decree-holder-landlord of the amount deposited shall not operate as an admission of the transferability of the tenancy. Further from the terms of s. 26-F, it is clear that the landlord is not debarred from filing an application for pre-emption by reason of the fact that he had accepted rent from the transferee. Sub-Section (3), s. 26-F, expressly provides that the Court shall give notice to the transferee to appear within a certain time and state "what other sums" besides the consideration money "he has paid in respect of the rent for the period after the date of transfer." Sub section (6) provides that from the date of the making of the order under sub s (5) the liability of the transferee for the rent due on account of the holding shall cease. Suppose for instance, when one purchases a holding from a tenant, there are already rents due, the transferee may pay all those arrears and may also proceed to pay rents as they become due after his purchase. Because the landlord has the right of pre emption under s. 26 F, it does not follow that he must refuse to accept rent from the transferee and go without any rent until his application under s. 26 F was filed and decided. On the contrary the terms of that section expressly provide for the contingency of rent being paid by the transferee after his purchase.

The next point urged in support of the rule is this: it appears that in the application under s. 26 F the landlords gave a description of the property and that subsequently they filed another application on 15th March, 1930, in which it was stated that in the original application there were certain mistakes in the description of the property which should be corrected. From the order dated 15th March, 1930 on the order sheet of the lower Court it appears that the petition for amendment was not actually moved. It is contended that on the landlords' own showing the application for pre-emption does not contain a correct description of the property and, therefore, the application should not be allowed on the principle that this being a special privilege granted to the landlord, the provision must be construed strictly. The question however is not whether the description of the property as given in the application under s. 26-F is in all respects the same as that given in the notice under s. 26-C. The question really is whether the two properties are identical. In this case it appears that there are certain differences, but they are not material. Dag No. 630 is wrongly described as Dag No. 670 in the application under s. 26 F. In other respects the Dag numbers given in the application are correct. The description of the *mauzas* is also the same, and so are the names of the district, *perganna*

thana, sub-registration office The only difference is that the name of the *mauza* is given in the *kobala* as "*Mauza* Amalhara in Danan Settlement" and in the petition as "*Mauza* Tola Danan appertaining to Amalhara." The discrepancy as to area is also insignificant, as in the petition the area is 1 acre 43 decimal and in the *kobala* it is 1 acre 44 decimal: *vide* paras. 10 and 11 of the counter-affidavit filed by the opposite parties Nos. 1 and 2. The lower Court has distinctly found that the discrepancies are right and that they cannot defeat application for pre-emption.

In these circumstances it cannot be said that it was not open to the lower Court to decide the matter in the way it has done. The petition must fail. The Rule is discharged with costs the hearing-fee being assessed at one gold *mohur*.

A. *Rule discharged.*

CALCUTTA HIGH COURT.

Civil Appeal No. 2489 of 1929.
June 18, 1931.

RANKIN, C. J. AND PEARSON, J.

ABDUL HAMID SARDAR—APPELLANT
versus
BIJOY CHAND MAHATAP AND OTHERS—RESPONDENTS.

Patni Regulation (VIII of 1819), s. 14—Auction of patni *rights—Auction-purchaser paying rent to* zemindar—Patni *sale set aside on suit by* patnidar *—Subsequent suit for refund of rent by auction-purchaser, maintainability of—Expression of opinion by previous Court, effect of*

A *patnidar* on 3rd June, 1922, brought a suit both against the *zemindar* and the auction-purchaser for setting aside a sale effected under the *Patni* Regulation on 15th May, 1922. On 9th June symbolical possession was obtained by the auction-purchaser. In December, 1922, and in April and May, 1923, he paid certain sums of rent to the *zemindar*. The suit of the *patnidar* succeeded and the sale was set aside by the first Court. At the time the first Court set aside the sale it provided that the *patnidar* should recover possession and it directed the *zemindar* to pay the plaintiff's costs and also to refund the purchase-money to the auction-purchaser with interest, to return him certain security and to bear his costs in the suit. The auction-purchaser as well as the *zemindar* filed appeals. The auction-purchaser's appeal proceeded on the ground that he should have been refunded the rent which he had paid to the *zemindar*. The Appellate Court dismissed the appeal but in doing so remarked in its judgment that s. 14 of the Regulation would not be a bar to another suit for the recovery of the rent paid. Thereupon the present suit was brought by the auction-purchaser both against the *zemindar* and the defaulting *patnidar* for the refund of the money paid by him as rent:

Held, that the suit against the *zemindar* was barred. The proper remedy of the auction-purchaser was under s. 14 of the Patni Regulation. It was not intended by the Regulation that the matter should be dealt with piecemeal. The intention was, at all events so far as the claim against the *zemindar* was concerned, the whole matter should be enquired into and the auction-purchaser should be put in such a position as to suffer no loss. [p. 473, col 2.]

Held, also, that s. 14, Patni Regulation, does not exclude suits against any party except the *zemindar*, *e. g.*, against *patnidar*. *Radha Madhub Samonta* v. *Sasti Ram Sen* (1), followed. [p 473, col 1]

Held, further, that the mere expression by the Appellate Court in the former suit that another suit would lie, could not bind the parties. [p. 473, col. 2.]

Held, still further, that payment of rent by the auction-purchaser to the *zemindar* could not be regarded as payment under a mistake of fact and could not, therefore, sustain a suit for money paid without consideration. [p. 474, col. 1.]

Appeal against appellate decree of the Additional District Judge, Hooghly, dated the 20th April, 1929.

Messrs. *Brojo Lal Chuckerbutty* and *Subodh Chander Dutt*, for the Appellant.

Messrs. *Sarat Chandra Basak* and *Nasim Ali*, for the Respondent.

Rankin, C. J.—In this case, the plaintiff-appellant was the auction purchaser of a *patni* sold under Regulation VIII of 1819 on 15th May, 1922. Very soon afterwards, on 3rd June, 1922, the *patnidar* sued to set aside the sale under s. 14 of the Regulation. The plaintiff obtained symbolical possession as it is called on or about 9th June, 1922. In December, 1922, and in April and May, 1923, he paid certain sums of rent to the *zamindar*. In the end the suit of the *patnidar* succeeded and the sale was set aside by the first Court. At the time the first Court set aside the sale, it provided that the *patnidar* should recover possession and it directed the *zamindar* to pay the plaintiff's costs and also to refund to the present appellant the purchase-money with certain interest, to return him certain security and to bear his costs in the suit.

It is natural enough that in the written statement of that suit no mention should have been made by the present appellant, the auction-purchaser, of the sums of money paid as rent and I will assume that he did not refer to them and for that reason, it may be that the matter was omitted from the consideration of the Court of first instance. However the auction purchaser as well as the *zemindar* appealed from the decision of the first Court and in the lower Appellate Court the auction-purchaser contended that he should be refunded the rent for 1329 B.S. which he had paid; apparently, he must have contended that it should be refunded to him by the

zemindar. The lower Appellate Court observing that the matter was not mentioned in the written statement went on to express this opinion :

"I think s. 14 of the Regulation would not be a bar to such a suitfor recovery of rent paid subsequently. In fact the lower Court awarded to the defendant No. 2,"

that is, the auction-purchaser, "the amount he claimed in the written-statement." Thereupon the present suit was brought the auction purchaser claiming against the *zemindar* the return of the money which he had paid as rent. He claimed also against the defaulting *patnidar*. The defaulting *patnidar* did not appear and contest and judgment was given against him *ex parte*. Both the lower Courts have dismissed the suit so far as the *zemindar* is concerned.

On this second appeal, it is contended for the plaintiff-appellant first that s. 14 of the *Patni* Regulation is not exhaustive of the remedies of the plaintiff for the present purpose; secondly, that if it is thought to be exhaustive in view of the opinion expressed by the Appellate Court in the suit of the *patnidar* to set aside the sale, it must be taken for the purpose of this case that it is not exhaustive—the matter having been so decided between the parties and thirdly, that the plaintiff is quite entitled to recover what he claims independently of s. 14 as money had and received to the use of the defendant or money paid without consideration. No question of limitation arises in the present case

In my judgment the correct view of s. 14 is the view adopted by Banerjee, J., in the case of *Radha Madhub Samonta* v. *Sasti Ram Sen* (1). In that case the learned Judge was dealing with the question whether the auction-purchaser in such a case was entitled to recover the rent paid from the defaulting *patnidar* and the Court held that under s. 69, Contract Act, there was a cause of action independently of s. 14 altogether. On the question whether a separate suit was an infringement of s. 14 of the Regulation, Banerjee, J., pointed out that that section provided for the auction-purchaser being indemnified against all loss at the expense of the *zemindar* at whose instance the sale was brought about. He was not therefore prepared to hold that that section excluded suits against any party other than the *zemindar*, namely, against the *patnidar*. To that view of the section I venture to think that there is no valid objection. But it is another matter altogether when it is said that the auction-purchaser can get part of his remedy against the *zemindar* under s. 14, and can also retain the right to sue the *zemindar* for further relief in respect of the same transaction by a separate suit. In my judgment, so far as the *zemindar* is concerned, it is not intended by s. 14 of the Regulation that the matter should be dealt with piecemeal. The intention is that, at all events so far as the claim against the *zemindar* is concerned, the whole matter should be inquired into and the plaintiff auction-purchaser should be put in such a position as to suffer no loss.

The next question is whether, if that is so, the decision of the Appellate Court in the previous case makes any difference. It is said that the auction-purchaser asked for his remedy before the lower Appellate Court and the lower Appellate Court held that he could get it in another suit It is contended that that being so, unless the other suit is held to be maintainable, the auction-purchaser would have no remedy at all. I cannot say that I agree in this contention. It was open to the auction-purchaser to appeal to the High Court against the refusal of the relief claimed by him under s. 14 of the regulation. The mere expression of opinion that another suit would lie cannot possibly be held as binding on the parties It was not part of the duty of the Appellate Court to give advice to the parties; and, while one cannot but be sorry for the auction-purchaser if he was misled by this expression of opinion on the part of the lower Appellate Court, there can be no doubt that the legal position was that he should have appealed against that judgment; otherwise he took the risk of the advice given to him.

The third branch of the case which seems to me worthy of consideration is the question whether assuming that s. 14 of the *Patni* Regulation does not stand in the way of the plaintiff, the plaintiff here can show an independent cause of action apart from the provisions of s. 14 of the regulation. In one case, namely, the case of *Nagendra Nath Pal* v. *Chandra Sekhar Dalal* (2) Woodroffe, J., was of opinion that in a case of this character, money was recoverable as money paid under a mistake of fact. The learned Judge says :

(1) 26 C. 826.

(2) 5 C. L. J. 59.

"The question whether there can be said to have been such a mistake is not altogether free from difficulty but the effect of the subsequent reversal of the sale must I think be taken to be this: that when the payments were made they were so made under mistake, though the circumstance which made the payment one by mistake did not take place until afterwards."

Now, I cannot say that I agree with these remarks in principle. The mistake may be discovered afterwards but it cannot be that the circumstance which makes the payment one by mistake is one which took place afterwards. In the present case, the position was that the plaintiff got symbolical possession or ineffective possession on 9th June 1922, a suit at that time having been started to set aside the sale. It was in October of the following year that the payments were made to the *zemindar*, that is to say, he made the payments with his eyes open seeing that the sale had been challenged by the *patnidar*. In these circumstances if a question arises whether these payments were payments made under a mistake of fact, I fail altogether to be convinced that it can be treated in that way. I am also not convinced that, as a matter of common law, the rents which were paid by the auction-purchaser to the *zemindar* can be treated as money paid without consideration. It is said in this case that the possession was entirely ineffective and was only symbolical possession. In an ordinary case, one would suppose that the person paying rent is in effective possession and whether in these circumstances he ought to get back any of the rents which he has paid is essentially a question to be determined under s. 14 of the *Patni* Regulation. But I am not prepared to hold, even supposing that he got no effective possession, that the fact would be of any service to him and that notwithstanding the symbolical possession which he did obtain, he was in a position to maintain a common law cause of action for money paid without consideration. The remedy which is to be obtained from the *zemindar* should be obtained quickly and once for all under s. 14 of the Regulation. I think this is the true effect of the section not doubting that the interpretation put on it by Banerjee, J., is a correct interpretation.

For the reasons given above, the appeal, in my opinion, fails and must be dismissed with costs.

Pearson, J.—I agree.

A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Criminal Revision No. 1226 of 1930.

April 15, 1931.

LORT-WILLIAMS AND MALLIK, JJ.

BEHARI MAJHI—PETITIONER

versus

HARI MAJHI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Criminal appeal—Private prosecutor, whether entitled to be heard.

Under s 423, Criminal Procedure Code, the only persons who have got a right to be heard in a criminal appeal are the appellant or his Pleader and the Public Prosecutor if he appears and in certain cases, the accused if he appears. A private prosecutor has no right to be heard, though the Court may in its discretion hear him and an acquittal in appeal without hearing the complainant's Vakil is not bad in law. [p. 475, col. 1.]

Messrs. *Sures Chandra Taluqdar* and *Bhutnath Chatterjee*, for the Petitioner.

Mr. *A. Quasem*, for the Opposite Party.

Mallik, J.—This rule was obtained by the complainant in a private prosecution under ss. 427 and 352, Indian Penal Code. The Magistrate who tried the case convicted the accused under these two sections and sentenced him to four months' rigorous imprisonment, and to a fine of Rs. 50. Against this order of the trying Magistrate there was an appeal preferred to the District Magistrate and the learned District Magistrate after hearing the appellant's Pleader but without hearing the Pleader who appeared for the private prosecutor allowed the appeal and acquitted the accused.

The only ground upon which the rule was issued and the only point that was urged on behalf of the petitioner before us was that the learned District Magistrate committed an error of law when he disposed of the appeal without hearing complainant's Pleader. If the complainant's Pleader had a right to be heard and the District Magistrate disposed of the appeal without hearing him, the order passed by him could not but he held to be an order wrong in law. But the question is whether the complainant's Pleader had such a right. Mr. Talukdar for the petitioner in this connexion drew our attention to the provisions of s. 440, Criminal Procedure Code. This section lays down certain restrictions against parties being heard, in revision cases. Mr. Talukdar contended that when there are these restrictions laid down by the law in revision cases, it follows by implication that a party in a criminal appeal cannot be refused a hearing. I could have understood the force of this argument if there was no pro-

vision in the Act as regards the procedure that is to be followed in hearing a criminal appeal.

But in Chap. XXXI, Criminal Procedure Code which deals with "appeals," there is one section, *viz.*, s 423 which specifically deals with the procedure which an Appellate Court has to follow in disposing of an appeal. Section 423 lays down that the Appellate Court shall peruse the record of the case and hear the appellant or his Pleader if he appears and the Public Prosecutor if he appears and in case of an appeal under s. 417, the accused if he appears and then proceed to dispose of the appeal. Under this section the only persons who have got a right to be heard in a criminal appeal are therefore the appellant or his Pleader and the Public Prosecutor if he appears and in certain cases, the accused if he appears. It cannot therefore be said that a private prosecutor, like the complainant in the present case had under s 423 any right to be heard. It is true that in some cases it has been held that it may be advantageous to the Appellate Court to allow the complainant to support the judgment. But in the present case the Appellate Court did not consider it necessary to hear the Pleader for the complainant. The Appellate Court in the present case did not exercise its discretion on the point in favour of the complainant it is true but simply because it did not do so, it cannot be said that it did something that was wrong in law. That being so, the ground on which the rule was issued must be held to have failed. The rule is accordingly discharged.

Lort Williams, J.—I agree.

A. *Rule discharged.*

CALCUTTA HIGH COURT.

Criminal Reference No. 269 of 1930
and
Criminal Revision No 1314 of 1930.
May 4, 1931.

LORT-WILLIAMS AND S K. GHOSE, JJ.

HARI CHARAN DE—PETITIONER
versus
SHERALI TALUKDAR—Opposite Party.

Criminal Procedure Code (Act V of 1898), s. 145—Breach of peace—Fear of 'imminent' breach of peace, whether necessary.

Section 145, Criminal Procedure Code, requires that there must be a present dispute, and that there must be a likelihood of the breach of the peace. Under the section there must be a present fear, that it is probable that there will be a breach of the peace owing to the dispute, unless proceedings are taken under the section. But it does not require that there should be a fear of an 'imminent' or 'immediate' breach of the peace. [p. 476, col. 1.]

Criminal Reference made by the Sessions Judge, Bakarganj, dated the 28th November 1930.

Messrs *Sures Chandra Talukdar* and *Jatis Chandra Banerjee*, for the Petitioner.

Mr *Usha Kanta Guha*, for the Opposite Party.

Judgment—In this case the Magistrate made an order under s 145, Criminal Procedure Code, in favour of the first party. He acted upon the Police report dated 14th January 1930, which stated that a certain *char* had formed in the bed of the Rajpur river and that this had been cultivated by the first party without objection, but that in June 1929, members of the second party tried to cultivate the *char*, and that there was a likelihood of a breach of the peace but for Police interference. He went on to say that he had formed the opinion that the first party was rightly in possession so that :

"the cultivating season is near at hand and there is every chance of a breach of the peace over the possession of the said *char* land;"

and he asked that proceedings under s. 145, Criminal Procedure Code, should be drawn up. That being the position, the matter came before the Sessions Judge of Bakarganj and he has made a reference to this Court. In this letter of reference he recommends that the order may be set aside as being bad in law and states that his reason for the recommendation is that the Police report to which I have referred discloses that there was a likelihood that a breach of the peace would occur in June 1930, some five months after the date of the report, and that this anticipation was based on the fact that a breach of the peace in June of the previous year had been narrowly averted. The learned Judge does not think that s. 145, Criminal Procedure Code, can have any application to such circumstances and he refers to the ruling in the case of *W. Stewart* v. *Hubert Hughes* (1), which in his opinion, exactly covers the present case. A rule also was issued by this Court upon the ground that the Police report did not state that there was a dispute likely to cause a breach of peace and on the ground that the first party did not lay any claim to the western

(1) 118 Ind. Cas. 892; A. I. R. 1929 Cal. 341; 30 Cr. L. J. 977; 49 C. L. J. 394; 33 C. W. N. 509; Ind. Rul. (1929) Cal. 760.

portion of the disputed land, which the Magistrate had declared to be in the possession of the first party, in addition to the other land The Magistrate in his explanation says that it was clearly stated in the Police report that there was an apprehension of a breach of the peace and that the western portion of the land had been included by an oversight, and that it was clear from the petition of the first party that they had surrendered their claim to possession of this western portion. In our opinion the words of s. 145, Criminal Procedure Code, must be given their plain meaning without adding to them any explanatory words. Formerly, in some decisions, words such as, 'imminent' or 'immediate' were added by Judges to the section in an attempt to make the meaning more clear.

But in the case of *Kulada Kinkar Roy* v. *Danesh Mir* (2) it was decided that the introduction of such words into the section, giving it a stronger significance than the words used in the section, was not justified and we agree with that opinion. The section requires that there must be a present dispute, and that there must be a likelihood of the breach of the peace. That is to say, there must be a present fear, that it is probable that there will be a breach of the peace owing to the dispute, unless proceedings are taken under the section. Of course that does not mean that orders under this section are to be made when somebody comes and says that he fears that a breach of the peace will occur a considerable time ahead. The procedure under the section is intended to deal with conditions in which the parties responsible for law and order have an existing fear that unless steps are taken under the section, a breach of the peace will occur before they can prevent it. In this case the words of the Police report are that the cultivating season is near at hand and that a breach of the peace is feared. That must mean that in the opinion of the writer of the report a breach of the peace was near at hand. The learned Sessions Judge has interpreted that to mean that the writer of the report only feared that a breach of the peace might occur in June 1930. But the words of the report do not justify any such interpretation. We therefore reject the reference.

Revision No. 1314 of 1930.

The order of the Magistrate, so far as it refers to the western portion which has been described by the first party as "land on the west of the western boundary of plot No. 2209 produced northwards," is set aside, otherwise the order stands intact. To this extent the rule is made absolute.

A. *Reference rejected.*

(2) 33 C. 33; 10 C W. N. 257; 2 C. L. J. 271; 2 Cr. L. J. 670 F. B.

CALCUTTA HIGH COURT.

Appeal from Appellate Decree No. 1010 of 1929.

February 24, 1931.

GUHA, J.

KALIKUMAR PAL—PLAINTIFF—APPELLANT

versus

RAJKUMAR PAL—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s 126—Communication by client to Pleader, when privileged.

On general principles, and under s. 126 of the Indian Evidence Act, there is no privilege to communications made before the creation of relationship of Pleader and client Further, where two persons have a dispute about a claim made by one of them upon the other, and both seek the help of a Pleader, and one of them makes a statement to the Pleader, the statement so made to the Pleader by one of the parties is certainly admissible. *Shore* v. *Bedford* (1) and *Perry* v. *Smith* (2), referred to. [p. 477, col. 2.]

Again, to be privileged under s. 126 of the Indian Evidence Act, a communication by a party to his Pleader must be of a confidential nature. *Memon Hajee Haroon Mahomed* v. *Abdul Karim* (3), referred to. [*ibid*]

Appeal against the decree of the Additional Subordinate Judge, Noakhali, dated the 5th October 1928, modifying that of the Munsif, Sudharam, dated the 8th September 8, 1926.

Mr. *Yajneshwar Majumdar*, for the Appellant.

Mr. *Bhupendrakishore Basu* for Mr. *Hemkumar Basu*, for the Resdondent.

Judgment.—This is an appeal by the plaintiff in a suit for recovery of money due on a simple mortgage bond, dated the 11th *Agrahayan*, 1319 B. S., executed by defendant No. 1. The claim of the plaintiff in the suit was resisted by defendant No. 1 and it was pleaded by defendant that there was a payment made of Rs. 150 to the plaintiff on 20th *Chaitra*, 1326 B. S. On the pleadings before the Court, the first issue and the material question arising for consideration in the case was whether the plea of payment of Rs. 150, as alleged by the defendant, was true or not. The plea of payment as raised in the suit, based on

an alleged admission of the plaintiff himself, was sought to be substantiated by the defendant by evidence adduced by him; and the material witnesses examined in this behalf were two in number, D. Ws. Nos. 3 and 4. With reference to the first of these witnesses, witness No. 3, his deposition was to the effect that the plaintiff had on a previous occasion admitted the receipt of Rs. 150 from the defendant, in part payment of the mortgage debt. The most important evidence in the case in respect of this payment by defendant No. 1 was that afforded by the deposition of the D. W. No. 4 Babu Harikrishna Bhatta, a Pleader; and the statement that this Pleader witness made before the Court in his deposition was this:

"The plaintiff and the defendant admitted to have received and paid respectively the same amount of money Rs. 125 or Rs. 150 in connexion with payment due to the mortgage bond."

The witness added that the plaintiff and the defendant were present, but did not remember who else was present when the plaintiff admitted to have received the amount of Rs. 150. The witness further stated in his deposition before the Court, that the defendant approached him, and had informed him that the settlement of the debt due on the mortgage-bond had not been effected. Upon this state of the evidence before the Court, the trial Court passed a decree in favour of the plaintiff, holding that the plea of payment of Rs. 150 had not been made out.

On appeal by the defendant No. 1, the decision of the trial Court and the decree passed by that Court in favour of the plaintiff were reversed. The learned Subordinate Judge in the Court of Appeal below allowed the appeal by defendant No. 1 in part. The decree of the Court of first instance was modified. The plaintiff's claim was reduced on the footing of the payment of Rs. 150 on 25th *Chaitra*, 1326, as alleged by defendant No. 1; and the decree made by the Court below was for the sum found due with interest upon calculation as indicated in the judgment of the lower Court. The lower Appellate Court has entirely relied upon the testimony of the two witnesses referred to above. According to the learned Subordinate Judge, the testimony of the witnesses could not be lightly discarded. It was held that the deposition of the two witnesses mentioned above supported the other evidence given by defendant No. 1, relating to the actual payment of Rs. 150 to the plaintiff; and the Court below has expressed the definite opinion that it could not but believe that the plaintiff did actually get Rs. 150 from defendant No. 1 in *Chaitra*, 1326.

The present appeal is directed against the decision and the decree of the Subordinate Judge in the Court of Appeal below. The main question that has been raised in support of the appeal by the plaintiff is this: that the Court of Appeal below has erred in law in relying upon the statement of the Pleader, Harikrishna Bhatta, which was inadmissible in evidence by reason of s. 126 Evidence Act. It is necessary, therefore, to examine whether the deposition of D. W. No. 4, Harikrishna Bhatta, was or was not admissible in evidence by reason of s. 126, Evidence Act. The witness has stated in his deposition that the admission was made by the plaintiff in the presence of the defendant and it was not suggested, neither was it indicated by anything contained in the deposition of the witnesses before the Court, that the communication was made to him as a Pleader, much less as a Pleader, who was employed by the plaintiff; nor was there any indication that the communication was made to the witness in the course, and for the purpose of his employment as a Pleader. On general principles, and under s. 126, Evidence Act, there is no privilege to communications made before the creation of relationship of Pleader and client. Further where two persons have a dispute about a claim made by one of them upon the other, and both seek the help of a Pleader, and one of them makes a statement to the Pleader, the statement so made to the Pleader by one of the parties is certainly admissible. see *Shore* v. *Bedford* (1). The question being, was the communication or admission made by the plaintiff to the witness in the character of his own exclusive Pleader or legal adviser? If it was so, the bond of secrecy is upon the witness; and if it was not, the communication was not privileged: see *Perry* v. *Smith* (2). It may be mentioned further that to be privileged under s. 126 Evidence Act, a communication by a party to his Pleader must be of a confidential nature: see *Memon Hajee Haroon Mahomed* v. *Abdul Karim* (3). The communication to the Pleader in this case was

(1) (1843) 5 Man. & G. 271; 134 E. R. 567; 12 L. J. C. P. 138; 63 R. R. 285.
(2) (1842) 9 M. & W. 681; 152 E. R. 288; 11 L. J. Ex 269; 60 R. R. 869.
(3) 3 B. 91.

made in the presence of the defendant. As indicated above, regard being had to the principles which underlie s 126, Evidence Act, to which reference has already been made, it is impossible to hold that the deposition of the Pleader witness, D. W. No. 4 in this case, was inadmissible in view of the provisions contained in s. 126, Evidence Act.

A further point was argued in support of the appeal by the plaintiff, that the plea of payment, as raised by the defendant No. 1 in the suit, could not be allowed to be proved by him, by reason of the fact that the admission as to payment made by the plaintiff was in the course of a negotiation for arriving at a compromise. That compromise having fallen through, the terms could not be proved. There is no substance in this contention. It is hardly necessary to mention that it was not necessary for defendant No. 1 to prove the terms of any compromise, which ultimately failed, and which had no direct bearing on the plea of payment raised in this case, the question for consideration in this case being whether the plaintiff had made an admission as to the receipt of the amount of Rs. 150 from defendant No. 1. The admission by the plaintiff has been proved, and the plaintiff's claim in suit has therefore been reduced to the extent of the payment already made by the defendant No. 1.

In the result, the appeal fails and is dismissed with costs.

A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Civil Appeal No. 335 of 1930.
June 12, 1931.
RANKIN C. J. AND PEARSON, J.
NURJAHAN KHATUN AND OTHERS—
PLAINTIFFS—APPELLANTS
versus
ASIA KHATUN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Deposit under protest—Validity—Attachment by decree-holder's creditor, effect of.

When a deposit is made under O. XXI, r. 89, Civil Procedure Code, it must be made, in the ordinary way, for payment to the decree-holder voluntarily and unconditionally. [p. 479, col. 1.]

Where a judgment-debtor in depositing the amount under O. XXI, r. 89 stated that the amount calculated by the Court Officer was in excess of the real amount due and besides this, execution costs and interest were also claimed in excess and prayed that permission should not be granted to the decree-holder to withdraw pending the hearing of the objections:

Held, that the deposit was bad.

Where in such a case the deposit has been attached by a creditor of the decree-holder and has been ordered to be paid to him, the effect of this fact must be considered. [p. 479, col. 2.]

Appeal against an order of the First Class Sub-Judge, Bakargani, dated the 26th May 1930.

Messrs *Dwarkanath Chakravarti* and *Srish Chandra Dutt*, for the Appellants

Messrs. *Gunada Charan Sen* and *Prokash Chandra Majumdar*, for the Respondents.

Pearson, J—The question for determination in this appeal is whether in the circumstances a deposit in Court by a judgment debtor made under protest, would entitle him to have a sale in execution set aside under O. XXI, r. 89, Civil Procedure Code.

The sale was held on 19th February, 1930 and the matter was directed to come up for confirmation on 24th March. Meantime on 19th March two orders were passed *viz.*:—

"(1) Judgment-debtors are permitted to deposit the decretal money with compensation as prayed for; and (2) judgment-debtors by a petition state that they have deposited the decretal amount with interest on protest on the ground stated therein. The decretal money will remain in Court until further orders."

On 24th March notice was directed to issue on the decree-holders to show cause why the sale should not be set aside. The matter came on for hearing on 26th May, 1930, when the learned Judge directed the sale to be set aside and the execution case dismissed on full satisfaction. The ground on which this order proceeded was that the protest in making the deposit by the judgment-debtors was so far justified in that interest had been calculated on the entire decretal money up to the date of deposit; that that was wrong; that a sum of Rs. 47-3-6 on that account had been wrongly assessed and fell to be deducted from the deposit in Court.

The amount specified in the sale proclamation is what the judgment-debtor has to deposit under O. XXI, r. 89 (1) (*b*) of the Code. That figure in this instance was the sum of Rs. 11,593 7-0 from which had to be deducted certain payments made by the judgment debtors. In addition to that there was charged against the judgment-debtors in the account made up by the Court Officer the sum of Rs. 10-1-3 for "subsequent costs" and Rs. 264-1-6 for "interest up to 19th March 1930," both of which sums were included in the total deposited by the judgment-debtor under protest the latter sum apparently including the sum of Rs. 47-3-6 disallowed by the

Judge in his order of 26th May. At any rate having regard to the provisions of r. 89 (1) (*b*) it may be taken that the judgment-debtor was not compellable to pay those two sums of Rs. 10-1 6 and Rs. 264-11-6 in order to obtain the benefit given him by the rule.

It has been argued in the present appeal that the learned Judge was nevertheless wrong in passing an order setting aside the sale because by making the payment under protest in the way they did the result was that the judgment-debtors prevented the money from becoming available forthwith unconditionally to the decree holder and such a conditional deposit is bad: see 10 Ind. Cas. 880 *Dulhim* v. *Bansidhar* (1), *Shakoti* v. *Jotindra* (2) and *Narayan* v. *Amgauda* (3). It seems to be clear that when a deposit is made under r. 89 it must be made, in the ordinary way, for payment to the decree-holder voluntarily and unconditionally: see *Narayan* v. *Amgauda* (3) and *Raghu Ram* v. *Deokali* (4). Mr. Sen however has argued that the present case differs from the cases cited in that the judgment-debtors here never denied but on the contrary admited their liability under r. 89, O. XXI. In the present case the deciding factor in my judgment must be the terms on which the payment of the deposit was made. These are to be found in the petition of the judgment-debtors filed on 19th March. In that they state that:

"When the petitioners wanted to deposit money with the permission of the Court the officer of the Court gave them an account according to which they have to deposit a large sum of money in excess. Besides this an excess amount is found to have been calculated as costs of execution and interest. Still the judgment-debtors deposit unders protest the amount as calculated by the officer of the Court."

and this is followed by a prayer that—

"the permission to the decree-holder to withdraw the said money may be withheld till the hearing of the objection on behalf of these judgment-debtors"

Had the objection been limited only to the execution costs and interest, the judgment-debtors would have been in better case; but it is not so limited. They object to having to deposit "a large sum of money in excess" and "besides this" (meaning "in addition to this" there are the items of costs and interest. It is not, therefore, correct to assert that in that petition the judgment-debtors are admitting their liability. It would have been easy enough for them to frame the petition for deposit, without objection of the amount required by the rule and protest against the other items but this they have not done. The protest according to the petition extends to a "large sum of money in excess" over and above the costs and interest. In my judgment therefore this was not a good deposit under r. 89 which entitled the judgment-debtor to have the sale set aside and *prima facie* the order of the learned Judge cannot stand.

It appears, however, that on 25th March, 1930, a few days after the deposit an attachment in execution was made of the deposit moneys to the extent of R. 3,410 10-0 by creditors holding a decree against the decree holders in the present matter. A certificate for payment of that amount was granted to the attaching creditors on 12th July, 1930. In the circumstances this matter must go back to the lower Court for consideration of what effect if any, these facts may have upon the present position and rights of the parties.

The appeal is allowed with costs three gold *mohurs*. The case is remanded to the lower Court for the final disposal of the matter upon determination of the question set out in the foregoing paragraph.

Rankin, C. J.—I agree.

A. *Appeal allowed.*

(1) 10 Ind. Cas. 880.
(2) 1 C. W. N. 132.
(3) 62 Ind. Cas. 104; A. I. R. 1921 Bom. 169, 45 B. 1094; 23 Bom. L. R. 455.
(4) 115 Ind. Cas. 193; A. I. R. 1928 Pat. 193; 7 Pat. 30; I. L. T. 40 Pat. 109.

CALCUTTA HIGH COURT.

Civil Revision No. 713 of 1931.

July 8, 1931.

JACK, J.

ASHUTOSH GANGOPADHYA AND ANOTHER—PETITIONERS

versus

SAROJINI SAHA CHAUDHURANI AND ANOTHER—OPPOSITE PARTIES.

Bengal Land Revenue Sales Act (XI of 1859), s. 9—Bengal Land Registration Act (VII of 1876), s 68—Contract Act (IX of 1872), s. 69—Transfer of tenure—Name of transferee not registered—Person paying arrears, whether entitled to recover from transferor.

Where a tenure has been transferred by a registered proprietor, even though the transferee's name is not registered, a person who deposits arrears of revenue accruing after the date of transfer cannot recover the same under s. 9 of the Act XI of 1859 or under s. 69, Contract Act, from the transferor, he can recover it only from the transferee.

Under s. 68 of the Land Registration Act a transferee becomes liable for the discharge of any duties and obligations which are by any law imposed upon the proprietors of the estate, from the date on which he should have applied for registration.

Civil Revision against an order of the First Class Sub-Judge, Barisal, dated the 7th March 1931.

Mr. *Phanibhusan Chakravartti* for Mr. *Sudhansu Sekhar Mukerji*, for the Petitioners

Messrs. *Gopal Chandra Das* and *Bhuban Mohan Saha*, for the Opposit Party.

Judgment—This rule has been issued upon the opposite party to show cause why a judgment and decree of the Small Cause Court should not be set aside in a suit by the plaintiff opposite party for contribution on account of rent paid by the plaintiff on account of arrears of rental of tenures alleged to be held by the opposite party in order to save them from sale.

The first ground on which the rule was issued is that, the plaintiff opposite party's *raiyati* holdings, having been in no danger of being avoided or in any way adversely affected by the default in paying up the revenue, the present suit should have been dismissed; and secondly that assuming that the plaintiff was entitled to recover, she was entitled to a decree, only against the opposite party No. 2, who is defendant No. 3 to whom, the petitioners allege, they had transferred the tenure which was saved from being sold by the payment made by the plaintiffs.

As regards the first point, contribution is claimed under s. 9, Act XI of 1859, and the person depositing the arrears of revenue is entitled to recover the amount if it is deposited in good faith, believing that the interest of the person so depositing is in danger. In the circumstances of the present case, there is no reason to think that the deposit was not made in good faith thinking that the interest of the plaintiff was endangered by the sale. So there is no substance in this ground.

The other ground of the rule is that in fact, the defendants are not liable, because they had already sold their tenure, previous to the period for which the revenue was in arrears. It appears that in the suit, they filed a sale deed, showing that they had transferred their interest to defendant No. 3, and referring to this the learned Judge of the Small Cause Court says, that, defendant No. 3 did not register her name in the Collector's register after her purchase. It therefore appears that he finds that defendant No. 3 actually purchased these tenures, but holds that under s. 11, Act VII of 1868 read with s. 9 of Act II of 1859, the liability to Government, as well as, to the party depositing would attach to the registered defaulter. Section 9, Act XI of 1859, states that the person, so depositing, shall be entitled to recover the amount deposited from the defaulting proprietor. As the tenures had been transferred to defendant No. 3 before this deposit was made and these arrears accrued, he is obviously the defaulting proprietor, so that it is defendant No, 3 alone, who would be liable under s. 9, Act XI of 1859. There is no mention in this section of the registered defaulter. But it is contended on the other side, that under s. 69, Contract Act, the persons whose names are registered as the proprietors of the tenure, in the Collector's register, being jointly liable, the plaintiff is also entitled to recover from them. Under s. 68, Land Registration Act, the recorded proprietors are jointly and severally liable for the discharge of any duties and the obligations imposed upon the proprietors of the estate and all persons, who are required by this Act to apply for registration, shall from the date on which the obligation so to register is imposed on them respectively by the Act, be deemed to be liable for the discharge of any duties and obligations, which are by any such law imposed upon the proprietors of the estate. From this it appears that from the date on which the parties are required to apply for registration, the liability devolves upon them. Defendant No. 3 having purchased the estate it is clear that he should have applied for registration, within six months from the date of his purchase, so that the liability under s. 68 has devolved upon defendant No. 3. I therefore think that the plaintiff was entitled to the amount claimed against defendant No. 3, and not against defendants Nos. 1 and 2, because they had already transferred their share, before the period in respect of which the arrears of revenue accrued.

The rule is therefore made absolute. The decree of the Court below is set aside and the suit is decreed for the same amount as against defendant No. 3. The petitioners will be entitled to their costs in this Court—the hearing fee being assessed at one gold *mohur*.

A. *Rule made absolute.*

BOMBAY HIGH COURT.

Second Civil Appeal No. 885 of 1925.
November 15, 1929.
FAWCETT AND MIRZA, JJ.
March 12, 1931.
PATKAR AND BAKER, JJ.

HARAKOHAND TARACHAND—
PLAINTIFF—APPELLANT
versus
SUMATILAL CHUNILAL—
RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 65, 83—Commission agent—Suit against principal to recover loss—Limitation—Article applicable—Cause of action—Art. 83, scope of—Cross-contracts—Cause of action, when arises.

A suit by a commission agent to recover loss on the transactions entered into on behalf of his constituents is governed by Art 83 of the Limitation Act. Article 65 applies only where there is an agreement between the parties to pay the loss immediately on its being ascertained, and in the absence of any specified time or specified contingency, that Article would not apply. Under Art. 83 time begins to run when plaintiff is actually indemnified. *Kadari Pershad* v. *Har Bhagwan* (12), *Munshi Ram* v *Bhagwan Das* (13), *Abdul Aziz Khan* v. *Mohammad Bakhsh* (5), *Muhamad Mazhart Ahad* v. *Muhamad Azim-ud-Din* (6), followed. *Kandaswamy Pillai* v. *Anayambal* (3), dissented from. [p. 485, cols. 1 & 2.]

The contract to indemnify within Art. 83 of the Limitation Act need not be by express stipulation, and may be either imposed by Statute or implied or inferred by virtue of the jural relations of the parties. *Ram Barai Singh* v. *Mohendra Persad* (15), relied on. [p 485, col 1.]

When a commission agent allocates the cross-contracts to himself it might be said that he is damnified on the day when the cross-contracts were entered into. If, on the other hand, he enters into cross-contracts with others, it cannot be said that the loss has necessarily occurred to the commission agent on the day on which such cross-contracts were entered into. *Bhagwan Das* v. *Kanji* (1), referred to. [p. 485, col. 2.]

Second Appeal from a decision of the District Judge, Dhulia, in Appeal No. 28 of 1924.

Mr. *P. B. Shingne*, for the Appellant.

Messrs. *B. G. Rao* and *S. A. Merchant*, for the Respondent.

Fawcett, J.—This was a suit brought by a *pakka adatia* against a client, who dealt through him in regard to contracts of cotton seeds, cloth bales, etc., in *Samvat* 1974-1975. He sought to recover a sum of Rs. 2,227-12-0 as balance due on the account with interest. The defendant raised various contentions, which are now immaterial. Among them there was no objection that the claim, or any part of it, was barred on account of limitation, but the point seems to have been raised, as the Subordinate Judge in his judgment held, that by virtue of an admission in the written statement that a certain sum was due the claim was not time-barred and passed a decree for the amount claimed with future interest. The defendant appealed, and among the grounds of appeal was one that the lower Court was wrong in holding that the admission of part of the claim in the written statement saved the bar of limitation. The Appellate Court had also before it other questions which were raised, but which are not now material. In regard to the point of limitation the District Judge held that the claim was time-barred. The proved transactions between the plaintiff and the defendant are in regard to the purchase and sale of eleven bales of cloth, in respect of which items were debited and credited in the account of the defendant. The District Judge says:

"On 23rd August, 1918, there is a debit for the value of eleven bales purchased. On 7th September, 1918, and then on 8th September, 1918, there are credit items for the value of five bales and six bales sold by defendant. Thus this *saoda* for eleven bales was settled on 8th September, 1918, and on that date plaintiff could know what amount defendant had to pay to him for the loss. The plaint was filed on 18th November, 1921 more than three years after 8th September, 1918. I have not overlooked the fact that the *saoda* for eleven bales was of the *vaida* of 15th *Kartik Sud* corresponding to 18th November, 1918. But it was open to parties to settle it up even before that date and since the whole contract was fulfilled before then, I think limitation ran from the day after 8th September, 1918."

The plaintiff comes to us in second appeal on the ground that the lower Court erred in holding the claim in regard to these eleven bales to be time-barred.

In the arguments before us Mr. Shingne for the appellant contended that the article applicable was either Art. 65 or Art. 120. On the other hand, Mr. Rao for the respondent contended that the article applicable was Art. 83, and he cited various authorities in support of that contention. In my opinion, the article that directly applies to the claim is Art. 83. In this case the contracts were made through the plaintiff as *pakka adatia* on terms that in *Bhagwandas* v. *Kanji* (1) are stated by Sir Lawrence Jenkins at pages 215 and 216 * He there says that the contract is one of employment for reward; and as pointed out by the Privy Council in *Bhagwandas Parasram* v. *Burjorji Ruttonji* (2), in so far as the plaintiff made the contracts in suit in exercise of the authority conferred upon him and became liable for their performance, he also became entitled to be indemnified by his

(1) 30 B. 205; 7 Bom. L. R. 611.

(2) 44 Ind Cas. 284; A. I. R. 1917 P. C. 101; 45 I. A. 29; 42 B. 373; 20 Bom. L. R. 561; 23 M. L. T. 203; 34 M. L. J. 305; 4 P. L. W. 229; 16 A. L. J. 241; 27 C. L. J. 358; (1918) M. W. N. 315; 22 C. W. N. 625; 7 L. W. 577; 11 Bur. L. T. 211 (P. C.)

*Pages of 30 Bom.—[*Ed.*]

employer, against the consequences of the acts done by him, unless those acts were unlawful Here, there is no question of any illegality. In view of this relationship, in my opinion, the basis of the plaintiff's claim in respect of the loss caused by these cross-contracts is the right to be indemnified, and the suit is, therefore, one upon a contract to indemnify, which does not fall either under Art. 81 or Art. 82, and so comes under Art. 83.

In *Kandaswamy Pillai* v. *Avayambal* (3) it was held that Art. 83, Limitation Act, only applied to a case where the obligation to indemnify directly arose from the contract itself and not from any statutory enactment such as that contained in s. 222, Contract Act. This view has been dissented from in various cases, such as *Manghi Ram* v. *Ram Saran Das Maman Chand* (4), *Abdul Aziz Khan* v. *Mohammad Baksh* (5) and *Muhamad Mazaharat Ahad* v. *Muhamad Azim-ud-Din* (6). I agree with the view taken in these latter cases, because there is nothing in the article itself which, in my opinion, justifies the distinction made by the Madras High Court. But, in any case, I think that the obligation to indemnify in this instance arises from the customary terms of a *pakki adat*, quite apart from the provisions of s. 222, Contract Act; and if that is so, even if the distinction made by the Madras High Court is a good one, still the present case falls under Art. 83.

I do not think that the case can be properly held to fall under Art. 65, Limitation Act. That article requires the suit to be one for compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency. Due effect must, I think, be given to this word "specified." It might, for instance, be contended that Art. 65 contemplates a contract in writing just as a contract in writting is obviously contemplated in Art. 66 and Art. 67, where the same word "specified" is used; and the Privy Council in *Durga Chowdhurani* v. *Jewahir Singh Chowdhury* (7) and *Ramgopal* v. *Shamskhaton* (8) held that the word "specified" in s. 584, Civil Procedure Code, 1882, as used in the phrase 'specified law or usage", meant "specified in the memorandum of appeal." But, on the other hand, I am prepared to concede that a thing can be specified in an oral contract as well as in a written contract: and s. 46, Contract Act, for instance, which says:

"Where, by the contract, a promisor is to perform his promise without application by the promisee and no time for performance is specified, the enagement must be performed within a reasonable time"

clearly applies to an oral contract as well as a written contract. At the same time it seems to me that the word "specified" implies that there must be some particularity in the contract as to the time when the promise is to be performed, or as to the contingency which is to happen. I quite agree that in a contract of this kind there is an implied promise on the part of the defendant to pay the plaintiff under ordinary rules as to constructive contracts, such as are given in Halsbury's Laws of England, Vol. 7, s. 2, at pages 465 and 467. The case would fall either under Art. 946 or Art. 950, para. 2, as regards an agent's right to recover any payment that he makes on behalf of his employer. But that does not necessarily imply a promise to pay at any particular time, and certainly not a promise to pay at a "specified" time.

The view of the District Judge would amount to this; that there was an implied promise to pay as soon as the cross-contract effected on 8th September, 1918, resulted in showing what was the loss on the transactions. If an agreement were proved to pay such loss immediately on its being ascertained, then, no doubt, there would be a specified time which would bring the case under Art. 65. But, where is the evidence of any such contract in this case? So far as I am aware there is not an iota of such evidence, and the accounts that were actually rendered by the plaintiff to the defendant were drawn up at a date subsequent to 8th September. It seems to me that the circumstaces would not warrant it being held that there was an agreement by the defendant to pay the loss in a case settled by cross-contract on the very day that the loss is ascertained. A debtor is generally not in a hurry to pay his debts, and the probable state of affairs would be that the obligation to pay would not arise till the plaintiff made a demand for payment by sending his account to the defendant. That would probably be at any rate not before the settlement day, for ordinarily, while

(3) 7 Ind. Cas. 899; 34 M. 167; (1910) M. W. N. 316; 8 M. L. T. 194; 20 M. L. J. 989.
(4) 26 Ind. Cas. 415; 23 P. R. 1915; 35 P. W. R. 1915; 100 P. L. R. 1915.
(5) 64 Ind. Cas. 431; 2 Lah. 316; 3 Lah. L. J. 542.
(6) 73 Ind. Cas. 17; A I. R 1923 Cal. 507; 27 C. W. N. 210; 37 C. L. J. 108.
(7) 18 C. 23; 17 I. A. 122; 5 Sar. P. C. J. 560 (P. C.)
(8) 20 C. 93; 19 I. A. 228; 17 Ind. Jur. 38; 6 Sar. 247; (P. C.

some transactions might be settled by cross-contract, others might stand over for settlement on the *vaida* day.

In my opinion, there is no warrant for holding that in this case there was an implied promise to pay the loss on the very day that the loss was ascertained. Then, can it be said that there was a breach of a promise to pay anything upon the happening of a specified contingency? Can it be said that the settlement of differences of cross-contracts is a specified contingency within the meaning of this article? In my opinion, the answer is clearly, No. The word "contingency", so far as it applies to contracts, obviously has reference to the case of "contingent contracts," which are the subject-matter of Chap III, Contract Act. Section 31 defines a "contingent contract" as a contract to do or not to do something, if some event, collateral to such contract does or does not happen; and the various illustrations to this and the following sections are all ordinary cases of a contract to do something, such as to make a payment, if a house is burnt, if a person survives another, if somebody marries somebody, and so on. The only way in which the present case can be brought within the definition of a contingent contract is to say that there is a contract between the parties that, if the transactions are settled by cross-contracts payment will be made at once, although otherwise payment would be made later; but the event of settling transactions by cross-contracts is one within the entire control of the parties and not of the fortuitous kind contemplated by Chap. III, Contract Act, or the general meaning of the word "contingency." Accordingly, in my opinion, Art. 65 cannot properly be applied in the present case; and, as I have already said, the real basis of the suit is a *pakka adatia's* right of reimbursing, or being indemnified, so that Art. 83 seems to me to be the appropriate one. Under Art. 83 limitation begins to run from the time, "when the plaintiff is actually damnified." These words are of significance.

The article does not say, "when the loss is ascertained." but "when the plaintiff is actually damnified," and that is based upon the leading case of *Collinge* v. *Heywood* (9), which interpreted the corresponding law in England. There it was held that on a contract to indemnify plaintiff against costs of which he is afterwards called upon to pay, the cause of action arises when he pays, and not when the costs were incurred or the attorney's bill was delivered to the plaintiff, and, therefore, the time of statutory limitation runs from the time of payment. Accordingly, here also limitation would not run from the time when the plaintiff submitted a bill or an account to the defendant about the loss; *a fortiori* it would not run merely from the time when the loss was ascertained It runs from the time when the plaintiff becomes out of pocket by payment of the loss incurred on account of these contracts; so that, if the District Judge intended to hold that Art. 83 applied, I think he is clearly in error in saying that time ran from 8th September, when the loss was ascertained.

Supposing that Art. 61 applied and not Art. 83, the suit being treated as one for money paid for the defendant, still the same test would apply. Limitation would run only from the time when the money was paid by the plaintiff for the defendant. Therefore, in my opinion, before it can be decided whether the suit is time-barred, it has to be ascertained when it was that the plaintiff paid this loss as agent of the defendant. So far as I am aware, it is not clear when in fact, he paid it; and to enable us to pass orders on the appeal, in my opinion, the parties should be heard on this point, if necessary, an issue should be framed about it and sent to the lower Court for determination.

Mirza, J —The only point in this appeal is whether the appellant's claim in the suit is time-barred. The appellant sued the respondent to recover a sum of Rs. 2,227-12-0 which had become due on a transaction for the purchase of eleven bales of cloth. The respondent employed the appellant as his *pakka adatia* to purchase eleven bales of cloth deliverable on 18th November, 1918. Before the due date the transaction was settled by means of two cross-contracts of sale, one dated 7th September, 1918, for the sale of five bales and the other dated 8th September, 1918, for the sale of six bales. Rs. 2,227-12-0 was the difference which thus became payable by the respondent. The appellant instituted this suit on 18th November, 1921. The lower Appellate Court held that the suit should have been brought within three years from the day after 8th September, 1918, and was, therefore, time-barred.

Mr. Shingne for the appellant contends that the period of three years should be

(9) (1839) 9 Ad. & El. 633; 1 P & D 502; 2 W. R. & H. 107; 8 L. J. Q. B. 98.

computed from 18th November, 1918. He relies upon Art. 65 of the Schedule to the Limitation Act, and contends that the respondent committed a breach of his promise on 18th November, 1918, when he had to pay for and take delivery of the eleven bales. This argument in my opinion, ignores the fact that on 18th November, the transaction was not outstanding. It was settled and closed on 8th September, previously. The liability of the respondent in respect of the transaction was then ascertained and settled. The original transaction became merged in the subsequent transaction. The amount found due became payable immediately and the period of three years would, in my opinion, commence from 8th September, 1918

In *Chandulal* v. *Sidhruthrai* (10) Jenkins, C. J., in dealing with the nature and effect of cross-contracts under the *pakki adat* system, states that when the cross-contracts are effected the liability is treated as balanced and adjusted. In *Bhagwandas* v. *Kanji* (1), the learned Chief Justice says that a contract between a *pakka adatia* and his constituent is one of employment for reward. At page 217* he remarks,

"I do not say that there is no relation of principal and agent between the parties at any stage; there may be up to a point."

He is inclined to limit the agency to the earlier stages in the transaction when, *e. g.*, the rate at which goods are to be purchased or sold is agreed upon.

When the transaction is settled the constituent is immediately, in my opinion, liable to the *pakka adatia* in respect of the difference. That liability, in my opinion, does not depend on the *pakka adatia* proving actual loss or damage to himself as he would have to do in an ordinary agency. He is entitled, if he so chooses, to appropriate the contracts to himself. The constituent is not interested in the *pakka adatia*'s transactions with third parties in pursuance of his employment as *pakka adatia*. The *pakka adatia* is not bound to disclose those transactions to the constituent. Article 83 of the Schedule to the Limitation Act has, in my opinion, no applicability to the case.

The judgment of the lower Appellate Court, in my opinion, is correct. The appeal should be dismissed with costs.

Fawcett, J.—In view of this difference of opinion the case will have to be referred to another Judge or other Judges for decision under s. 98 (2), Civil Procedure Code, on the point of law on which we differ, *viz.*, whether the plaintiff's suit is time-barred.

(The case was next heard by a Bench composed of Patkar and Baker, JJ.)

Patkar, J.—This is a suit brought by the plaintiff to recover from the defendant a sum of money as damages on the allegation that the defendant purchased through the plaintiff eleven bales of cloth at Rs. 2-12-6 per lb on 20th August, 1918. The defendant, on 7th September, 1918, sold five bales through the plaintiff, and on 8th September, sold six bales, and it is alleged that in the transaction of the eleven bales the defendant was bound to pay the plaintiff loss to the extent of Rs. 479 13-0.

In the suit the plaintiff also claimed that the defendant had entered into an additional transaction of purchase with him with regard to five bales. The learned Subordinate Judge held the transaction proved, but the lower Appellate Court held that the transaction was not proved. We are, therefore, concerned only with the transaction of eleven bales of cloth purchased by the defendant through the plaintiff on 20th August, 1918

The question of limitation was not raised in the trial Court, and the defendant in his written statement admitted the claim with regard to Rs. 479-13-0 in respect of the transaction relating to the eleven bales. On appeal the learned District Judge held that limitation ran from 8th September, 1918, on the ground that on that day the plaintiff could know what amount the defendant had to pay to him as damages. He, therefore, dismissed the plaintiff's suit.

On second appeal the case came before Fawcett and Mirza, JJ. Fawcett, J., was of opinion that the article of limitation applying to the present case was Art. 83, Limitation Act. Mirza, J., was of opinion that Art. 83, Limitation Act, had no applicability to the present case, but, without specifying the Article of the Limitation Act applicable to the case, held that when there was a cross-contract entered into by the plaintiff on behalf of the defendant the liability was settled, and the liability did not depend on the *pakka adatia* proving actual loss or damage to himself. In view of this difference of opinion the case was referred to this Bench under s. 98, cl. (2), Civil Procedure Code.

The question, therefore, arising in the present case is which Article of the Limi-

(10) 29 B. 291; 7 Bom. L. R. 165.

*Page of 30 B.—[*Ed.*].

tation Act applies to the facts of the present case. According to the decision in *Bhagwandas Parasram* v *Burjorji Ruttonji* (2), when a commission agent enters into a transaction on behalf of his constituent he becomes entitled to be indemnified by his employer against the consequences of the acts done by him unless those acts are unlawful. To the same effect is the decision in the case of *Tika Ram* v. *Daulat Ram* (11). The commission agent, therefore, has a right to be indemnified in respect of the transactions entered into on behalf of his constituent.

Under those circumstances we think Art. 83, Limitation Act, would apply. This view is accepted in the cases of *Kadari Pershad* v. *Har Bhagwan* (12), *Munshi Ram* v. *Bhagwan Das* (13) and *Kirpa Ram Lachman Das* v. *Firm Sawan Mal Gopi Chand* (14). To the same effect are decisions in *Manghi Ram* v. *Ram Saran Das-Maman Chand* (4), *Abdul Aziz Khan* v. *Mahomad Bakhsh* (5) and *Muhamed Mazharal Ahad* v. *Muhamad Azimuddin* (6) where the view taken in *Kandaswamy Pillai* v. *Avayambal* (3) is dissented from In *Kandaswamy's case* (3) the Madras High Court appears to have held that the agent's right to indemnification arises from the statute law, *i. e*, s. 222, Contract Act, and is not a part of the agency contract. We think that the right to indemnification though recognized by statute is the necessary consequence of the agency contract. The contract to indemnify under Art. 83, Limitation Act, need not be by express stipulation, and may be either imposed by statute or implied or inferred in virtue of the jural relations of the parties: see *Ram Barai Singh* v. *Mohendra Persad* (15).

We think that a suit by a commission agent to recover loss on the transactions entered into on behalf of his constituents is goverend by Art. 83, Limitation Act. Article 65, Limtation Act, would not apply unless there is an agreement between the parties to pay the loss immediately on its being ascertained; and in the absence of any specified time or specified contingency, Art. 65 would not apply. Under Art. 83, Limitation Act, the time would begin to run when the plaintiff is actually damnified. It is urged on behalf of the respondent, relying on the case in *Chandulal* v. *Sidhruthrai* (10), that when cross-contracts are entered into by a commission agent the liability on the original contract must be considered to have been balanced and adjusted. On the other hand, it is contended that the time ought to begin to run from the *vaida* date which in this case would be 18th November, 1918. It is further urged that in the books of the plaintiff the account is written on 19th November, 1918, *i. e.*, the day after the *vaida* day. Incidents of the custom relating to *pakki adat* have been fully dealt with in *Bhagwandas* v. *Kanji* (1) It may be that when the commission agent allocates the cross-contracts to himself it might be said that he is damnified on the day when the cross contracts were entered into. If, on the other hand, he enters into cross-contracts with others, it cannot be said that the loss has necessarily occurred to the commission agent on the day on which such cross-contracts were entered into. There is no evidence in the present case to show when as a matter of fact the plaintiff commission agent was damnified. There is no dispute with regard to the amount due to the plaintiff, *viz.* Rs. 493-13-0 We think, therefore, that it is desirable that we should send down an issue in this case on the following point:

When was the plaintiff actually damnified?

Both the parties will be allowed to lead evidence on the point. Finding will be returned within two months.

(On return of the finding on the issue Patkar and Baker, JJ., delivered the following judgment on 12*th March* 1931.)

Patkar, J.—The case was sent down for a finding on the issue as to the date on which the plaintiff was actually damnified. The finding of the lower Appellate Court is that the plaintiff was actually damnified on the *vaida* day, *viz*, on 18th November, 1918. The suit was brought on 18th November, 1921. Therefore the plaintiff's claim is within time.

It is agreed on both sides that the amount due to the plaintiff would be Rs 479-13 0. The decree of the lower Appellate Court will be reversed, and a decree passed in favour of the plaintiff for Rs. 479-13-0 with proportionate costs. The rest of the claim will be dismissed with costs.

Order accordingly.

(11) 80 Ind. Cas. 661; A. I. R. 1924 All. 530; 46 A. 465; 22 A. L. J. 591; L. R. 6 A. 9 Civ.

(12) 66 Ind. Cas. 900; 3 Lah. L. J. 65.

(13) 92 Ind. Cas. 595; A.I. R. 1926 Lah. 152; 7 Lah. L. J. 596; 27 P. L. R. 32.

(14) 106 Ind. Cas. 40; A. I. R. 1927 Lah. 826; 9 Lah. L. J. 493; 29 P. L. R. 61.

(15) 16 Ind. Cas. 73; 16 C. W. N. 1040.

BOMBAY HIGH COURT.

Second Civil Appeal No. 905 of 1930.
August 18, 1931.
BAKER, J.

LAKSHMINARAYAN HIRALAL—
DEFENDANT—APPELLANT
versus
LADURAM ONKAR AGARWALA
PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 47, 144—Restitution of property—Decree-holder selling property of judgment-debtor in his possession and under charge of decree—Over payment and satisfaction of decree—Recovery of sum overpaid.

The plaintiff obtained a money decree against the defendant. The decree created a charge on certain bales of cotton in the possession of the plaintiff and which belonged to the defendant. The plaintiff alleged to have sold the said bales for Rs. 143-2-6. The first Court found the value of the bales to be Rs. 1,830 On appeal the lower Appellate Court declared the value of bales to be Rs. 5,511-10-0. The decree was for a sum of Rs. 4,413-7-9. The defendant prayed that the plaintiff should deduct the decretal amount from the value of the bales and claimed to recover the balance under s. 144, Civil Procedure Code:

Held, that s. 144, Civil Procedure Code, on a liberal construction applied to the case. [p. 487, col. 2]

Held, further, that the question of over payment like this and satisfaction of a decree is a matter to be decided in an application in execution and not by a separate suit. [p. 488, col 2]

Hukum Chand Boid v. *Kamalanand Singh* (1), referred to. [*ibid.*]

Second Appeal from a decision of the District Judge of West Khandesh at Dhulia, in Appeal No. 134 of 1930, varying that of the Munsif, Joint Subordinate Judge at Dhulia, in Miscellaneous Application No. 196 of 1929.

Mr. *G. N. Thakor* (with him Mr. *W. B. Pradhan*), for the Appellant.

Mr. *H. C. Coyajee*, (with him Mr. *Y. V. Dixit*,) for the Respondent.

Baker, J.—In order to undertand this appeal, it is necessary to set out the facts in some detail. The present respondent Laduram obtained a decree against the present appellant and his partners in Suit No. 474 of 1919 on September 6, 1921. The decree was for Rs. 3,307 principal, and Rs. 295 for interest, and Re. 24 for commission, in all Rs. 3,626, and the costs of the suit, to be paid by the defendant to the plaintiff, and it was provided that the said amount should be a charge on nineteen bales of cotton belonging to the defendant which were lying with the plaintiff, who was a commission agent for sale. The value of the nineteen bales was not stated. In execution of this decree the plaintiff presented a *darkhast* in which he gave credit to the defendant for Rs. 143 2 6, being the price of the nineteen bales of cotton which he had sold. The defendant objected to this price, and in execution proceedings an issue was framed regarding the value of the nineteen bales of cotton, and it was held in 1925 that the value of the bales was Rs. 1,830. Against this decision an appeal was presented by another partner of the defendant's firm, and ultimately it was held by the District Court on February 12, 1927, that the value of the bales was Rs. 5,511 11-0. It so happened that in the interval between 1921 the date of the first *darkhast*, and 1927 the date of the final determination of the value of the bales by the District Court, the decree-holder-plaintiff had recovered various sums under the decree from the defendants, and ultimately this amounted to Rs. 3,152 odd. Therefore, when the Appellate Court finally found that the value of the bales was over Rs. 5,500, it was obvious that the decree-holder had recovered from the judgment-debtor considerably more than the amount of the decree, and an application was made by the present appellant to the executing Court for restitution. In the course of those proceedings accounts were taken, and the objections raised by the respondent in those proceedings were as to certain items of figures and interest. But he did not contend that the judgment-debtor should be referred to a separate suit, and both parties joined in a *purshis*, which is Ex. 9, dated January 25, 1930, agreeing to the appointment of a Commissioner to take the accounts. Accounts were taken. The contention regarding interest was overruled, and ultimately the Subordinate Judge found on the Commissioner's report that Rs. 2,092-4-6 were due for principal, and Rs. 49-1-9 for interest, in all Rs. 2,193-6-3 to be paid by the decree-holder to the judgment-debtor. It is to be noted that this order is based on the calculation that the nineteen bales of cotton were sold by the decree-holder for Rs. 5,511. Against this order the decree-holder lodged an appeal to the District Court, in which it was contended that the order passed by the Subordinate Judge could not be said to be an order under s. 144 as the original decree was neither varied nor reversed, so that the appellant (plaintiff) could not be called upon to restore to the applicant (defendant) what he had erroneously recovered under the decree. The District Judge accepted this contention, and held that it was not an order under s. 144, although it was an order more properly speaking under s. 47, and he held that the order so far as it called upon the plaintiff to refund Rs. 1,098-3-3, which

is the difference between the decretal amount and the price of the bales as found by the District Judge, *viz*, Rs. 5,511 odd, which sum could not in any sense be said to form part of the decree, cannot be sustained. The order, therefore, could not be sustained either under s. 47 of the Civil Procedure Code or under s 144, and that under the latter section the only restitution that the defendant could get was as regards the sum recovered by the plaintiff in execution of the decree and in support of that proposition, the learned District Judge relied on the case of *Hukum Chand Boid* v. *Kamalanand Singh* (1), and, therefore, he set aside that part of the order which includes the sum of Rs. 1,098-3-3 and the interest thereupon. The judgment-debtor has appealed, and it is contended by the learned Counsel on his behalf, first, that it was not open to the decree-holder to raise that contention in appeal, because the whole of the execution proceedings in the lower Court had proceeded on the basis that the price of the nineteen bales was to form part of the proceedings in execution, and that no objection was taken before the Subordinate Judge to that sum or whatever sum the bales were found to be worth being taken into account, the only objection being as regards certain figures, matters of calculation, and, secondly, on the merits, it is contended that on the rulings of the Privy Council s. 144 is not to be narrowly construed, and that it would cover the present case, and thirdly, it is contended that in any case this case clearly falls under s. 47, and any balance due by one party to the other can be recovered in execution proceedings without a separate suit The learned Counsel for the respondent has very fairly admitted that the objection taken by his client is a technical objection, and he commenced by saying that the decree only gave a charge on the nineteen bales, and that ordinarily speaking a charge-holder has no power to sell. I have no hesitation in holding that the decree-holder is estopped from raising this contention, because as a matter of fact he has sold the bales. He has credited the price towards the decretal amount, and the whole execution proceedings have proceeded on that basis, *viz.*, that the price of the bales was to form part of the payment towards the decree. I am unable to accept the contention of the District Judge that this sum of Rs. 1,089, which represents the difference between the decretal amount and the amount for which the bales were held to be sold, does not form part of the decree. The decree itself gives the decree-holder a charge on the ninteen bales, and therefore, these nineteen bales are directly covered by the decree. It is quite true that the decree did not lay down what the value of the bales was to be, but that was subsequently ascertained in execution proceedings, and it cannot be said that the executing Court has varied the decree when it finds what the value of the charge is, a matter which was left open, or rather I may say, undisposed of by the original decree. Throughout these years from 1921 to 1929 the execution of the decree has been going on on the basis that the price of the nineteen bales, which were sold by the decree-holder, forms part of the amount recovered in execution of the decree. Section 144 of the Civil Procedure Code says :—

"Where and in so far as a decree is varied or reversed, the Court of first instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed; .."

Now, strictly speaking, there has been a variation of the decree in this case, because the original decree, as I have said, merely gave the decree-holder a charge on nineteen bales of cotton. Subsequently when he sold those bales and the amount is brought into accounts in the execution proceedings, the first Court held that the value of those bales was Rs. 1,800 odd, but in appeal that decree was varied by finding that the value of the bales was upwards of Rs. 5,000. Now, if at the presentation of the first *darkhast* the decree holder had mentioned in his application that he had sold the bales, and their value was Rs. 5,500, it is obvious that the decree would have been completely satisfied, and that the judgment-debtor would have been entitled under s. 47 to recover the excess of the amount received by the decree holder above the decretal amount. As a matter of fact, s. 144 has been held by the Privy Council not to be one which is to be strictly construed. That is laid down in *Jai Berham* v. *Kedar Nath Marwari* (2), and a reference has been made

(1) 33 C. 927; 3 C. L. J. 67.

(2) 69 Ind. Cas. 278; 49 I. A. 351; 25 Bom. L. R. 643; A. I. R. 1922 P. C. 269; 4 P L T. 61; 32 M. L. T. 10; 37 C. L. J. 351; 27 C. W. N. 582; 44 M. L. J. 735; 21 A. L. J. 490; (1923) M. W. N. 368; 2 Pat. 10; 18 L. W. 802 (P. C.).

to the *dictum* of Cairns L. J. as to the expression 'act of the Court", meaning' not merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case. It is quite true that the facts in that case were not on all fours with the present case, but in view of the opinion expressed by their Lordships as to the section being read in a liberal manner, I have no doubt that these principles will apply to the facts of the present case. The case which the learned District Judge has quoted in *Hukum Chand Boid* v. *Kamalanand Singh* (1) rather supports the appellant. The penultimate paragraph of the headnote says:—

"The Code of Civil Procedure binds all Courts so far as it goes. It is not however exhaustive and does not affect previously existing powers, unless it takes them away; in matters with which it does not deal the Court will exercise an inherent jurisdiction to do that justice between the parties, which is warranted under the circumstances and which the necessities of the case require."

Now if we apply that to the facts of the present case, it will be seen that the amount which the decree-holder credited to the judgment-debtor on account of the sale of the bales has been found on appeal to be an extreme under-estimate, and it is also apparent that by reason of the decree-holder having received the sum of Rs. 5,500 by his sale of the bales plus a sum of some Rs. 3,000 which he has recovered in other ways from the judgment-debtor, he has as a matter of fact been overpaid Quite apart from s. 144, s. 47 of the Civil Procedure Code strictly applies to the facts of the present case, which lays down that all questions between the parties to the suit or their representatives—there are no representatives in this case—relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. This section directly relates to the discharge and satisfaction of the decree, because the point which we have to consider is what is the amount which the decree-holder has received in excess of that to which he was entitled under the decree. Lastly, no such point was taken in the first Court when the Commissioner was appointed with the consent of both the parties, who have put in a *purshis*, and the only objections raised were as to some questions of arithmetical calculation.

In these circumstances, I have no doubt that the view of the lower Appellate Court cannot be supported, that by a liberal application of s. 144 it cannot be made to cover this case and that there has as a matter of fact been a variation of the decree in appeal. Secondly clearly under s. 47 the question of an overpayment like this and satisfaction of a decree is a matter to be decided in an application in execution and not by a separate suit. For these reasons, I do not think that the judgment of the lower Appellate Court can stand. The decree will be reversed, and the order of the first Court, the Joint Subordinate Judge, will be restored with costs throughout.

R. L. *Decree reversed.*

BOMBAY HIGH COURT.

Civil Reference No. 5 of 1929.

August 18, 1931.

BEAUMONT, C. J. AND RANGNEKAR, J.

THE COMMISSIONER OF INCOME-TAX, BOMBAY—REFEREE

versus

THE TRUSTEES OF THE *Sir* CURRIMBHOY EBRAHIM BARONETCY—ASSESSEE.

Income-Tax Act (XI of 1922), s. 3—Currimbhoy Ebrahim Baronetcy Act (IV of 1913)—Individual, what is—Trustees under latter Act—Liability for income-tax and super-tax.

The assessee corporation were the trustees under a private Act No IV of 1913 which was passed by the Governor-General of India in Council entitled "an Act for settling certain properties belonging to Sir Currimbhoy Ebrahim Baronet, so as to accompany and support the title and dignity of a Baronet and for other purposes connected therewith". The corporation was constituted with perpetual succession and common seal under the style and title of the trustees of the Sir Currimbhoy Ebrahim Baronetcy. The corporation consisted of the Baronet for the time being and three Government Officials named in the Act. Certain properties were made to vest in the corporation who were to pay all taxes etc, to defray the expense of repairs and insurance, to set aside a sinking fund and a repair fund and to pay the surplus to the Baronet for the time being. The second Baronet died just before the end of the Financial year 1927, 1928. On 26th September, 1928, the corporation made a return for income-tax for the year 1928-29. The corporation were ordered to pay the income-tax which was paid. In March they were asked to pay super-tax which they refused to do. The question referred by the Commissioner of Income-tax was whether apart from s. 56, Income-Tax Act, the corporation were properly assessed to income-tax and super-tax for the year 1928-29:

Held, that the corporation constituted by the special Act was an individual within the orbit of s. 3, Income-Tax Act and not an association of individuals. [p. 490, col. 1.]

Held, further, that the corporation was liable to be assessed both for Income-tax as well as super-tax. [p. 491, col. 1.]

Civil Reference made by the Commissioner of Income-Tax, Bombay.

Sir *Jamshed Kanga*, Advocate-General (with him Mr. *A Kirke-Smith*, Government Solicitor), for the Commissioner of Income-tax.

Mr. *Coltman* (with him Messrs. *Payne & Co*,) for the Assessee.

Beaumont, C. J.—This is a case which the Income-tax Commissioner has referred to this Court under s. 66 (2) of the Indian Income-tax Act, and the question which he asks as in his amended case is whether notwithstanding the payment already made of Income-tax by the corporation they were properly assessed to Income-tax and super-tax or either of them for the year 1928-29 by the Income- tax Officer as per his orders of October 11, 1928, and March 11, 1929, in view of the circumstances of the case and the provisions of ss. 40 and 55 of the Indian Income-tax Act, 1922.

The corporation referred to are the trustees under a private Act IV of 1913 which was passed by the Governor-General of India in Council entitled "an Act for settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, so as to accompany and support the title and dignity of a Baronet and for other purposes connected therewith." Shortly before the passing of the Act Sir Currimbhoy Ebrahim had been created a Baronet and the purpose of the Act according to the preamble was to make provisions for keeping up the Baronetcy. By s. 2 of the Act there was constituted a corporation with perpetual succession and a common seal under the style and title of the trustees of the Sir Currimbhoy Ebrahim Baronetcy. That corporation was to consist of the Accountant-General of Bombay, the Collector of Bombay, the Chief Presidency Magistrate of Bombay,and the Baronet for the time being. Then by s. 5 certain immoveable properties of the estimated value of twenty lakhs of rupees described in the First and Second Schedules to the Act were by virtue of the Act vested in the corporation. Section 6 of the Act provided that out of the income of the properties the corporation should pay all rates, taxes, assessments, dues and duties in respect of the said hereditaments and premises and defray the cost of all ordinary repairs and of insuring the same against fire and all other outgoings of every nature whatsoever. Then s. 7 provided for the setting aside of a sinking fund and a repair fund by paying certain fixed proportions of the income into the sinking fund and repair fund. Then under s. 8 the residue of the income after making all the above payments is to be paid to the Baronet for the time being provided he is of full age and using the name of Sir Currimbhoy Ebrahim. Then the Act contained provisions enabling the corporation to sell the immoveable properties and invest the proceeds and there are powers for the Baronet for the time being of jointuring a widow, and under s. 29 the Baronet is to have the actual management of the hereditaments vested in the corporation including the collection of rent.

The second Baronet died in March, 1928, that is to say, just before the end of the financial year 1927-28. On September 26, 1928, the trustees under the Act made a return for Income-tax for the year 1928-29, that is, the year expiring on March 31, 1928, and on October 11, 1928, the Income-tax Officer made an order on the trustees to pay the Income-tax. On February 22, 1929, the trustees paid the tax. On March 11, 1929, the trustees were assessed to super-tax and they objected to the assessment and it was owing to their objection that this case was stated.

It appears from the case that for the previous year 1927-28 there had been an arrangement between the Commissioner and the trustees under which the trustees paid the Income tax and the Baronet paid the super tax, and the trustees say that when they paid the Income-tax for the year in dispute they assumed that the same arrangement would continue and that the Baronet would be charged with the super-tax. The Commissioner, not desiring to do anything unfair or to take advantage of a mistake, has agreed that he will not treat the payment of the Income-tax as imposing any liability for the payment of super tax under s. 56 of the Indian Income-tax Act, and that accordingly we should deal with the questions put to us without reference to that section and as though the Income-tax for the year 1928-29 had not in fact been paid. On the other hand the assessee agrees not to claim any refund.

Now, the argument which Mr. Coltman puts forward on behalf of the assessee—it is really on behalf the Baronet—is that the general scheme of the Act is to tax the person who actually enjoys the income, so that he says, where you have property vested in *A* in trust to collect the income and pay the income over to *B*, it is *B*, the beneficiary, and not *A*, the trustee, who is to be assessed under the Act. The charging section under the Act is s. 3 which provides that:—

"Where any Act of the Indian Legislature enacts

that Income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions of this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other associations of individuals."

I think the corporation constituted by the special Act is an individual within that section. The learned Commissioner seems to treat it as an association of individuals, but I think myself it comes within the term individual, and not an association of individuals, and on the words of that section it seems to me clear that the trustees can be charged, if you take that section alone.

When one comes to the later assessing ss. 22 and 23, they seem to me to contain nothing to prevent the trustees being assessed. But Mr. Coltman relies very strongly on ss. 40, 41 and 42 which contain special provisions for assessing trustees in certain specified cases, as for instance, where the beneficiary is a minor, lunatic or idiot or residing out of British India, and he says that if the Act enabled a trustee to be assessed in any case, it would be quite unnecessary to provide for those special cases of assessing the trustees. Well, I agree that there is a good deal of force in that argument. We were referred to the case of *Williams* v. *Singer* : *Pool* v. *Royal Exchange Assurance* (1), in which the question whether trustees or beneficiaries should be assessed to income-tax was fully discussed. The learned Law Lords were of course dealing with the English Acts which are worded quite differently from the Indian Act, but I think the conclusion at which Lord Cave arrived is as applicable to cases under the Indian Act as to cases under the English Act. He points out that in a normal case, if you were to assess the trustee and not the beneficiary you would get into all sorts of difficulties, because the trustee might be entitled to allowances and so forth which the beneficiary would not be entitled to, and it would not do to confuse the beneficiary's income, with the trustee's income, and, therefore, he says, generally speaking, the beneficiary is the person who should be charged. But then he points out that in certain cases the trustee might be the person to be charged as, for instance when he holds property in trust for somebody who cannot deal with it, say, an infant or lunatic, or in cases of trusts for accumulation of income, and then he sums up the matter thus (page 72*):—

"The fact is that if the Income-Tax Acts are examined, it will be found that the person charged with the tax is neither the trustee nor the beneficiary as such, but the person in actual receipt and control of the income which it is sought to reach. The object of the Acts is to secure for the State a proportion of the profits chargeable, and this end is attained (speaking generally) by the simple and effective expedient of taxing the profits where they are found. If the beneficiary receives them, he is liable to be assessed upon them. If the trustee receives and controls them, he is primarily so liable."

Now that may be the general rule in the case of an ordinary trustee and beneficiary, indeed I think it is the general rule; but in the present case it seems to me we are dealing with something which is quite unusual. We have by a special Act of the Legislature a trust constituted which unless so constituted would not be recognised by the general law because it would infringe the rule against perpetuities. We have a corporation specially created by the Act for the purpose of acting as a trustee under the Act. That corporation has vested in it by the Act certain property. It has to a great extent to manage that property although the Baronet himself is given the power actually to collect the rents and so forth. But the trustees must receive the rents and income as they have to apply a proportion in effecting ordinary repairs and paying for insurance of the property, and they have also to set apart a proportion of the income to constitute the sinking fund and repairs fund. There may also be a proportion of the income payable to a widow or widows for jointures and then the balance is payable to the Baronet. It seems to me that in such a case the trustees are a taxable unit in respect of this trust property. It appears from the case that of the total taxable income of the trustees the Baronet receives about seventy-five per cent. and about twenty-five per cent is expended by the trustees either in management or in establishing the two funds under the Act and plainly in respect of that twenty-five per cent. the trustees are the only persons who can be assessed and charged because the income never goes into anybody else's hands. It seems to me that the Commissioner is entitled under s. 3 of the Act to assess and charge the trustees, and there is nothing in any other part of the Act, so far as I can see, which prevents him from doing so. There is no express provision that trustees are not

(1) 1921) 1 A. C. 65; 89 L. J. K. B. 1151; 123 L. T. 632; 64 S. J. 569; 36 T. L. R. 661; 7 Tax. Cas. 387.

*Page of (1921) I. A. C.—[*Ed.*]

to be charged, and it is obviously a convenient course in this case to charge the trustees. The difficulties which arise in the case of an ordinary trustee, who has got other income vested in him—either trust income or private income of his own—on which he may be assessed, cannot arise here because these trustees are constituted simply for the purposes of this Act and they have got the income of this particular property vested in them and nothing else and there is no inconvenience in assessing them I think, therefore, that in this special case and having regard to the peculiar circumstances and the peculiar language of the special Act the Commissioner is entitled to assess and charge the trustees both to income-tax and super-tax.

I should have said that the charging section in respect of super-tax is s. 55, but that is worded in virtually the same way as s. 3, and most of the argument in this case has proceeded on the basis that the corporation are not liable for the income-tax. If they are liable for income-tax, I think they are also liable for super tax. In my judgment, therefore, we must answer the question by saying that the corporation were properly assessed to income-tax and super-tax for the year 1928 29 by the Income-tax Officer as per his orders of October 11, 1928, and March 11, 1929

Assessee to pay the costs on the Original side scale. Costs include costs reserved.

Rangnekar, J.—I agree.

R. L. *Answer accordingly.*

BOMBAY HIGH COURT.

First Civil Appeal No. 4 of 1929.

July 16, 1931.

PATKAR AND TYABJI, JJ.

MOTILAL KANJI & Co.—APPELLANTS

versus

NATVARLAL M. JHAVERI—

RESPONDENTS

Companies Act (VII of 1913), ss. 153, 202—Appeal—Persons entitled to appeal—Scheme for restarting, consideration of.

A creditor, contributory or a liquidator only has a right of appeal under s. 202, Companies Act. A person who has no present interest but only expects to be appointed secretary or agent of the company if it restarted under a scheme under s. 153 of the Act has no right of appeal. *In re London Chartered Bank of Australia* (1) and *In re Bradford Navigation Company* (2), followed. [p. 492, col. 1.]

In considering a scheme the wishes of the creditors and the contributories have to be consulted and not the wishes of any person who may have propounded a scheme. [*ibid.*]

First Appeal from an order of the District Judge at Surat, in Miscellaneous Application No. 40 of 1928.

Mr. *G. N. Thakar* (with him Messrs. *Kapadia, Shroff & Co*). for the Appellants

Messrs. *H V. Wivatia, H C Coyajee*, (with him Messrs. *Vachha & Co.* and *N. P. Desai*), for the Respondents.

Patkar, J.—In this case the Hatim Mills ceased to work in February, 1924, and went into voluntary liquidation, and on June 13, 1928, the learned District Judge on hearing the application of one Dhirajlal Bhimbhai referred the scheme, which was propounded by the present appellants Motilal Kanji and Co, to the creditors to ascertain whether the modifications suggested were acceptable to the statutory majority after first obtaining the approval of the present appellants to those modifications.

A meeting was held on July 8, 1928, and on July 21 one of the Official Liquidators, Mr. N. M. Jhaveri, made a report Ex. 58. On August 5, Dhirajlal made an application to sanction the scheme as modified. The Court declined to give sanction on the ground that there was not the requisite statutory majority as required by s 153 of the Indian Companies Act. Dhirajlal filed First Appeal No. 556 of 1928, but died during the pendency of the appeal, and his heirs not having been brought on the record the appeal has abated.

The present appeal is by Motilal Kanji and Co. who propounded the scheme. It is contended on behalf of the respondents that an appeal does not lie under s. 202 of the Indian Companies Act at the instance of the present appellants who are neither creditors nor contributories and who have no present interest in the company but only a prospective interest to be appointed secretaries and agents if the company is made to stand on its legs as a result of the modified scheme.

Under s. 153 of the Indian Companies Act, in the case of a company which is not being wound up, an application has to be made by a creditor or a member of the company, or, in the case of a company being wound up, by the liquidator, and if a majority in number representing three-fourths in value of the creditors or class of creditors, or members or class of members agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on the

creditors or the members and also on the company, or in the case of a company in the course of being wound-up on the liquidator and contributories of the company. The persons interested, therefore, in such application are the creditors or the members or the liquidators of the company. According to Buckley on Companies Acts, 11th Edition, page 321, a scheme under s. 153 of Companies Act, 1929, which corresponds to s. 153 of the Indian Companies Act, is an alternative mode of liquidation, which by operation of law relieves the company and its contributories from liability further than that which is contemplated or imposed by the scheme. See *In re London Chartered Bank of Australia* (1). Under s. 174 of the Indian Companies Act, the Court may, as to all matters relating to a winding-up, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence. It appears clear, therefore, that in considering a scheme the wishes of the creditors and the contributories have to be consulted and not the wishes of any person who may have propounded a scheme. The appellants have no present interest in the affairs of the company, but only a prospective interest if the scheme is sanctioned. They are neither creditors nor contributories of the company. Their present interests are not likely to be in any way affected by the order of the lower Court. If the scheme had been sanctioned they would have benefited by the scheme in so far as they would have been appointed secretaries and agents of the company if re-started according to the scheme. But by reason of the scheme not being sanctioned it does not appear that the interests of the appellants are in any way affected.

In *In re Bradford Navigation Company* (2) it was held that no person has a right to be heard against a petition for winding up a company, except creditors and contributories, and that although the Court may reasonably hear other persons who have an interest in the property of the company as *amici curiæ*, yet such persons cannot appeal against the decision. In the judgment the winding-up proceedings of a company have been dealt with on the same footing as the winding-up proceedings of a partnership, and it was held that if the winding-up order does not in the slightest degree derogate from any right whatever which a third person has in respect of the property, he is not entitled to file an appeal against the order.

Unless a person shows that he has got an interest which is adversely affected by the decree of the lower Court or has an interest in the subject-matter which is under litigation, he has no right to appeal: see the decision of the Privy Council in *Chandrika Bakhsh Singh* v. *Indar Bikram Singh* (3), where a person, who has no present title to protect and no interest which can give him a right to contest, is described by their Lordships of the Privy Council as "a mere impertinent intervener in another person's affair."

It is contended on behalf of the appellants that they were parties in the lower Court, but the mere fact that they were parties in the lower Court does not invest them with a right to appeal unless they conclusively prove that their rights are adversely affected by the decision of the lower Court.

I, therefore, think that the preliminary objection prevails and this appeal must be dismissed with costs. There will be two sets of costs, one in favour of respondents Nos. 7, 9 and 11 and another in favour of respondents Nos. 1 to 4.

Tyabji, J.—This is an appeal from an order of the District Judge refusing to sanction a scheme of arrangement presented in the liquidation of the Hatim Mills Co. Ltd.

The appellant before us is neither the Official Liquidator, nor a contributory, nor a creditor of the company, but he is the person who put forward the rejected scheme.

A preliminary objection is taken that such a person cannot appeal.

The decision depends upon the general principle of law that no person has a right to appeal unless he has an interest in the question sought to be raised in the appeal. It does not entirely depend upon whether the person who proposes to appeal is a party to the proceedings. The principle is stated in clear terms in Daniell's Chancery Practice, 8th Edition, page 1111; and is well illustrated by the decision of the Privy Council in *Chandrika Bakhsh Singh* v *Indar Bikram Singh* (3). There the question was whether a transfer by a Hindu widow was valid. The respondent before their Lordships of the Privy Council had claimed under a Will, which was held and

(1) (1893) 3 Ch. 540 at p. 546; 62 L. J. Ch. 841; 3 R. 696; 69 L. T. 593; 42 W. R. 14.
(2) (1870) 5 Ch. 600; 39 L. J. Ch. 733; 23 L. T. 487.
(3) 35 Ind. Cas. 958; 38 A. 440 at p. 445; 18 Bom. L. R. 846; 20 C. W. N. 1149; 20 M. L. T. 164; (1916) 2 M. W. N. 120; 4 L. W. 288; 31 M. L. J. 505; 14 A. L. J. 1024; 24 C. L. J. 291; 19 O. C. 141; 4 O. L. J. 4 (P. C.).

admitted by the respondent to be invalid. Nevertheless, in appeal to the Judicial Commissioners of Oudh, the respondent had been allowed to contend that the widow was not entitled to deal with the estate (in which he was himself not interested), and the Judicial Commissioners went into the merits, and decided that the widow's dealings with the estate were unauthorised, and ought to be set aside. The Privy Council reversed this decision, holding that inasmuch as the respondent had admitted that he himself had no interest in the estate, the Judicial Commissioners were wrong in hearing him in appeal, and that the appeal should have been dismissed.

It was argued that the appellant before us had a right to appeal inasmuch as he had been made a party to the proceedings in the lower Court; and, secondly, that he was interested in the appeal, as the scheme of arrangement that was rejected was put forward by him, and, if it had been accepted he would have been given the management of the Mills.

The question whether the appellant's interests are affected must be decided with reference to the proceedings before the Court. The proceedings arose in the liquidation of the company. Section 153 of the Indian Companies Act provides for the manner in which—in liquidation as well as at other times—questions arising between a company, its contributories and its creditors may be compromised or arranged. The persons concerned in the liquidation of a company are strictly only the contributories, following the analogy of partners in the dissolution of an ordinary partnership. But the law relating to joint stock companies (as explained by Lord Justice James in *In re Bradford Navigation Company* (2) has provided that the creditors of the company should also have a say in its liquidation: this is given effect to in s. 153. That section provides that any arrangement or compromise which is proposed shall be placed before the creditors, as well as the contributories and shall (if sanctioned) be binding on both. But no one except the liquidator, the contributories and the creditors of the company is bound by it, or has any concern in any of the questions arising in liquidation. A compromise or arrangement in the course of liquidation is an "alternative mode of liquidation," as Lord Wrenbury calls it (Buckley on Companies, 11th Edition, page 321).

That a person has come forward before a meeting of the share-holders, and proposed a scheme for carrying out the liquidation of the company, does not make him a party to the original proceedings relating to the winding-up of the company, nor does it give him any interest, in the eye of the law, in the question how the liquidator, the contributories and the creditors settle their domestic affairs. It may have been convenient in this case—the analogy of the *Bradford Navigation Co's case* (2) is very close—to let the creditors and the contributories hear for themselves what scheme the appellant proposed for their consideration. But when the parties really concerned in the affairs of the company rejected the scheme, it was no concern of the appellant to appeal to this Court, and say that the contributories and the creditors of the company shall not be allowed to manage their own affairs as they like. Without applying to him the choleric words of the Privy Council to which my learned brother has referred, it may be said that he has nothing to do with what the liquidator, the contributories and the creditors of the company do amongst themselves.

I, therefore, agree that the appeal should be dismissed with costs on the preliminary point.

R. L. *Appeal dismissed.*

BOMBAY HIGH COURT.

Criminal Appeal No. 275 of 1931.

August 12, 1931.

BEAUMONT, C. J. AND BARLEE, J.

JAGANNATH RAGHUNATHDAS—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 405—Criminal breach of trust—Partner, liability of—Dishonest intent—Burden of proof—Duty of Court in partnership cases.

The words of s. 405, Penal Code, are quite enough to cover the case of a partner and if one partner is given authority by the other partners to collect moneys or property of the firm, he is entrusted with dominion over that property and if he dishonestly misappropriates it, then he comes within the section. *Queen* v. *Okhoy Coomar Shaw* (1) and *Emperor* v. *Lalloo* (2), followed. [p. 494, col. 2.]

The burden of proving dishonest intention under s 405, Penal Code, on the part of the accused is on the prosecution. In other words, the prosecution must prove facts from which the only possible inference which can reasonably be drawn is that there was a dishonest intent [p. 495, col. 1.]

In case of charges of criminal breach of trust against partners, the Court ought to be very careful

In many cases it is impossible to say what the share of the accused may be, whether he is indebted to the firm or whether the firm is indebted to him and if the firm is indebted to him there may be no dishonest intent in his withdrawing money from the firm. If there is any doubt upon the matter, the accused must always have the benefit of the doubt. [p. 495, col. 2.]

Criminal Appeal from the convictions and sentences passed by the Chief Presidency Magistrate, Bombay.

Mr. *G. N. Thakor* (with him Messrs. *Bhaishankar, Kanga & Girdharlal*), for the Accused.

Mr. *Taraporewala*, Acting Advocate-General (with him Mr. *P. B. Shingne*, Government Pleader), for the Crown.

Beaumont, C. J.—This is an appeal by the accused from a conviction before the Chief Presidency Magistrate under s. 406 of the Indian Penal Code. The charge is that the accused on or about September 14, 1929, at Bombay did bring various sums of money aggregating to Rs. 51,228 5-0 from several constituents of the firm of Rai Saheb Ramdayal Ghasiram for the use of the said firm and did dishonestly misappropriate the said sum to his own use and thereby committed an offence punishable under s. 406. He was sentenced to six months' rigorous imprisonment and a fine of Rs. 1,000, in default six months' rigorous imprisonment.

The history of the matter so far as is material is this: There was an old firm in which one Gopilal, whose *Munim* Ganpatlal Jankidas is the complainant in this case (though I will hereafter refer to Gopilal as the complainant), was a partner, and the accused and a man named Motiram were also partners. That firm was wound up in July, 1928, a settlement was then arrived at and a deed of retirement executed. The firm was to be taken as having been wound-up from October 26, 1927, and Motiram retired. The deed of settlement shows that Motiram was indebted to the firm in a sum of Rs. 48,000 odd and the accused was indebted in a sum of Rs. 42,000 odd. For that sum the accused gave a promissory note to the complainant and it is said, and I will assume, that thereby the accused's liability to the firm was discharged. Very shortly prior to this settlement in July 1928, the complainant had written some letters to the accused pointing out that the accused was indebted to the firm and that until that debt was paid-off the accused was not entitled to draw a single pie out of the firm and the accused seems to have acquiesced in that position. Those letters were strongly relied upon by the learned Magistrate as showing that the withdrawals—the subject-matter of the charge, could not possibly have been justified. But it is, I think, a fair criticism that those letters were written prior to the settlement of July 2, and I will assume for the purposes of my judgment that the arrangement embodied in those letters did not continue after July 2. Motiram having retired, there is no question but that the complainant and the accused continued in partnership. There is a question as to the relative shares which they had in the partnership business and profits, but I will assume for the purposes of my judgment that the accused was entitled (as he claims) to a half share in the profits. It is in evidence that the accused brought no capital into the business. That statement was elicited in the cross-examination of the complainant's *Munim*. Now, on September 14, 1929, the accused admittedly collected outstandings of the firm amounting to the sum mentioned in the charge, that is to say Rs. 51,000 odd, and he applied those moneys for his own purposes: that is to say, he did not put them into the firm, he debited himself in the accounts with the firm as having had those moneys but he put the moneys in fact into his own pocket. The question is whether in those circumstances he can be charged with criminal breach of trust under ss. 405 and 406 of the Indian Penal Code. Section 405 is in these terms :—

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits 'criminal breach of trust'."

Now Mr. Thakor's first point is that that section does not apply to the case of a partner dealing with partnership property. He points out that all the illustrations are illustrations of a person entrusted absolutely with property of another and do not relate to property which is in part in the ownership of the accused. But, in my opinion, the words of the section are quite wide enough to cover the case of a partner. Where one partner is given authority by the other partners to collect moneys or property of the firm I think that he is entrusted with dominion over that property, and if he dishonestly misappropriates it, then I think he comes within the section. That is the view which prevailed in a Full Bench case of the Calcutta High Court as long ago as 1874—the case of *Queen* v. *Okhoy Coomar*

Shaw (1), and the view was adopted by this Court apparently with approval in *Emperor* v. *Lalloo* (2), and in my opinion that is the right view. Then Mr. Thakor says that assuming the section applies, the burden is upon the prosecution to prove a case under it, and one of the essential ingredients which has to be proved is that there was a dishonest intent, and Mr. Thakor says that we cannot uphold this conviction unless the prosecution have proved such a position that a dishonest intent must necessarily be inferred. Well I agree with that. I think that the prosecution must prove facts from which the only possible inference which can reasonably be drawn is that there was a dishonest intent. Here, the accused brought no capital to this firm. I ought perhaps to have mentioned in my statement of the relevant facts that when the old firm was wound-up in 1929 some of the property was retained by the three former partners jointly and the accused says that that property may be of value. But I think that property must be left out of account entirely in dealing with this charge. I think that it is really essential for the accused's case to say that a new firm started in July 1928 because otherwise he would still be saddled with the liability of Rs. 42,000. Therefore, I leave out of account the property in the joint names which formerly formed part of the old partnership assets, and I repeat that the accused brought no capital into the new firm. The accused says that he had reasonable grounds for thinking that at the time when he received this Rs. 51,000 and applied it to his own use his share in the partnership was at least equal to that sum. Now, can we accept that view? The accused had no interest in the capital of the firm, the firm had only been in existence for two years and there is some evidence that a certain amount of profit had been made. But no accounts had been taken. This is clear from the evidence. Therefore, it was impossible to say what the profits were. The complainant in a plaint which he filed against the accused in a civil action admitted that the profits for 1928 were Rs. 30,000. On the other hand, the witness Dagroolal Shivnarayan says that he thinks that in 1929 there will be a loss of Rs. 50,000. However that may be there is not a particle of evidence that the profits of the new firm will amount to any thing like Rs. 1,00,000, and unless it does, clearly the accused was not entitled to withdraw Rs. 51,000. Nor can I see any evidence from which the accused could have supposed that the profit reached that figure. It seems to me that on the facts as proved by the prosecution we must necessarily infer that when the accused received collectively Rs. 51,000 odd and put them into his own pocket he did it dishonestly. We have got his account with the firm and it appears that at no time during 1928 and 1929 did he withdraw a sum exceeding at any one time Rs. 300. Most of his withdrawals are quite small. There is one item of just over Rs. 4,000, but that according to an entry in the book was a *havala* entry because the accused had settled a claim for Rs. 4,000 and the firm accepted that settlement and credited him with the amount. But so far as ordinary drawings are concerned he had only withdrawn small sums below Rs. 300 and then suddenly for no particular reason he collects Rs. 51,000 and puts the whole amount into his pocket at once.

In these cases of charges against partners of criminal breach of trust, I think the Court ought to be very careful. In many cases it is impossible to say what the share of the accused may be, whether he is indebted to the firm or whether the firm is indebted to him, and if the firm is indebted to him there may be no dishonest intent in his withdrawing money from the firm. If there is any doubt upon the matter, I think the accused must always have the benefit of the doubt. To some extent the question is one of degree. If you have a partnership consisting of two partners entitled in equal shares and the assets consist of a particular item of property, say a ship, and you find that the managing partner has sold the ship and put the whole of the sale proceeds into his own pocket, that would be an obvious case from which one would have to infer a dishonest intention because it is plainly robbing the partner of his share of the entire property. On the other hand, if you have a firm with assets valued at a lac of rupees and you find that the managing partner entitled to half the assets has put into his own pocket sums amounting to Rs. 10,000 or Rs. 20,000, I think it would be impossible to infer a dishonest intention because it is really then only a question of accounting and his partners are not going to lose. As I say, if there is any doubt, it is the duty of the Criminal Court to say that the prosecution must wait until the accounts are gone into in a civil action, if there is a civil action

(1) 13 Beng. L. R. 307 (F. B.).
(2) 6 Bom. L. R. 553.

proceeding, as in this case there is. But in my view on the facts of this case it is impossible really to say that there is any doubt at all. The accused might have given evidence himself to displace the prosecution case. Mr. Thakor very much objects to the phrase that the burden of proof shifts to the accused. He says that the burden of proof in a criminal case is always on the prosecution. I think it is really only a question of language. I agree that the burden of proof is always on the prosecution and that they must prove their case, and where a dishonst intention is an essential ingredient, they must prove facts from which the necessary inference is that there was a dishonest intention. But having got to that point it is open to the accused to bring evidence to disprove the facts or to give evidence of new facts from which it appears that the inference of a dishonest intention should not necessarily be drawn. It would have been open to the accused here to give evidence to show that he had reasonable grounds for thinking that he had a right to a share in the assets greater than the amount which he withdrew. But he gave no such evidence and on the prosecution evidence as it stands I think the charge under s. 435 is made out. The appeal, therefore, must be dismissed.

We modify the sentence of six months' rigorous imprisonment to six months' simple imprisonment. Fine to stand.

Barlee, J.—The facts in this case shortly are that the complainant, the accused and one Motiram were partners in business. All the capital was supplied by the complainant. That business went on for many years until 1927 *Diwali* when Motiram retired. The complainant and the accused each had a six annas share and Motiram had a four annas share and one anna was devoted to charity making in all a rupee of seventeen annas. The making of the accounts lasted till the next July and then it was discovered after leaving aside certain items of which the value could not be estimated at that time, that there was a debit balance against Motiram of some of Rs. 26,000 and against the accused of some Rs 42,000. The items excluded were, firstly, an item of Rs 22,000, secondly an item of *anamat* amounting to Rs. 18,094, and thirdly, an unvalued item *i. e.*, a decree of a Civil Court by which the partnership had become entitled to land.

After this settlement the accused gave the complainant a promissory note for Rs. 42,000 and his account of the old partnership was squared. The accused and the complainant continued as partners and it has been found by the learned Chief Presidency Magistrate that their shares in the new partnership were eight annas each. The accused had a power-of-attorney and managed the business in Bombay and Bayandar. He did not pay up the amount of the promissory note and was pressed for security but he did not give it. Then a year later, in September, 1929, the accused who had been in the habit of drawing small amounts—never more than Rs. 200 or Rs. 300, from the shop presumably for his maintenance and as pocket money, suddenly collected from the constituents and withdrew Rs. 51,000 odd. He entered this withdrawal, debiting the amount against himself in his own hand in the account book and wrote to his capital partner at Hyderabad asking him to come down and take over charge. The complainant came down, looked into the accounts and at once filed the complaint againt the accused for criminal breach of trust as a servant. He also filed two suits, one on the promissory note and one for the dissolution of the partnership. These suits have been mentioned in the argument, but it is only necessary to say here that they were referred to arbitration, that the arbitrators made awards but were not accepted and the criminal prosecution was presisted in.

The learned Chief Presidency Magistrate convicted the accused. He held that the accused was a partner and not a mere servant as had been stated in the complaint. But he also held that by agreement which is evidenced by certain letters he was restricted to withdrawals of about Rs 250 a month and on this account he decided that the withdrawal of Rs. 51,000 amounted to misappropriation and was dishonest.

I shall take it for the purpose of this case that these letters had not the effect which has been given them by the learned Chief Presidency Magistrate. As pointed out by Mr. Thakor the only letters which really restricted the power of the accused to draw were written before the settlement of the accounts in 1927, and it is not unfair to say that this restriction had no effect afterwards or at any rate that these letters do not prove that the restriction was in force at the time of the withdrawal of Rs. 51,000 in 1929. The only questions of fact about which there has been any dispute here are as to who supplied the capital and

whether there were any losses or profits in the new partnership.

The first question does not appear to have been disputed in the lower Court where it seems to have been assumed all through by every one that the accused had supplied no capital but that the capital had all been supplied by the complainant. Nevertheless it was necessary for the complainant to prove that the capital belonged to him and it was very fortunate for the prosecution that this fact was elicited by the defence in the course of the cross-examination.

It was also argued here by learned Counsel for the accused that there was no evidence on the record to show that there had not been any profits in the new firm. At first on searching the record and looking through the examination-in-chief of the complainant's witnesses we failed to find any evidence on this important point. But later on it was pointed out that one of the prosecution witnesses had been questioned on the matter in cross-examination and that he had stated that he had been through the accounts and had found that there had been a loss of Rs. 50,000. That of course may or may not be true but the fact remains that this point which was very important to the prosecution is on the record owing to the kindness of the defence in the lower Court.

Now the first and most important point in this case is whether the evidence offered by the complainant in the lower Court was sufficient to satisfy the burden of proof, that is, was the accused to be called on for an explanation or was he entitled to an acquittal even though he had kept his mouth shut and refused to make any statement at all. Mr. Thakor's argument is partly based on the wording of s. 405 and partly on the law of partnership. He practically denies that a partner can be guilty of criminal breach of trust on the ground that it cannot be said that partnership funds of which he has control and which he is entrusted with come within the meaning of s. 405. He has relied on the case of *Debi Prasad Bhagat* v. *Nagar Mull* (3), where it is laid down that a partner cannot be held guilty of misappropriation, but is only entitled to be called upon for an account of the expenditure of the money which he has received, and that it is open to him to spend the money received by him and to account for it in dealing with the partnership. But so long as 1874 a Full Bench of the Calcutta High Court in *Queen* v. *Okhoy Coomar Shaw* (1) decided that a partner, who dishonestly misappropriates or converts to his own use any of the partnership property with which he is entrusted or which he has dominion over, is guilty of an offence under s. 405, and this Full Bench case is quoted with approval in a case of our own High Court, *Emperor* v. *Lalloo* (2). I agree, therefore, with his Lordship the Chief Justice in the view that there is nothing in s. 405 to prevent its being applied to a partner. Especially this is the case where, as here, we have a capital partner and a working partner. A capital partner is one who supplies the capital for the working partner and it seems to me that in such a case it can certainly be said that the working partner is entrusted with dominion over the capital partner's property. The position in law seems to be this that the working partner, as the accused in this case was entitled only to a share in the profits and had no interest in the capital. Therefore he was an agent and trustee for the capital partner's capital and was entitled only to the profits after they had been ascertained. Speaking strictly, therefore, according to the section it can be said that if he used for himself any of the property in his hands which could not be looked upon as profits, he was misappropriating it. Whether of course the misappropriation is criminal or not depends naturally on the intention with which it was done. But I cannot agree with the learned Counsel on behalf of the accused that under s. 405 there can be no misappropriation of partnership property on the ground that the partner cannot be looked upon as a person entrusted with partnership property.

[*Note.* The rest of the judgment is not necessary for purposes of this report.—*Ed.*]

R. L. *Appeal dismissed.*

(3) 35 C. 1108.

BOMBAY HIGH COURT.

First Civil Appeal No. 390 of 1927.

April 14, 1931.

BEAUMONT, C. J. AND MURPHY, J.

BHAGVAN GOKULJI AND Co. —PLAINTIFF—APPELLANT *versus* BALKU BABAJI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. I, r. 3, —Misjoinder of causes of action—Contract of sale by one partner—Dissolution of partnership—

Suit for specific performance against vendee and for indemnity against contracting partner—Practice —Dismissal of suit on preliminary issue, propriety of.

The plaintiffs and defendant No. 2 were partners in a firm of which the latter was the managing partner. He agreed on behalf of the firm to sell certain land belonging to the firm to defendant No. 1 and entered the transaction in the books of the firm as being a contract to sell the land for Rs. 9,000. The actual agreement for sale was for Rs 5,000. Subsequently the partnership dissolved and the terms of dissolution were embodied in a deed and the effect of dissolution was that the plaintiffs took over the whole of the partnership assets, the accounts were to be taken as correct, and if it was found that any entry was wrong, the partner in default was to make good the loss to the plaintiffs. The plaintiffs sued for specific performance of the agreement of sale, stating in the plaint that if the sale price was Rs 9,000 the defendant No. 1 was bound to pay Rs. 9,000 and purchase the land. If on the other hand the price fixed was Rs. 5,000 then they claimed against defendant No. 1 specific performance on that basis and as against defendant No. 2 the balance of Rs. 4,000 under the contract of indemnity contained in the deed of dissolution. The Sub-Judge dismissed the suit on ground of misjoinder of causes of action:

Held, that there was no misjoinder of causes of action as there was a common question of fact, namely, what were the terms of the contract of sale. [p. 498, col. 1.]

Order I, r. 3, Civil Procedure Code, applies to joinder of causes of action as well as to joinder of parties. *Payne* v. *British Time Recorder Co.* (1). and *Harendra Nath Singha Ray* v *Purna Chandra Goswami* (2), followed. [p. 499, col. 1.]

As a general rule a Subordinate Judge ought not to dismiss an action on a preliminary issue, but ought to try the preliminary issue and then try out the other issues as well. It is only in exceptional cases when the preliminary point seems clear and the record is a very heavy one and the trial of other issues would take a long time that it would be desirable to dismiss the action on a preliminary issue [p. 499, col. 2.]

First Appeal from the decision of the First Class Subordinate Judge at Thana, in Civil Suit No. 40 of 1926.

Mr. *H. C. Coyajee*, (with him Messrs. *Y. V. Dixit* and *P. B. Shingne*), Government Pleader, for the Appellants.

Messrs *R. W Desai*, *G N. Thakor*, (with him Mr. *Ramnath Shivlal*, for Mr. *W. B. Pradhan*,) for the Respondent.

Beaumont, C. J.—This is an appeal from a decision of the Subordinate Judge of Thana. At the trial the learned Judge framed the first issue in these terms—

"Is the suit bad for misjoinder of causes of action against different persons ?"

and he answered that issue in the affirmative and dismissed the action without considering the merits.

In dealing with the preliminary issue, one must, of course, assume that the facts stated in the plaint are correct and see whether on that basis the plaintiff has a cause of action.

Now, the material facts are these—

The plaintiffs and respondent No. 2 were partners at the material dates. There were other persons also in the partnership, but that is immaterial. Defendant No. 2 was the managing partner, and on June 2, 1924 he agreed on behalf of the firm to sell certain land belonging to the firm to respondent No. 1 and he entered the transaction in the books of the firm as being a contract to sell these lands to respondent No. 1 for Rs, 9,000. The actual agreement for sale made between respondent No 2 and respondent No. 1 was for a sale of the land at Rs. 5,000, and not Rs. 9,000. In January 1925, there was a dissolution of the firm between the plaintiffs and respondent No. 2 and the other partners. The terms of the dissolution were embodied in a deed and the effect of the dissolution was that the plaintiffs took over the whole of the partnership assets, the accounts were to be taken as correct, and if it was found that any entry in the accounts was wrong, the partner in default was to make good the loss to the plaintiffs. In that state of the facts, on February 2, 1926, this suit was commenced against respondent No. 1 and respondent No. 2; and what the plaintiffs claimed was this. They claimed, first of all, specific performance of the agreement for sale. They stated in their point that they did not know what terms respondent No. 2 had actually made for the sale of the land. If the sale price was Rs. 9,000 then they claimed specific performance against respondent No. 1 and on that basis payment to the plaintiffs of the balance of Rs. 9,000. If, on the other hand, the agreement was for a sale for Rs. 5,000 then they claimed against respondent No. 1 specific performance on the basis and as against respondent No. 2 the balance of Rs. 4,000 under what is really the contract of indemnity against mistakes in the accounts contained in the deed of dissolution.

The learned Judge held that those two causes of action could not be joined. He said that the transactions were unconnected with each other and that there was no common question of fact or law. It seems to me obvious that there was a common question of *fact*, *viz*, what were the terms of the contract of sale.

Now, the plaintiffs' case is that the action is well constituted having regard to the terms of O I, r. 3. That rule provides :—

"All the persons may be joined as defendants

against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact would arise."

It seems to me that this case plainly falls within the words of that rule. There is a series of transactions contained in the agreement for sale and the deed of dissolution and there is a common question of fact, *viz.*, what were the terms of the agreement for sale. That being so, the learned Judge was wrong in dismissing the action on the preliminary point.

Mr. Thakor, on behalf of respondent No. 2, has argued that O. I, r. 3, must be read in conjunction with O. II, r. 3. Order II, r. 3, says :—

"Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; ..."

And Mr. Thakor says, no doubt with truth, that the cause of action against the defendants here is not, in any sense, joint. Mr. Thakor points out that the heading to O. I is "Parties to Suits" and that the heading in O. II is "Frame of Suit". But, unless we are going to disagree with a large number of English cases and also cases in this country, we are bound to hold that O.I, r. 3, applies to joinder of causes of action as well as to joinder of parties. Questions relating to the history and application of these rules and the corresponding rules of the Supreme Court in England were considered at length by the English Court of Appeal in the case of *Payne* v. *British Time Recorder Co.* (1), and by the Court of Appeal in Calcutta in *Harendra Nath Singha Ray* v. *Purna Chandra Goswami* (2), and I think the reasoning in those two cases clearly covers this case

Mr. Thakor has further contended that in this case the cause of action does not arise under the same transaction, or the same series of transactions. He says that the case against respondent No. 1 arises under the sale agreement and the case against respondent No. 2 arises under the deed of dissolution, but that point is covered by the English case to which I have referred in *Payne* v. *British Time Recorder Co.* (1). In that case the plaintiff had entered into a contract with B. & Co., to supply them with certain printed cards which were to conform to certain specimens supplied to them and in order to carry out that contract the plaintiff entered into another contract with W. & Co., for the supply of the cards. W. & Co, sent the cards direct to B & Co., and B. & Co., refused to accept them on the ground that they were not in accordance with samples The plaintiff brought an action against B & Co., for the price of the cards, and against W. & Co, claiming that if the cards supplied to B. & Co., were not in accordance with sample then he was entitled to damages against W. & Co. So that, in that case, as in this, the causes of action against the two parties were totally distinct and arose under different contracts, but the Court of Appeal held that the two causes of action could be joined in one action. It is quite true that the wording in the English rule is not identical with the wording of the rule we have to deal with, but, in my opinion, the wording of O. I, r. 3, in this country is much more favourable for the plaintiffs than the wording of the English rule, O. XVI, r. 4.

In my opinion, therefore, the learned Judge was wrong and this action must go back to be tried.

I desire to say that I think the learned Judge adopted an extremely inconvenient course in this case. As a general rule the Subordinate Judge ought not to dismiss an action on a preliminary issue, but ought to try the preliminary issue and then try out the other issues as well. Of course, there may be exceptional cases when the preliminary point seems clear and the record is a very heavy one and the trial of the other issues would take a long time. In such a case it may be desirable to dismiss the action on the preliminary issue but no such consideration as that arises in this case. The trial of the action on the merits would not have taken more than a few hours. The result of the course which the learned Judge adopted is that the unfortunate parties have to wait for four years in order to get the preliminary point disposed of and now they will have to go back to the trial Court in order to have the issues tried. I think the appeal must be allowed. Respondent No. 2, who took the preliminary point, must pay the plaintiff's costs of the appeal. Respondent No. 1 was not interested in the preliminary point and did not take it originally, but he has argued in this Court that we ought to exercise our discretion under O. II, r. 6, directing that the issues against the

(1) (1921) 2 K. B. 1; 90 L. J. K. B. 445; 124 L. T. 719; 37 T. L. R. 295.

(2) 109 Ind. Cas. 755; 55 C. 164; A. I. R. 1928 Cal. 199; 32 C. W. N. 885; 2 L. T. 40 C. 137.

two parties should be tried separately. I see no reason whatever for exercising our discretion in that way, and as respondent No 1 has failed on that point I think we should make no order as to his costs.

Murphy, J.—The real dispute on the statements in the plaint is about a sum of Rs. 9,000 the sale-price of some land. Defendant No. 1, who agreed to buy from defendant No. 2, who then represented plaintiff's firm, contends that the price settled was Rs. 5,000 only, and the reason for joining the two defendants was that plaintiffs considered that if they could not recover more than Rs. 5,000 from defendant No. 1 they had the right to recover the difference from defendant No. 2, in the terms of the agreement on the dissolution of the partnership. Under O. I, r. 3, the bond which justifies joining several defendants is, that the relief sought is one arising out of the same act or transaction, or series of transactions, jointly, severally or alternatively, involving a common question of fact or law had separate suits been brought. I agree that the relief here is sought in respect of the consideration of the agreement to sell, and whether it was for Rs. 5,000 or Rs. 9,000 is a question common to the case against both the defendants, and this seems to me sufficient to bring the case within the rule, and the finding that the suit is bad for multifariousness appears to me on the facts to have been a mistaken one. I agree that the decree should be set aside as proposed by the learned Chief Justice.

Costs of the trial will have to be dealt with by the trial Court.

R. L. *Appeal allowed.*

BOMBAY HIGH COURT.

Letters Patent Appeal No. 25 of 1929.
April 7, 1931.
BEAUMONT, C. J. AND MURPHY, J.

SANGANGAUDA FAKIRGAUDA—
DEFENDANT—APPELLANT
versus
HANMANTGAUDA SANGANGAUDA—
PLAINTIFF—RESPONDENT.

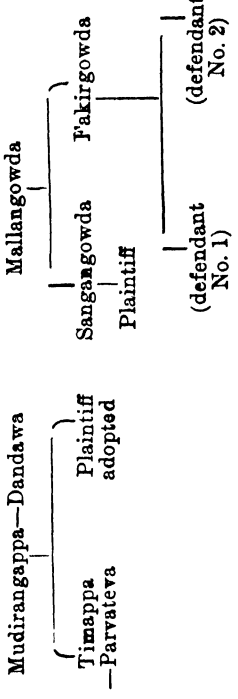
Hindu Law—Adoption (Bombay School)—Power to adopt—Death of son leaving widow—Mother's power to adopt with consent of son's widow.

Under the Bombay School of Hindu Law where a person dies leaving his widow and a son, and the son dies thereafter leaving a widow, the mother has no power to adopt, even with the consent of the son's widow. *Ramkrishna* v. *Shamrao* (1), followed. *Payapa* v. *Appanna* (2), distinguished.

Letters Patent Appeal against the decree of Madgavkar, J. in Second Appeal No. 28 o 1927, confirming the decree passed by the District Judge, Bijapur, in Appeal No. 85 of 1925, reversing the decree passed by the Subordinate Judge, Bagalkot, in Civil Suit No 603 of 1924.

The appeal was originally heard by Madgavkar, J. and his Lordship delivered the following judgment.

Madgavkar, J.—The relationship between the parties will be apparent from the following genealogical tree :—



The plaintiff-respondent claimed in this suit to be the nearest heir of Sangangauda and to succeed to his *watan* property. The defendants appellants resisted the claim on the ground that the plaintiff respondent had been adopted by Dandava the widow of Mudirangappa with the consent of Parvateva, the widow of Timappa the son of Mudirangappa. The respondent's reply was that his adoption by Dandava was invalid. The question in appeal is whether the respondent's adoption by Dandava was valid so as to deprive him of his succession to Sangangauda, or was invalid so as to maintain him in that succession. The trial Court held that the consent of Timappa's widow rendered the adoption valid, and, therefore, dismissed the suit. The lower Appellate Court held that Dandava had no

power to adopt, and, therefore, the adoption was invalid, and the suit must succeed. The defendants appeal

It is contended for the appellants that the Full Bench decision in *Ramkrishna* v. *Shamrao* (1), is not applicable, but that the present case falls within the third exception laid down by Mr. Justice Ranade in *Payapa* v. *Appanna* (2), and that the view in *Payapa's case* (2) had been applied and followed in a series of cases such as *Shidappa* v. *Ningangauda* (3), *Pratapsing Shivsing* v. *Agarsingji Raisingji* (4), *Vaman Vithal* v. *Venkaji Khando* (5) and *Yeshvadabai* v. *Ramchandra* (6).

For the respondent reliance is placed on the Full Bench decision in *Ramkrishna* v. *Shamrao* (1).

As was pointed out by Shah, J. in *Shidappa* v. *Ningangauda* (3), the Full Bench ruling in *Ramkrishna* v. *Shamrao* (1) is not in conflict with the main ground of the decision in *Payapa's case* (2).

The essential points in the two cases were entirely different. The question in *Payapa's case* (2), affirmed a rule that (page 329) :—

"it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, of their proprietary rights."

To this rule Ranade, J. sought to summarise four exceptions. The Full Bench decision in *Ramkrishna* v. *Shamrao* (1), affirmed the view of this Court in *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (7), where it was held that:

"An adoption to herself and her deceased husband by a mother who has succeeded as heir to her son after his death and that of his widow is invalid according to Hindu Law."

In the Full Bench case it is laid down that :—

"Where a Hindu dies, leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived".

The facts in the last case were very similar to the facts here, and these observations apply precisely to the facts now in question. Mudirangappa died in about 1875 and left his son Timappa who died about six years later, leaving a widow Parvateva who died in 1920. Dandava, the widow of Mudirangappa, purported to adopt the plaintiff-respondent in 1902 as heir to her husband Mudirangappa. That power under the above Full Bench ruling and on general principles she did not possess, and it was extinguished when Timappa died leaving the widow Parvateva. The case would be different had the power been potential and capable of revival as it might be in the various sorts of cases, some of which have been referred to in *Payapa's case* (2) In such a case it might well be that the consent of the parties affected by such adoption might validate an adoption otherwise invalid. This, however, is not the case in the present appeal. The same view has been taken by other High Courts: *Adivi Suryaprakasa Rao* v. *Nidamarty Gangaraju* (8), where it was held that :—

"A power given to a widow to adopt is absolutely at an end when once the estate has vested in the heir of her deceased son and is not revived even if she afterwards succeeds to the estate" and "that, in such a case, the consent of the son's heir in whom the estate had vested, will not validate the adoption. *Manikyamala Bose* v. *Nanda Kumar Bose* (9)"

and the observations of the Privy Council in *Madana Mohana* v. *Purushothama* (10). In this view, the trial Court was in my opinion, wrong in holding that any consent by Parvateva would validate the adoption of the plaintiff respondent by Dandava. I agree with the lower Appellate Court that Dandava had no power to adopt the plaintiff as she purported to do, and that the respondent did not, therefore, by such adoption lose his right to the estate of Sangangauda

The appeal fails and is dismissed with costs.

Defendants appealed under the Letters Patent.

Mr. *Jayakar* (with him Mr. *S. D. Sapre*,) for the Appellants.

Mr. *Nilkant Atmaram*, for the Respondent.

Beaumont, C. J.—This is an appeal under the Letters Patent from a decision of Mr. Justice Madgavkar in second appeal, and the case raises a short but interesting

(1) 26 B 526; 4 Bom. L. R. 315 (F. B.).
(2) 23 Bom. 327.
(3) 27 Ind. Cas. 51; 16 Bom. L. R. 663; 38 B. 721.
(4) 50 Ind. Cas. 457; 46 I. A. 97; 21 Bom. L. R. 496; 36 M. L. J. 511; 17 A. L. J. 522; (1919) M. W. N. 313; 10 L. W. 339; 24 C. W. N. 57 (P. C.)
(5) 61 Ind Cas. 460; 45 Bom. 829; 23 Bom. L. R. 269.
(6) 105 Ind. Cas. 351; 29 Bom. L. R. 1320.
(7) 17 B. 164.
*Page of 23 Bom.—[*Ed.*]
(8) 4 Ind. Cas. 326; 33 M. 228; 7 M. L. T. 236; (1910) M. W. N. 251.
(9) 23 C. 1306.
(10) 46 Ind. Cas. 481; 45 I. A. 156; 20 Bom. L. R. 1041; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 23 C. W. N. 177 (P. C.)

point of law. The plaintiff claims to succeed to certain *watan* property as the heir of his natural father Sangangauda. The answer of the defendants is that the plaintiff was adopted into the family of one Mudirangappa and that thereby he lost his right to succeed to his natural father. The reply of the plaintiff is that the alleged adoption was invalid.

The material facts are that the adoptive father Mudirangappa died in 1875 leaving a widow named Dandava, whom I will hereafter refer to as "the father's widow." He also left a son named Timappa who died in 1881. Timappa left a widow named Parvateva, whom I will refer to as "the son's widow." It is clear that on the death of the son the estate would vest in the son's widow, and that whether before or after the death of the son the father's widow could not herself exercise any power of adoption, because under the general rule of Hindu Law the widow has no power to adopt if by so doing she will divest the estate of another. Therefore, the father's widow never actually had a power of adoption which she could have exercised at any given moment. On the other hand the son's widow could undoubtedly have adopted to her husband after his death. In 1902 the son's widow consented to the father's widow adopting the plaintiff and it is not disputed that a form of adoption of that nature was gone through. The question is whether that adoption is valid

Mr. Jayakar, to whom we are indebted for his very able argument, has referred us to a large number of cases commencing with the Privy Council case of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (11) and including *Padma Coomari Debi* v. *Court of Wards* (12), *Thayammal and Kuttisami Aiyan* v. *Venkatarama Aiyan* (13), *Keshav Ramkrishna* v. *Govind Ganesh* (14), *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (7), *Ramkrishna* v. *Shamrao* (1) *Anandibai* v. *Kashibai* (15) and *Manikyamala Bose* v. *Nanda Kumar Bose* (9). Those cases establish a rule which, I think, is accurately stated in the judgment of the Full Bench of this Court in *Ramkrishna* v. *Shamrao* (1) a judgment which was expressly approved by the Privy Council in *Madana Mohana* v. *Purushothama* (10). The learned Judge Mr. Justice Chandavarkar delivering the judgment of the Court states the rule which he gathers from the Privy Council decisions at page 532* in these terms:—

> "Where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived."

Now it is clear that the facts of this case do come within the literal terms of that rule, because a Hindu died leaving a widow and a son and that son died leaving his own widow. But Mr. Jayakar says that in none of these cases was the question of consent to the adoption by the person in whom the estates were vested in any way raised. Of course the facts in the various cases differ, but putting it shortly I think they were all cases of this nature: A Hindu dies leaving a widow and descendants. So long as the descendants live the widow cannot exercise her power of adoption because of the general rule that she cannot divest the estate of others. Eventually by reason of the deaths of parties and the failure of issue, natural or adopted, the estates descend upon the original deceased owner's widow and the question which the Court has had to decide has been whether, when that event happens, the power of adoption which up to then the widow has not been able to exercise can then be exercised by her. The question really has been whether the power should be treated as having been in abeyance while the estates were vested elsewhere than in the widow and as having revived on the estates descending upon the widow, or whether the power should be treated as having come to an end. The Privy Council decided that in such cases the rule was that the power had come absolutely to an end, had been extinguished and could not be revived. I think, as appears from the Privy Council judgment in *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (11) that the rule is rather one of convenience than of principle, and that the Court felt that at some time or other this power of adoption must come to an end and could not be kept in a state of suspended animation indefinitely. At any rate the cases do undoubtedly establish that that rule exists, but Mr. Jayakar is quite right in saying that in none of those

(11) 10 M. I. A. 279; 3 W. R, P. C. 15; 1 Suth P. C. J. 574; 2 Sar. P. C. J. 111; 19 E. R. 978.
(12) 8 I. A, 229; 8 C. 302; 4 Sar. P. C. J. 285; 6 Ind. Jur. 148 (P. C.).
(13) 14 I. A. 67; 10 M. 255; 11 Ind. Jur. 271; 5 Sar. P. C. J. 10 (P. C.).
(14) 9 B. 94.
(15) 28 B. 461; 6 Bom. L. R. 464.

*Page of 26 Bom.—[*Ed.*]

cases was the question of consent by the owner for the time being of the estate discussed, and he says that this case really falls within the principle of *Payapa* v. *Apanna* (2). Now *Payapa's case* (2) was the converse of the present case. In that case the son had predeceased the father leaving a widow. Therefore, on the father's death the estate descended upon his widow, who had a power of adoption exercisable at any time. She consented to the son's widow exercising a power of adoption to the son, and it was held that that adoption was good. Mr. Justice Ranande who gave the judgment of the Court refers in the first instance to the settled rule that (page 328*):

"it is only the widow of the last full owner who has the right to take a son in adoption to such owner, and that a person in whom the estate does not vest cannot make a valid adoption so as to divest (without their consent) third parties, in whom the estate has vested, or their proprietary rights."

Then he says that there are four exceptions to this general rule and the third one is stated in these terms (page 331*):—"When the adoption takes place with the full assent of the party in whom the estate has vested by inheritance, the adoption is validated by such consent," and in the course of his judgment Mr. Justice Ranade gives what he considers the justification for the rule. He says at page 332* of the report:—

"Nothing is more common in this country than to find that parents, when they grow old, and have the misfortune of losing an only son in their old age, leaving a young widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves."

Mr. Nilkant has suggested that *Payapa's case* (2) is not good law, and he relies on an observation of Mr. Justice Chaubul in *Datto Govind* v *Pandurang Vinayak* (16). But *Payapa's case* (2) has been followed by this Court in *Shidappa* v. *Nigangauda* (3) and in *Yeshvadabai* v *Ramchandra* (6). In particular, in the case of *Shidappa* v. *Nigangauda* (3) Mr. Justice Shah, a great authority on Hindu Law, not only follows *Payapa's case* (2) but expressly says that he approves of it. I think, therefore, that we must take *Payapa's case* (2) as being an authority binding upon this Court. But I also think that the learned Judges who decided *Payapa's case* (2) had not present to their minds any case of the exercise of a power of adoption which had come to an end. They state the rule by saying that the adoption is "validated" by the consent. The word "validated" would be an inappropriate word to apply to a power which had altogether ceased to exist. I think, therefore, we must take the rule as stated in connection with the facts of that particular case in which there is no suggestion that the power had come to an end and had been extinguished. The real question which we have to determine in this appeal is whether this case on its facts falls within *Payapa's case* (2) or whether it falls within the general rule established by the Privy Council as stated in *Ramkrishna* v. *Shamrao* (1). Mr. Jayakar says, and I am disposed to agree with him, that there is no substantial difference between the adoption which was held valid in *Payapa's case* (2) and the adoption with which we are dealing in this case. It does not seem to matter to the reversioners whether the father's widow consents to the adoption by the son's widow or whether the son's widow consents to the adoption by the father's widow. In either case the adoption goes in the same line and the effect on the reversioners is the same. But there is in, my opinion, this essential difference between *Payapa's case* (2) and the present case. In *Payapa's case* (2) there was no question of the power to adopt of the son's widow having been extinguished. It is true that it never became exercisable and could not be exercised at the moment when the particular adoption was made, because any such exercise would divest the estate of the father's widow. But if that is the only objection to the exercise of the power, it seems logical to hold that the objection can be removed with the consent of the person affected, namely, the father's widow. But in the present case, having regard to the decisions of the Privy Council, we are bound to hold that the power of adoption in the father's widow has absolutely come to an end, has been extinguished, and cannot be revived; and if that is so it seems to me impossible to say that it can be validated by the consent of anybody. However the case is put, it is clear that the power of adoption which was exercised in this case was the power of the father's widow, and not the son's widow. However much it may have been exercised with the consent of the son's widow, it is in no sense a delegation of the power which admittedly existed in the son's widow, because any adoption by the father's widow must be to her husband, the father and any adoption by the son's widow must be to her husband, the son. On the whole, therefore, I have come to the conclusion that to apply the principle of *Payapa's case* (2) to the facts of

(16) 32 B. 499; 10 Bom. L. R. 692.

*Page of 23 Bom.—[*Ed.*]

this case would really be to go behind the rulings of the Privy Council, and that we must hold that the adoption by the father's widow in this case was invalid. The appeal must accordingly be dismissed with costs.

Murphy, J.—The facts out of which this appeal arises are the occasion of a new point of Hindu Law, or at any rate of one not directly included in existing decisions. The original plaintiff, Hanmantgauda, was adopted into another family by Dandava, a widow to her deceased husband. He, however, claimed to be the next heir to his natural father, on the ground that his adoption by Dandava had been invalid, because at the time she had no power to adopt, since her husband, who had died in 1875, had left a son Timappa who died in 1881 leaving a widow Parvateva, who on these facts was alone entitled to adopt a son to the family. The reply was that Dandava's adoption had been made with Parvateva's consent, which validated it. Whether Parvateva could, by consenting to the adoption, validate it, is the only point in the appeal.

I think the general rule is beyond dispute, that the person entitled to adopt in a Hindu family is the widow of the last male owner, with certain exceptions, such as a widow in an undivided Hindu family who adopts with the consent of her husband's surviving coparceners. The original Court dismissed the plaintiff's suit. The first Appellate Court allowed it, and a single Judge of this Court agreed with the first Appellate Court in second appeal. This appeal is under the Letters Patent.

The general rule to be derived from authoritative decisions is that where a Hindu dies leaving a widow and a son, and the son dies leaving a widow to continue the line by means of an adoption, the power of the first widow is extinguished and can never be revived. We have considered the cases of *Pudma Coomari Debi* v. *Court of Wards* (12), *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (11), *Thayammal and Kuttisami Aiyan* v. *Venkatarama Aiyan* (13), *Ramkrishna* v *Shamrao* (4), which was a decision of the Full Bench, *Krishnarav Trimbak Hasabnis* v. *Shankarrav Vinayak Hasabnis* (7) and *Vaman Vithal* v. *Venkaji Khando* (5) and the cases relied on for the contrary, the original one being *Payapa's case* (2)—which is the exact converse of the present one—*Payapa* v. *Appanna* (2). The facts there were that the widow of the last male owner, in whom the right vested, consented to an adoption by her predeceased son's widow, such an adoption being held valid, as being in agreement with Hindu sentiment, by the late Mr. Justice Ranade. The later Bombay cases are all on adjacent facts to those in *Payapa's case* (2): see *Vaman Vithal* v. *Venkaji Khando* (5) and *Yeshvadabai* v. *Ramchandra* (6). Mr. Justice Ranade's third exception, in *Payapa's case* (2), rests on an analogy drawn from the parallel instances where an adoption is permissible with the consent of the person in whom the estate vested at the time, and Mr. Jayakar's argument really is, that this is such a case, and therefore, comes within that rule. On the facts in *Payapa's case* (2) the widow of the predeceased son might have validly adopted with the consent of her father-in-law and the decision is really an extension of this power of consenting to the widow, in whom the estate vested on his death. But the facts are not so here. On those of the present case, Dandava never had a power of adoption, for on her husband's death her son stood in its way, and on his death, the estate vested in the son's widow, and if Dandava adopted, she was really doing so as deputy of her daughter-in-law, and there is no authority for holding such an adoption valid. The rule is clear that, in such circumstances, the power of the former widow, if it ever existed, is extinguished, and that it can never be revived. I agree that the appeal must be dismissed with costs, and the decree of the lower Appellate Court confirmed.

A *Decree confirmed:*
Appeal dismissed.

BOMBAY HIGH COURT.

First Civil Appeal No. 64 of 1930.
July 10, 1931.
BAKER AND NANAVATI, JJ.

RAMLAL HARIRAM—APPELLANT
versus
RATANLAL BALCHAND—RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15-B—Decree by Court to which Act does not apply—Execution by Court where Act applies—Power to grant instalments.

Held, per *Baker, J.*, (*Nanavati, J.*, dubitante):—

When a decree has been passed by a Court where the Dekkhan Agriculturists' Relief Act does not apply, it is not open to the executing Court where

the Dekkhan Agriculturists' Relief Act does apply, to grant instalments to the defendants assuming that they are agriculturists. [p. 505, col 1.]

First Appeal from a decision of the First Class Sub Judge, Jalgaon.

Messrs. *H. C. Coyajee* and *Y. V. Dixit*, for the Appellant.

Mr. *J. G. Rele*, for the Respondent.

Baker, J—The point arising in this appeal is one which, so far as I know, has not come before the Courts below. The facts are that the plaintiffs obtained a decree on a mortgage against the defendants in the Court of the District Judge at Akola in the Berars. The defendants pleaded that they were agriculturists, and prayed for instalments, but the Court held that the Dekkhan Agriculturists' Relief Act not having been made applicable to the Berars, the defendants could not avail themselves of its provisions, and they could not claim accounts or instalments. The bulk of the mortgaged property is situated in the Khandesh District. The decree was transferred for execution to the First Class Subordinate Judge of Jalgaon. The defendants asked for instalments, but the Judge held that instalments could not now be allowed as they were claimed in the suit and were refused, and, therefore, it was not necessary to go into evidence about their status as agriculturists. The defendants make this appeal, and the point is, whether, when a decree has been passed by a Court where the Dekkhan Agriculturists' Relief Act does not apply, it is open to the executing Court where the Dekkhan Agriculturists' Relief Act does apply to grant instalments to the defendants assuming of course that they are agriculturists. The learned Counsel for the appellant has contended that the Judge is wrong in holding that instalments were refused, the ground on which the Akola Court proceeded being that the Dekkhan Agriculturists' Relief Act was not applicable and so the question of instalments could not be considered. The defendants claim instalments under s. 15-B, Dekkhan Agriculturists' Relief Act, which says:

"The Court may in its discretion, in passing a decree for redemption, foreclosure or sale in any suit of the descriptions mentioned in s 3, cl. (*y*) or cl. (*z*), or in the course of any proceedings under a decree for redemption, foreclosure or sale passed in any such suit, whether before or after this Act comes into force, direct that any amount payable by the mortgagor under that decree shall be payable in such instalments, etc., etc."

Now in order that s. 15-B may apply, the suit in which the decree is passed or the execution proceedings are taken must be a suit of the description mentioned in cl. (*y*) or cl. (*z*). The present suit was of the same nature as suits falling under cl. (*y*), but it was not a suit under s. 3, Dekkhan Agriculturists' Relief Act. Chapter II, Dekkhan Agriculturists' Relief Act, applies to suits hereinafter described when they are heard by Subordinate Judges of the First or Second Class, and do not exceed a certain value. That is s. 2, cl. (*b*). The present suit is not a suit of that description. It was not heard by a Subordinate Judge under the Dekkhan Agriculturists' Relief Act, and it was held in *Devu* v. *Revappa* (1), that, considering the nature of the Act, the description of 'suit' in s. 3 is not confined to the relief claimed in the suit, but also includes the status of the parties, and hence it was held that the Court cannot, under the provisions of s. 15-B, Dekkhan Agriculturists' Relief Act, 1879, grant instalments under a decree to a person who at the time the decree was passed was not, but has since become, an agriculturist. There can be no doubt that at the time the suit was determined the defendant was not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which does not apply in Berars. There is another case in the same volume, which is apposite to the present case, *i. e*, *Mulji* v. *Goverdhandas* (2), in which a decree was passed on the original side of the High Court against the defendant. In execution proceedings the defendant made an application under s. 20, Dekkhan Agriculturists' Relief Act, for instalments contending that he was an agriculturist. It was held (1) that the point whether the defendant was or was not an agriculturist was involved in the suit as in virtue of s. 11 and s. 3, cl. (*w*), Dekkhan Agriculturists' Relief Act, the High Court would not have jurisdiction to entertain the suit if the defendant was an agriculturist, and it must, therefore, be taken to have been decided that the defendant was not an agriculturist at the date of the decree and (2) that as the defendant was not an agriculturist at the date of the decree he could not in execution proceedings raise the question that he was an agriculturist at the date of the decree. Applying this principle, it is clear

(1) 67 Ind. Cas. 840; A. I. R. 1922 Bom. 220; 46 B. 964; 24 Bom. L. R 370.

(2) 76 Ind. Cas. 148; A. I. R. 1923 Bom. 36; 24 Bom. L. R. 1291.

that as defendants were not agriculturists within the meaning of the Act at the date of the passing of the decree, they cannot now in execution proceedings raise this question.

The learned Counsel for the appellants has relied on three cases, *Maneklal* v. *Mahipatram* (3), *Rudrappa* v. *Chanbasappa* (4) and *Mancherji* v. *Thakordas* (5) In *Maneklal* v. *Mahipatram* (3), which is a Full Bench case, it was held that under s. 21, Dekkhan Agriculturists' Relief Act, 1879, the material date for the determination of the status of an alleged agriculturist is the date of the attempted arrest.

But by reason of the definition of the term "agriculturist" in s. 2 (2) of the Act, that determination may also import the determination of his status at the date when the liability arose. A person, who is sued as a non-agriculturist and who fails to appear and urges his status at the hearing of the suit and suffers a money decree to be passed against him *ex parte*, is not precluded from urging in execution proceedings that he is an agriculturist at the date of the arrest or imprisonment; and for the purposes of that plea, he is not debarred from urging, if necessary, that he was an agriculturist at the date of the decree. That case was a case under s. 21. This case does not overrule *Devu* v. *Revappa* (1), as is shown by the remarks of Patkar, J , at page 1120*. The next case relied on, *Rudrappa* v. *Chanbasappa*, (4) holds that where a decree is passed *ex parte* the defendant can in execution proceedings show that he was an agriculturist at the date of the decree and claim instalments under s. 15-B. The material date of the determination of the status of the alleged agriculturist under s. 15-B is the date of the decree, and that principle has been extended in the case of *Narayan* v. *Dhondo* (6), where it was held that the defendant can in execution proceedings show that he was an agriculturist at the date of the decree in spite of the fact that he had not claimed the privilege in previous execution proceedings arising out of the same decree. The material date for the determination of the status of the alleged agriculturist in all these three cases, which were decided under s. 15-B was, therefore, held to be the date of the decree. This view proceeded upon the particular words of s. 15-B which involved the result that the alleged agriculturist had to prove that he was an agriculturist at the date of the decree. But it has already been pointed out that at the date of the decree of the Akola Court the defendant was not an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act. It follows, therefore, on the decided case that he cannot raise that question now.

The learned Counsel for the appellant has relied on the case, in *Mancherji* v. *Thakordas* (5). In that case in execution of a decree for sale of mortgaged property a portion of the property was sold, and the rest was ordered to be sold by the Collector to whom the decree was transferred for execution. In the meanwhile the Dekkhan Agriculturists' Relief Act having been made applicable to the District, the mortgagor applied to the Court for payment by instalments under s. 15-B. The application was refused by the Court on the ground that the decree having been transferred to the Collector, it had no power to grant instalments. It was held on appeal by the mortgagor, reversing the order of the lower Court, that payment by instalments could be decreed. The application for payment by instalments having been made within one month from the time the Dekkhan Agriculturists' Relief Act was made applicable, no question of limitation arose. Now it is true that in that case at the time the decree was passed the Dekkhan Agriculturists' Relief Act was not applicable to the Surat District, and, therefore, it might be contended that the defendant was not an agriculturist within the meaning of the Act. But nowhere in the judgment do I find any reference to this point, the case, having been decided on other considerations, and hence although a very similar point to the present arose in that case it does not seem to have received the attention of the learned Judges deciding that case and in these circumstances I think I am bound by the view expressed in the cases already quoted, *Devu* v. *Revappa*, (1) etc. I am of opinion that the suit in which the decree was passed was not a suit under the Dekkhan Agriculturists' Relief Act, nor

(3) 103 Ind. Cas. 898; A. I. R. 1927 Bom. 492; 51 B. 454; 29 Bom. L. R. 1109. (F. B.)

(4) 80 Ind. Cas. 162; A. I. R. 1924 Bom. 305; 26 Bom. L. R. 153.

(5) 31 B. 120; 8 Bom. L. R. 963.

(6) 94 Ind. Cas. 76; A. I. R. 1926 Bom. 246; 28 Bom. L. R. 305.

*Page of 46 B.—[*Ed.*]

was the defendant an agriculturist as defined in that Act, and, therefore, s. 15-B will have no application. I may further refer to *Sawantrawa* v. *Giriappa* (7), as supporting my view.

I am, therefore, of opinion that the view of the lower Court is correct, and the appeal should be dismissed with costs including costs in the lower Court. In Civil Application No. 418 of 1930, the rule is discharged with costs.

Nanavati, J.—The decree-holder in this case had obtained a mortgage-decree against the mortgagors in the Court of the District Judge of Akola on 30th September, 1926, and it was sought to execute the decree in the Jalgaon Court by sale of the joint share of the debtors in the mortgaged property the bulk of which is situated in Khandesh. The judgment-debtors, among other things, claimed to be treated as agriculturists and asked for instalments The learned Subordinate Judge held that instalments could not be allowed as they were claimed in the suit and were refused. It is from this decision that the present appeal is brought.

Now it is true that an issue was raised in the trial Court on the point in question. It runs as followos :

"16. Whether the Dekkhan Agriculturists' Relief Act can apply to the defendants. Whether they can avail themselves of its provisions and whether they can claim accounts of the past dealings. Whether they can claim a decree for instalments?"

On this issue, the decision of the Akola Court was to the effect that as the Dekkhan Agriculturists' Relief Act had not been made applicable to the Berars the defendants could not avail themselves of its provisions. He, therefore, held that the Court could not grant any relief to the defendants under the Act. It has been contended, and I think rightly, that this decision is not a decision on the merits of the claim. The Court did not consider the question whether the defendants came within the description of an agriculturist in the Dekkhan Agriculturists' Relief Act; nor did it consider the question whether the grant of instalment would be a proper exercise of discretion in the circumstances of this case or not. It could not consider these questions as the Act was not in force in its territory. The cases, therefore, in which it has been held that where the status of an agriculturist might have been pleaded at the trial of a suit but was either not so pleaded, or if pleaded, was decided adversely to the defendant, the same plea could not be raised again in execution proceedings, do not apply to the present case. For example, in *Mulji* v. *Goverdhandas* (2), the suit was one that could not have been tried by the High Court on the original side unless the defendant had been a non-agriculturist; and so it was held that the fact that it was tried by that Court necessarily implied a decision against the status sought to be pleaded in subsequent execution proceedings. But in the present case the fact that the Akola Court was not able to consider the question of the defendant's status in any way, did not necessarily imply that he was not a person entitled to that status in the Jalgaon Court.

The question, however, remains whether s. 15 B, Dekkhan Agriculturists' Relief Act, can in its terms apply to the appellants. That section applies to proceedings under a decree in a suit of the description mentioned in s. 3, cl. (*y*), which refers to suits

"for sale of mortgaged property when the defendant or any one of the defendants is an agriculturist".

Now "an agriculturist" is defined in s. 2, and since the Act did not apply to the Akola Court, the question is whether the suit could at all be described as a suit against an agriculturist as defined in the Act.

A case somewhat analogous in its circumstances to the present case is to be found in *Mancherji* v. *Thakordas* (5). There the position was that at the date of the decree the Dekkhan Agriculturists' Relief Act was not applicable to the district in question, but it became applicable subsequently, and during the execution proceedings the judgment-debtor applied for instalments. The application was refused by the lower Court on the ground that the decree having been transferred to the Collector, it had no power to grant instalments. It was held on appeal that payment by instalments could be decreed. But the point that at the time when the decree was passed the defendant could not have been an agriculturist as defined in the Act by reason of the Act not being applicable to the District, does not appear to have been argued or noticed in the case.

It may, however, be urged that a person may be an agriculturist, that is to say, one who earns his livelihood by agriculture as defined in the Act, though he may not be one for the purposes of a suit in the Akola Court. When a class is defined in an Act,

(7) 21 Ind. Cas. 4; 38 B. 18; 15 Bom. L. R. 778 (F. B.).

it does not mean that persons included in that class can have no existence where the Act does not apply. In other words, an agriculturist is an agriculturist whether the Dekkhan Agriculturists' Relief Act applies or does not apply to the Court in which a suit against him is brought. The only result of the non-applicability of the Act to the area is that the Court cannot give him the protection of the Act. It may further be urged that in interpreting an Act intended for the benefit of a special class it would be too narrow a construction to hold that a person who satisfies the conditions laid down in the definition cannot get the benefit of that Act even where that particular legislation applies, merely because another Court could not apply the Act.

The question, however, is one of considerable difficulty. In *Sawantrawa* v. *Giriappa* (7), which was a case under s. 10 A, it was held that "agriculturist" was not to be read in the general and popular sense as a person earning his living by agriculture, but that he must belong to that class as defined by Statute at the date of the transaction. It was there held that the mortgagor could not have been an agriculturist at the date of the transaction because at the date the Act had not been extended to the district in question. This case, however, is distinguishable, because in the present case the mortgagors who had lands in Khandesh at the date of the transaction were (if they fulfilled the other conditions of the definition) agriculturists as defined in the Act in Khandesh.

In *Devu* v. *Revappa* (1) it was no doubt held that s. 3 includes the question as to the status of the parties and that, therefore, at the date of the suit the defendant must be an agriculturist. This is not, however, the point in dispute. This case does not lay down that he must be an agriculturist in the district in which he is sued.

In *Ganpat* v. *Tulsi* (8) the question was again under s. 10-A of the Act and it was agreed that a person to be an agriculturist within the definition in s. 2 should earn his livelihood by agriculture within a district where the Act for the time being extends. The main question in that case was different, *viz*, what was to be understood by the phrase "the District to which the Act may extend," and whether the extension of certain sections of the Act to a district was sufficient extension of the Act or not.

(8) 81 Ind. Cas. 284; A. I. R. 1924 Bom. 219; 48 B. 214; 26 Bom L. R. 118. (F. B.)

These cases, therefore, lay down that an "agriculturist" means an agriculturist as defined in the Act, and it might appear at first sight that these cases lay down that there can be no suit against an "agriculturist" as defined by the Act in a Court to which the Act does not extend. It is however possible to distinguish the present case for the following reasons. In the cases above referred to, the lands of the defendant from which his status as an agriculturist arose were situated in the district in which the suit against him was brought. If the Act had not been extended to that district he could not have been an agriculturist as defined for the reason that the definition requires that the agriculturist should earn his livelihood from agriculture carried on in a district to which the Act applies. But in the present case the suit was brought in a Court in a different district under the provisions of s. 17, Civil Procedure Code, part of the mortgaged lands being in the jurisdiction of that Court. Hence, in the present case the possibility of the defendant satisfying the condition laid down in the definition in s. 2 is not excluded. He may well have been a person earing his livelihood at the date of the suit by agriculture carried on within the limits of Khandesh District where his lands are situated and to which the Act applies. The only difficulty in his way is the fact that the Akola Court could take no cognizance of the fact because the Act does not apply to that district.

The question is, therefore, an extremely difficult one and there is much that can be urged for conflicting opinions. I have had the advantage of reading the judgment of my brother Baker. It seems to me, with great respect, that the fact that the case was not tried by a Subordinate Judge under the Dekkhan Agriculturists' Relief Act is immaterial for the present purpose. That fact is only material as regards the question of the application of the special procedure laid down in Chap. II, while s. 15 B is in Chap. III of the Act. I am inclined to think that it is possible for a person to be an agriculturist as defined in the Act though sued in a Court where the Act does not apply. The cases which appear to lay down that he cannot, all deal with the case of a person whose "agricultural work" was carried on within a district where the Act had no application, the Court in which he was sued also being situated in the same district.

In the present case the appellants' "agricultural work" (assuming that they so earn their livelihood) is carried on in a district where the Act does apply (Khandesh), and the only point against them is that they were sued in a Court where it does not. As against this is the fact that the execution proceedings are in a Court where the Act does apply. If in these circumstances it were to be held that they cannot possibly be "agriculturists" as defined in the Act merely because the trial Court could not apply the definition, it means not only that an agriculturist can have no existence in a Court not under the Act, but also that his existence cannot be recognized at any subsequent stage even by a Court governed by the Dekkhan Agriculturists' Relief Act. It would follow that when a decree of a Native State is transferred for execution to a British Indian Court under s. 44, Civil Procedure Code, the latter Court would be bound to execute the decree even by arrest of the judgment-debtor in spite of his being in a position to prove that at all material dates he was an agriculturist as defined by the Act in British India. Such a result would be at least very anomalous. Moreover, the Dekkhan Agriculturists' Relief Act is a special legislation designed for the protection of a particular class and it should, as far as possible, receive an interpretation calcutated to carry out that object.

It appears to me unnecessary however in the present case to decide this point finally one way or the other since it is clear that the relief sought by the appellants is a purely discretionary one which the Court might or might not grant according to the circumstances of each case. The circumstances of the present *darkhast* are such as to make it extremely unlikely that any Court would exercise that discretion in favour of the appellants. The judgment (Ex. 25) shows that the debt on which the suit is based, in its origin was a trade debt incurred in or about 1916. There were various proceedings in connexion with the debt and finally the suit from which the present proceedings arose was brought in the year 1922. A decree was obtained in the year 1926 and the decree was transferred to the Court at Jalgaon in 1928. No portion of the decretal amount appears to have been realised so far. Taking these circumstances into account as was done in *Balkrishna* v. *Sarupchand* (9), the present case does not appear to be a case in which the discretion of granting instalments should in any case be exercised.

I would, therefore, maintain the order of the learned First Class Subordinate Judge refusing to grant instalments and dismiss the appeal with costs.

A. *Appeal dismissed.*

(9) 95 Ind. Cas. 1017; A. I. R. 1926 Bom. 389.

BOMBAY HIGH COURT.

Second Civil Appeal No. 243 of 1928.
July 11, 1931.
BAKER, J.

ALLIBHAI MAHOMED AKUJI AND OTHERS—DEFENDANTS—APPELLANTS
versus
DADA ALLI ISAP AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 54, 10—Agreement of sale prior to Transfer of Property Act—Creation of equitable interest in property—Rule of perpetuities—Restraint or alienation—Civil Procedure Code (Act V of 1908), s. 66, construction of—Agreement of sale from vendee of benamidar, *validity of.*

Agreements for the sale of land entered into prior to the passing of Transfer of Property Act, were governed by English Law and created an equitable interest in land and, therefore, were subject to the rule of perpetuities. *Harkishandas* v. *Bai Dhanu* (1), *Dinkarrao Ganpatrao* v. *Narayan Vishwanath* (2), *London and South Western Railway Co.* v. *Gomm* (3), *Woodall* v. *Clifton* (4) and *Maharaj Bahadur Singh* v. *Balchand* (6), followed. *Charamudi* v. *Raghavulu* (5), not followed. *Fakirji* v. *Bhagvatlal* (7), distinguished. [p. 510, col. 2.]

Where an absolute transfer of property is effected and by a subsequent agreement executed on the same day the trasferee is restrained from parting with or disposing of that property to any person other than the transferor, the condition amounts to absolute restriction on the right of transfer and is void. *Asghari Begam* v. *Maula Baksh* (8), followed. [p. 511, col. 2; p. 512, col. 1.]

Section 66, Civil Procedure Code, has to be construed strictly and applies to a suit in which the cause of action is given by the *benami* purchase and not to a suit which is based on a contract which is separate from the transfer. *Balaram* v. *Naktu* (9), distinguished. [p. 512, col. 1.]

Second Appeal against a decision of the District Judge, Broach, in Appeal No. 40 of 1926.

Mr *H. V Divatia*, for the Appellants.
Mr *K. N. Koyajee*, for the Respondents.

Judgment.—The facts of this appeal are peculiar, and were I not of the opinion that they are covered by authority I should have referred it to a Bench.

The facts are simple. The plaintiffs sued for specific performance of a contract of sale dated 14th May, 1874. The plaintiffs' ancestor Ali Isap was the original owner of the land. One Ranchhod obtained a decree against him in 1871, and then in sale in execution the suit land was sold by auction and purchased by one Jibhai on 8th October, 1872. On 14th May, 1874, the said Jibhai sold the suit land to the grandfather of defendants Nos 1 to 3 and 5 to 10 and on the same day the vendee Akuji, defendants' grandfather executed a registered agreement in favour of Abhram by which he bound himself to sell the land to Abhram for Rs. 461 at any time when the money was offered, and not to sell the land to any other person whatever. The plaintiffs' case is that Jibhai was a mere *benamidar* for their ancestor Isap, the father of the person to whom the agreement was executed. And now after more than 50 years they sue for specific performance of the agreement. Both the Courts below have awarded the plaintiffs' claim. Defendant No. 1 makes this second appeal, and four objections have been taken in appeal: *viz.*, (1) that the agreement is incapable of specific performance as it infringes the law of perpetuity, (2) the agreement which prohibits alienation to anybody else is void, (3) Jibhai was a *benamidar* of the original creditor, and plaintiffs sue to enforce the agreement against the successor-in-title of the original purchaser, which is against s 66, Civil Procedure Code, and (4) the original agreement was with a minor. (This has been given up).

The most important ground is the first one. The agreement in question is before the Transfer of Property Act came into force. Under s. 54, Transfer of Property Act, a contract for sale does not of itself create any interest or charge on such property but it is contended that before the Transfer of Property Act came into force it was held that English Law applied to agreements and they created an equitable interest in land, and, therefore, were subject to the law of perpetuities, and reference is made to *Harkisandas* v. *Bai Dhanu* (1) That case refers to the case of *Dinkarrao Ganpatrao* v. *Narayan Vishwanath* (2) in which it was held, in dealing with a contract of 1878, that prior to the Transfer of Property Act a contract for the sale of immovable property created an equitable interest in the property and made the purchaser the owner in equity, and consequently the English decisions like *London and South-Western Railway Co.* v. *Gomm* (3) would apply, and it was not, therefore, really necessary in that case to decide the question whether the law would be the same in cases governed by the Transfer of Property Act. On reference to *Dinkarrao's case* (2), I am of opinion that the present case is clearly governed by it In that case by a sale-deed of 1878 the vendor conveyed to the purchaser a plot of land forming part of a larger piece of land, and the vendor covenanted that:

"In case you or your heirs have to sell the said plot, the same is to be sold back to me for the above-mentioned value. It is not to be sold to any other person. In case you are informed in writing that I or my heirs or *vahivatdars* or donees from me are not going to purchase it, then only you can sell it to another person if you like."

It was held that the covenants in question were void as offending against the principle underlying the rule against perpetuities, relying on *London and South-Western Railway Co.* v. *Gomm* (3), and the other cases quoted there. It is described in the judgment as a contract creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, and it was held by Macleod, C. J., that such contracts, though not creating an interest in land either equitable or executory under s. 54, Transfer of Property Act, do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties, and the rule of perpetuities made applicable to this country by s. 14, Transfer of Property Act, applies to this class of contracts, and it was held by Kanga, J., that prior to the Transfer of Property Act the law assumed in Illus. (*a*), s. 13, Specific Relief Act, that a contract for the sale of immovable property created an

(1) 98 Ind. Cas. 634; A. I. R. 1926 Bom. 497; 50 B. 566; 28 Bom. L. R. 954 (F. B.).
(2) 82 Ind. Cas. 628; A. I. R. 1922 Bom. 84; 47 B. 191; 24 Bom. L. R. 449.
(3) (1882) 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.

equitable interest in the property and made the purchaser the owner in equity, was the law in India, and he goes on to say (page 215*):

"Now we have before us an agreement made in 1878 to convey an immovable property upon the happening of an event which might occur at a more remote period than the lives in being and 18 years afterwards. It is an agreement creating under the law prior to the Transfer of Property Act an equitable interest in immovable property which would be void as infringing the rule against perpetuities": *London and South-Western Railway Co.* v. *Gomm* (3) and *Woodall* v. *Clifton* (4)."

I am unable to see any distinction between that case and the present case. In the present case we have an agreement which gives to one of the parties to it the right of pre-emption which might not arise until long after the period contemplated by the law of perpetuities, and is as a matter of fact now attempted to be enforced after an interval of 51 years The learned Advocate for the respondents admitted that he was not able to distinguish that case on any plain basis, but contended that a different view has been taken by the Madras High Court in *Charamudi* v. *Raghavulu* (5). I am, however, bound to follow the ruling of the Divisional Bench of this Court and it is not for me to say whether the view taken by the Madras High Court is correct or that taken by this High Court There is moreover a case of the Privy Council in *Maharaj Bahadur Singh* v. *Balchand* (6) which leads to the same conclusion. There an agreement had been made between a Maharaj and a Jain Society that if the Society should require a site for the erection of a temple thereon, he and his heirs would grant a site free of cost. The proprietor afterwards alienated the whole hill. Subsequently the Society sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site and that they had taken possession but had been dispossessed. It was held that the action failed because the agreement conferred on the Society no present estate or interest in the site, and was unenforceable as a covenant since it did not run with the land and infringed the rule against perpetuities It has been argued by the learned Advocate for the respondents that that was a suit against an alienee from the person who originally entered into the contract but that is not the sole ground of the decision. Their Lordships say (at page 380 of 46 I A.) that the covenant does not, and cannot, run with the land, and therefore was not capable of enforcement. But their Lordships also hold (page 380 of 46 I. A.):

"Further if the case be regarded in another light—namely, an agreement to grant in the future whatever land might be selected as a site for a temple—as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest in *præsenti*, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

In the present case the interest created is one which would take effect by the tender of the fixed price at a later date which is uncertain, the period being left entirely to the option of Abhram or his heirs. The learned Advocate for the respondents also referred to *Fakirji* v. *Bhagvatlal* (7). That however was a case under the Registration Act, and does not in my opinion, affect the principles which are laid down in the last lines of the Privy Council judgment in *Maharaj Bahadur Singh* v. *Balchand* (6) which I have just referred to. As a result, I must hold that the agreement is void as being against the principle of perpetuties, and that it cannot, therefore, be enforced.

This is sufficient for the decision of the appeal. I will however refer briefly to the other two contentions which have been raised by the appellant, in case there is a Letters Patent appeal against this decision. It has been contended that the agreement is also bad inasmuch as it prohibits alienation except to the plaintiffs and at a fixed price, and it, therefore, offends against the principle of s. 10, Transfer of Property Act, which provides that :

"where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him," etc

It has been contended that the case is governed by *Asghari Begam* v. *Maula Baksh* (8), where it was held that where a deed of transfer at first absolutely transferred property to another, but by a subsequent

(4) (1905) 2 Ch. 257; 74 L. J. Ch. 555; 93 L. T. 257; 54 W. R. 7; 21 T. L. R. 581

(5) 28 Ind. Cas. 871; 39 M. 462; 28 M. L. J. 471; 16 M. L. T. 76; (1915) M. W. N. 596.

(6) 61 Ind. Cas. 702; A. I. R. 1927 P. C. 165; 6 Pat. L. J. 163; 48 I. A. 376; (1921) M. W. N. 157; 2 P. L. T. 131; 25 C. W. N. 770; 3 U. P. L. R. (P. C.) 29; 14 L. W. 254 (P. C.)

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(7) 119 Ind. Cas 793; A. I. R. 1929 Bom. 290; 31 Bom. L. R. 494; Ind. Rul. (1929) Bom. 569.

(8) 116 Ind. Cas. 90; A. I. R. 1929 All. 361; (1929) A. L. J. 515.

clause makes the clause subject to a condition restraining the transferee from parting or disposing of that interest to any person other than the transferor, the condition amounts to an absolute restriction on the right of transfer and so is void. In the present case the transfer was by Jibhai the auction-purchaser to the defendant's ancestor, and that transfer was without any condition, and it is contended that in the Allahabad case the clause prohibiting the transfer was in the deed. In the present case the prohibition of transfer is in a separate agreement made with a third person, *i. e.*, Abhram. It is further contended on behalf of the appellant that the transfer by Jibhai and the agreement with Abhram which took place on the same day formed part of the same transaction, and are based on the fact of Jibhai being only a *benamidar* for Abhram who was the real owner of the land. The question of whether this amounts to a restraint of alienation within s. 10, Transfer of Property Act, which by the way was not in force at the time when this transaction was entered into, would depend on whether the agreement with Abhram is regarded as forming part of the same transaction as the sale by Jibhai. In my opinion they should be so regarded, and, therefore, under the ruling in the Allahabad case referred to above the restriction on alienation would be void under the principles of s. 10, Transfer of Property Act, although the Act itself was not in force at that time. It has been frequently held that the principles which underlie the Act were principles in existence before.

The third objection is that the suit is barred by s. 66, Civil Procedure Code, which lays down that:

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims".

and it is contended that the present suit is based on the allegation in the plaint that Jibhai was merely a *benamidar* for the original owner Ali Isap whose descendant the plaintiff is. It is contended that that section has no application. The section has to be construed strictly. The present suit has nothing to do with the transfer by Jibhai to the defendants' ancestor, and the ruling in *Balaram* v. *Naktu* (9) which was quoted by the learned Advocate for the appellant has no application inasmuch as the suit in that case was directly based on a *benami* transaction. I am of opinion that as s. 66, Civil Procedure Code, has to be strictly construed, it will apply only to a suit in which the cause of action is given by the *benami* purchase and not to a suit like the present which is based on a contract which is separate from the transfer. The Court sale which was in the name of Jibhai had taken place some time before. If Ali Isap had brought a suit to recover possession of the property against the present defendants' ancestor on the ground that he was the person on whose behalf the purchase was made, s. 66 would apply, but not I think to a suit which is based on a different cause of action, *i. e.*, a contract entered into between the defendants' ancestor and the ancestor of the plaintiff even though the basis of that contract might be the *benami* nature of the original purchase at the Court sale. That however is a minor point in view of the opinion to which I have come on the question of perpetuity.

As a result the decree of the lower Appellate Court will be reversed and the suit dismissed with costs throughout.

R L. *Decree reversed.*

(9) 108 Ind. Cas. 11; A. I. R. 1928 P. C. 75; 24 N. L. R. 59; 56 M. L. J 462; 47 C. L. J. 418; 30 Bom. L. R. 821; 27 L. W. 807 (P. C).

SIND JUDICIAL COMMISSIONER'S COURT.

Criminal Revision Application No. 88 of 1931.

June 23, 1931.

MILNE, J. C. AND ASTON, A. J. C.

EMPEROR—APPLICANT

versus

ABDULLAKHAN—OPPONENT.

Bombay District Police Act (IV of 1890), s. 80 (3)—Prosecution of Police Officer—Limitation—Applicability of rule of limitation to Crown prosecutions—'Act', whether includes omissions—'Under colour of duty', meaning of—Criminal Procedure Code (Act V of 1898), s. 436—Jurisdiction of High Court where application lies to Sessions Court

Although the High Court will not ordinarily entertain applications for revision under s. 436, Criminal Procedure Code, when the Sessions Court has jurisdiction to entertain them, the High Court may entertain them in special cases. When the application is connected with another application which has been made and which can be entertained only by the High Court, it may be entertained. *Gullay* v. *Bakar Husain* (1), *Emperor* v. *Abdus Sobhan* (3), *Bipin Behari Mukerji* v. *Emperor* (5), *Shafaqatullah* v. *Wali Ahmed Khan* (2) and *Bajirao* v. *Dadibhai* (4), referred to. [p. 513, col. 2.]

Section 80 (3), Bombay District Police Act, refers to all prosecutions, and covers a prosecution instituted by the Crown. *Queen-Empress* v. *Murarji Gokalal* (6), referred to. [*ibid.*]

The word 'act' in s. 80 (3) should be taken as including omissions also. [p. 514, col. 1.]

Where a Police Officer is dealing with a complaint in his capacity as such his procedure would be under the colour of his duty and authority though he had made up his mind from the beginning to hold no real investigation. *Narayan Hari* v. *Yeshwant Raoji* (7) and *Sivarama Krishna Ayyar* v. *Seshappa Naidu* (8), followed. [p. 514, col. 2.]

The act for which protection is given by s. 80 (3) must be an act which appears to be done in the lawful discharge of a duty or in the lawful exercise of an authority conferred by the Bombay District Police Act or other law for the time being in force. This would not include acts which are obviously offences and in no manner reconcilable with the duties or functions of a Magistrate or Police Officer such as bribery or extortion. *Narayan Hari* v. *Yeshwant Raoji* (7), *In re Mangapathi Naidu* (10) and *Emperor* v. *Khanchand* (11), referred to. [p. 516, col. 2.]

Application under s. 436, Criminal Procedure Code, against an order of the Huzur Deputy Collector and First Class Magistrate, Larkana.

Mr. *C. M. Lobo*, Public Prosecutor, for Sind, for the Crown.

Mr. *Lalchand Navalrai*, for the Opponent.

Milne, J. C.—The opponent a Sub-Inspector of Police was prosecuted under ss. 217, 218, 384 and 466, Indian Penal Code. It was alleged that opponent did not record the first report when a complaint of theft was made to him (s. 217), that he extorted money from the accused (s. 384), that he forged documents showing that no theft had been committed (ss. 218 and 466). The learned Magistrate held that the complaints under ss. 217, 218 and 466 were barred under s. 80 (4) of the Bombay District Police Act 1890, the prosecution not having been instituted within six months of the act complained of. The Crown has applied in revision against that order.

Opponent has objected at the outset that this application should have been made to the Sessions Court which has jurisdiction in the matter. He relies on *Gullay* v. *Bakar Husain* (1), *Shafaqatullah* v. *Wali Ahmed Khan* (2), *Emperor* v. *Abdus Sobhan* (3), *Bajirao* v *Dadibhai* (4), *Bepin Bihari Mukerji* v. *Emperor* (5); and a circular of this Court No A-1550 of 3rd August, 1927. But though it has been laid down that the High Court will not ordinarily entertain such applications when the Sessions Court has jurisdiction to entertain them, it has also been laid down that the High Court will do so in special cases. There is a special reason in this case. The opponent has applied that the proceedings under s. 384 should be quashed. This is a matter which must come before the High Court and it is, therefore, expedient that both applications should be heard together.

The Public Prosecutor has on the merits of the application contended in the first place that s. 80 (3) has no application to a prosecution by the Crown. He admits that he has no authority to support his proposition but he contends that it is absurd that a Police Officer who has been so clever as to escape detection for six months should on that account escape scot-free. I can find no warrant for the alleged distinction between Crown cases and others: the contrary is laid down in *Queen Empress* v. *Murarji Gokalal* (6). Even if any distinction could be drawn in respect of cases instituted by private complainants, it would be impossible to hold that s. 80 (4) applied only to the latter when there is absolutely nothing to show that any distinction was contemplated between various kinds of complaints. Section 80 (3) refers to all prosecutions. The Public Prosecutor contends that a suit could be filed only by a private person; therefore, a prosecution also must

(1) 28 A. 268; A. W. N. (1905) 279.
(2) 30 A. 116; A. W. N. (1908) 25; 3 M. L. T. 124.
(3) 2 Ind. Cas. 846; 36 C. 643; 13 C. W. N. 753; 10 Cr. L. J. 190.
(4) 91 Ind. Cas. 247; 27 Cr. L. J. 71; A. I. R 1926 Nag. 285.
(5) 45 Ind. Cas. 397; 3 P. L. J. 302; 4 P. L. W. 327; 19 Cr. L. J. 589.
(6) 13 B. 389.

be a private person. There does not appear to be any reason why the Crown should not sue one of its servants but even if the Public Prosecutor's contention were sound, that a suit contemplated by s. 80 (3) could be brought only by a private person, a prosecution could be instituted either by the Crown or by a private person. I hold, therefore, that s. 80 (3) covers a prosecution instituted by the Crown. The result may be unfortunate: it is not particularly so in this case, as one of the major charges stands. But the section is one which the Legislature might well amend.

The second contention raised was that s. 80 (3) refers only to acts and not omissions: the context shows that the section does not apply to omissions. The offence under s. 217 is the alleged omission. It is true that the words "any omission," do not go well with the words "under colour or in excess of any such duty or authority" as aforesaid. The acts of a Police Officer acting as such in respect of matters which fall within the scope of his duty or authority are clearly covered by the section. There is then no ground for distinguishing between acts and omissions. The intention of s 80 (3) as expressed is to give protection even to the *mala fide* acts of a Police Officer acting as such if proceedings are not taken against him within six months: it would be unreasonable to hold that his *mala fide* omissions also were not covered. We are not dealing with the case of an officer who refused to function as such: whether the omissions of an officer who so refused would be protected by s. 80 (3) is another question. But where the officer is functioning as such whether *bona fide* or *mala fide* and in the present case the officer was, it is clear, acting under colour of his office even if it was for the purpose of lurking the complaint, I would hold that the word "act" should be taken in its usual sense as including omissions.

The learned Public Prosecutor has argued that the opponent did not record the first report which must be done before the investigation starts: there was,therefore, no investigation: the Sub-Inspector of Police was not acting as a Police Officer: he was not, therefore, acting under colour or in excess of his duty or authority so as to get the benefit of s. 80 (3). On this ground *Narayan Hari* v. *Yeshwant Raoji* (7) is distinguished: the statements in that case were recorded in the course of an investigation. It is clear that it was the Sub-Inspector's duty to investigate the offence; he was ostensibly doing so: he went to the scene: the accused was secured; the stolen property was secured and a *mashirnama* made; documents were prepared showing that no offence had been committed. He was then acting under colour of his duty and authority: it may be that he was acting *mala fide*: but as he was dealing with the complaint in his capacity of Sub-Inspector his procedure would have been under the colour of his duty and authority though he had made up his mind from the beginning to hold no real investigation. It is clear that he recorded the alleged false statements of complainant in his official capacity: it was apparently to be part of his official record to show how the matter had ended. In an analogous case, *Sivaramakrishna Ayyar* v. *Seshappa Naidu* (8) it was held that a Judge, fabricating the record of a suit which was wholly false from beginning to end, was purporting to act in the discharge of his official duties.

I am of opinion that the order of the learned Magistrate was correct and would dismiss the application No. 88 of 1931.

The opponent has also applied in Criminal Revision No. 91 of 1931 that the proceedings against him under s 384 should be quashed. He contends that the words "under colour of" mean "in relation to": that the offence of extortion is alleged to have been committed in relation to the performance of his duty to investigate: and, therefore, the proceedings under s. 384 are barred under s. 80 (3).

The Sub Inspector relies on the ruling *Queen Empress* v. *Sadanund Doss* (9) under s. 170 Indian Penal Code. A person pretending to be a Police Officer reprimanded some villagers on account of the state of the roads in the vicinity and obtained some money from them: it was held that the act committed had some relation to the office which he pretended to hold. The pretended Police Officer was able to commit the offence under colour of the office which he had assumed. The question whether the office assumed would have entitled the holder to do the act complained of or whether any one was under that impression was not material in that case. The words "under colour of such office" in s. 170 connote two things: the false personation and

(7) 114 Ind. Cas. 246; 52 B. 832; 30 Bom. L. R. 1018; A. I. R. 1928 Bom. 352; 30 Cr. L. J. 278 (F. B.).

(8) 115 Ind. Cas. 248; 52 M. 347; 29 L. W. 17; (1929) M. W. N. 53; A. I. R. 1929 Mad. 172; 30 Cr. L. J. 396; 56 M. L. J 263.

(9) 2 W. R. 29.

the act which could not have been done without the false personation. But in the present case the question whether the act complained of could be or was attributed to any duty or authority of the Police Officer is material. Both sides however knew that the Sub-Inspector of Police had no authority, nor was it his duty to commit extortion: both knew that he was committing an offence.

The applicant has relied on certain rulings under s 197 of the Criminal Procedure Code. The wording both of the old and the amended section is different from the wording of s. 80 (3). In *In re Mangapathi Naidu* (10) it was held that where a Village Magistrate uses his authority and position to obtain a bribe: sanction was necessary for his prosecution. he was in the words of the old section a public servant accused as such public servant of an offence: *Cf.* also *Emperor* v. *Khanchand* (11). Under the amended section the question whether an offence arising out of abuse of official position by an act not purporting to be official requires sanction is disputed: *e. g*, a Municipal President threatening injury to the property of a voter to influence his vote or criminal breach of trust by an Official Liquidator But it would hardly have been contended that the public servant demanded the bribe or committed the other offences stated under the colour of any duty or authority. That is the wording of s. 80 (3) and it would be absurd to contend that the alleged extortion was committed under the colour of any duty or authority.

The present case is on all fours with the case reported as *Narayan Hari* v. *Yeshwant Raoji* (7); there the investigating police officers were alleged to have assaulted certain persons in the course of their investigation.

I would, therefore, dismiss the Application No. 91 of 1931.

Aston, A.J. C.—This is an application made by the Public Prosecutor under s. 436, Criminal Procedure Code, for the revision of an order of the learned First Class Magistrate, Saddar Station, Larkana, dated 1st May, 1931, dismissing the complaint against the accused under ss. 217, 218 and 466, Indian Penal Code. The accused has also made an application under s. 439, Criminal Procedure Code, for the revision of the learned Magistrate's order, of the same date, that he would enquire into the alleged offence under s. 384, Indian Penal Code.

The facts briefly are that on the 18th March, 1931, a complaint was filed by Gokaldas Wadhumal Deputy Superintendent of Police against the accused, who is Sub-Inspector of Police charging him with having intentionally omitted to record the first report of a theft made to him on 28th July, 1930, by one Ghulam Rasul, with having extorted Rs. 64 from Pherumal, the person accused, through his brother Govind, with having forged a statement, purporting to be that of Ghulam Rasul, showing that no theft was committed, and with having destroyed a *mashirnama* prepared by a Policeman, whom he had sent to investigate. The learned Magistrate issued process under ss. 217, 218, 384 and 466 of the Indian Penal Code. It was contended at the trial that no prosecution could be entertained or continued against the accused by reason of s. 80 (3) of the Bombay District Police Act IV of 1890, since the complaint was filed more than six months after the acts complained of. The learned Magistrate upheld the contention and dismissed the complaint with regard to ss 217, 218 and 466, Indian Penal Code. He disallowed the contention with regard to the alleged offence under s. 384, Indian Penal Code and decided to proceed with the enquiry into that alleged offence.

With regard to the application filed by the learned Public Prosecutor a preliminary objection has been raised by the defence that since s. 436, Criminal Procedure Code, gives concurrent jurisdiction to the Sessions Judge and District Magistrate and no application has been made to the Sessions Judge the High Court will not entertain it. Reliance is placed on *Gullay* v. *Bakar Hussain* (1), *Shafaqatullah* v. *Wali Ahmad Khan* (2), *Emperor* v. *Abdus Sobhan* (3), *Bajirao* v. *Dadibhai* (4) and to the Circular issued by this Court, dated 3rd August, 1927. It is a recognized rule of practice, no doubt, that failure on the part of an applicant to submit his application to a lower Court having concurrent jurisdiction will operate as a bar to the application being entertained by the High Court, see Mitra 7th Edition page 1135. Where however an application has been admitted by the High Court, even *ex parte*, there is nothing to prevent the High Court from disposing of it on the merits even though no petition has been made to the Sessions

(10) 2 Weir 221.
(11) 72 Ind. Cas. 523; A. I. R. 1922 Lah. 337; 24 Cr. L. J. 411.

Judge *Emperor* v. *Mansur Husain* (12), *Abdul Matlab* v. *Nanda Lal Khatel* (13), so too where special circumstances exist. In the present case it will be necessary for the determination of the accused's application under s. 439, Criminal Procedure Code, to consider the validity of the learned Magistrate's order with regard to the alleged offence under s. 384, Indian Penal Code and the principles of law applicable to the facts complained will have to be considered. There will be no saving of time in referring the applicant to a Sessions Judge with regard to his application under s. 436 and a rule has been granted. We have decided in the special circumstances of this case to dispose of this application ourselves on the merits.

It is contended by the learned Public Prosecutor that s. 80 (3) of the Bombay District Police Act has no application to prosecutions instituted by the Crown and that its object is to protect public servants from stale prosecutions by members of the public. In support of this contention, reliance is placed on language in s. 80 (3) having reference to suits and to the alleged absence of other instances of limitation, against the Crown. The doctrine "*nullum tempus occurit regi*", however, has been largely qualified by the legislature in modern times, see Broom's Legal Maxims, 3rd Edition, page 62 and the words in "in any case of the alleged offence the prosecution shall not be entertained" seem to me wide enough to cover not only complaints filed by private individuals, but also complaints filed by the Police or by a Public Prosecutor under instructions from a Local Government. It is suggested that it could never have been the intention of the legislature to give so wide a protection to the public servants referred to in s. 80 (3) and that unless the protection is limited to private complaints a public servant has only to conceal a crime for six months to be immune. A reference to the Bombay District Police Act however shows that s. 80 (3) does not provide a six months period of limitation for the prosecution of Magistrates, Police Officers and certain other persons acting under their orders with regard to all offences. The object of the section was to protect Magistrates, Police Officers and others from stale prosecutions, based on the fact, that some duty imposed or authority conferred by a provision of the Bombay District Police Act or by some rule or order or direction lawfully made or given thereunder had been neglected or misused whether such neglect or misuse was *bona fide* or *mala fide*. The section provides that the offence or wrong must be "under colour or in excess of a duty imposed or authority conferred by the Act" and this by virtue of s. 51 of the Bombay District Police Act includes duties imposed by other laws for the time being in force, see *Narayan Hari* v. *Yeshwant Raoij* (7). But since the offence must be "under colour or in excess of a duty or authority," the act for which protection is given by s. 80 (3) must be an act which appears to be done in the lawful discharge of a duty or in the lawful exercise of an authority conferred by the Bombay District Police Act or other law for the time being in force. This would not include acts which are obviously offences and in no manner reconcilable with the duties or functions of a Magistrate or Police Officer, such as an unprovoked assault: see *Narayan Hari* v. *Yeshwant Raoji* (7), though the language might protect a Police Officer who had used excessive force in making a lawful arrest. It is suggested on behalf of the accused that the charge if any with regard to the sum of Rs. 64 should be under s. 161, Indian Penal Code, and not under s. 384 Indian Penal Code. But neither of these offences seem to me to come within the protection provided by s. 80 (3) of the Bombay District Police Act. The taking of bribes is no more reconcilable with the duties or functions of a Police Sub-Inspector than the extortion of money. Neither could in my opinion be regarded as an act committed under colour of a duty or authority. A number of cases have been cited having reference to sections differently worded in the Indian Codes. Such cases have reference to an entirely different class of offence and provide protection of a different character. We cannot properly be guided by them in arriving at the meaning of s. 80 (3) of the Bombay District Police Act. Nor can we be guided by English authorities on different expressions in English Statutes: see *Bhagchand Dagdusa Gujrathi* v. *Secretary of State for India* (14) cited by Fawcett, J., in *Narayan Hari* v. *Yeshwant Raoji* (7). The word "acts" under the

(12) 50 Ind. Cas. 827; 41 A. 587; 20 Cr. L. J. 347; 1 U. P. L. R. (A.) 45; 17 A. L. J. 800

(13) 77 Ind. Cas. 990; 50 C. 423; A. I. R. 1923 Cal. 674; 25 Cr. L. J. 526.

(14) 104 Ind. Cas. 257; 51 B. 725; 53 M. L. J. 81; A. I. R. 1927 P. C. 176; 25 A. L. J. 641; 29 Bom. L. R. 1227; (1927) M. W. N. 561; 46 C. L. J. 76; 1 Luck. Cas. 291; 32 C. W. N. 61, 26 L. W. 809; 54 I. A. 338 (P. C.).

Bombay General Clauses Act include omissions where such inclusion is not repugnant to the words in the context.

At first sight the expression "an omission under colour of a duty or authority" seems perhaps incongruous, but a little reflection shows that an omission to act might well be under colour of a duty. If a complaint, for instance, were made to a Police Officer for a non-cognizable offence, it would be his duty to refrain from taking cognizance, and if a Police Officer, while ostensibly acting in the discharge of his duties as such, is guilty of illegal omissions, s 80 (3) of the Bombay District Police Act read with the Bombay General Clauses Act would, in my opinion, protect him against stale prosecutions instituted more than six months after the alleged omissions. For the reasons above mentioned I am of opinion that the learned Magistrate rightly decided that the alleged offences under ss. 217, 218 and 466, Indian Penal Code, were covered by s. 80 (3) of the Bombay District Police Act and that it was his duty to proceed with the enquiry into the alleged offence under s. 384, Indian Penal Code.

I would, therefore, dismiss both applications for revision.

N. K. & A. *Applications dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

Civil Suit No. 127 of 1930.

May 13, 1931.

ASTON, A. J. C.

RADHAKISHEN—PLAINTIFF

versus

SECRETARY OF STATE—DEFENDANT.

Minor—Guardian investing moneys in his own firm—Insolvency of firm—Liability of guardian's estate—Negligence—Contributory negligence—Apportionment of liability—Crown—Liability for acts of servants—Court losing security bond—Liability of Secretary of State.

Where the defendant's negligence is the primary and substantial cause of the damage sustained by the plaintiff, he will be responsible for the whole damage, though it may have been increased by the wrongful conduct of a third person or though there may have been negligence on the part of such third person which jointly with the defendant's negligence so caused the damage. The same rule applies where the negligence is that of a person for whom the defendant is liable [p. 519, col. 2.]

Where the guardian of the property of a minor deposited the minor's money in his own firm and omitted to give proper accounts and subsequently, after the death of the guardian, the firm was adjudicated insolvent owing to the speculation of other persons;

Held, that as the omission of the guardian to invest the minor's property in trustee securities as directed by s. 20, Trusts Act, 1882, and the omission to fil proper accounts was the main cause of the loss caused to the minor, both the guardian and his surety were liable for the loss sustained by the minor. *Collins* v *Middle Level Commissioners* (3) and *Burrows* v. *March Gas and Coke Co.* (5), relied on. [*ibid.*]

So far as torts committed by the servants of the Secretary of State in the conduct of undertakings which might be carried on by private persons are concerned, exemption from liability cannot be pleaded by the Secretary of State. But the Secretary of State will not be liable for torts committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign. [p. 521, col. 2.]

Where the security bond executed by the guardian of the property of a minor and deposited in the Judicial Commissioner's Office was lost due to the negligence of the office and a suit was brought by the minor after attaining majority against the Secretary of State for damages caused owing to the negligence of defendant's servants:

Held, that though the plaintiff had sustained loss as he was prevented from taking action against the surety, the fact relied on only constituted *damnum sine injuria* [p. 519, col. 1.]

Held, further, that as no appreciable benefit accrued to the Revenue of the Government by the taking of the surety bond and the transaction was not one out of which profit could be derived, the transaction was not such in which the old East India Company might have been sued and plaintiff had no cause of action against the Secretary of State. *Jehangir Cursetji* v. *Secretary of State* (22), *Shivabhajan* v. *Secretary of State for India* (19), *Secretary of State* v. *Moment* (20) and *Mathradas Ramchand* v. *Secretary of State* (21), relied on. Other cases referred to. [p. 522, col. 2.]

Mr. *Kimatrai Bhojraj*, for the Plaintiff.

Mr. *C. M. Lobo*, for the Defendant.

Judgment.—This is a suit filed by the plaintiff to recover a sum of Rs. 23,600 from the Secretary of State as damages for the negligence of the defendant's servants in losing a security bond executed in this Court for a sum of Rs. 23,600 The facts in the suit are virtually admitted. On the 13th of March, 1915, one Changomal Kushaldas applied to be appointed guardian of the property of the plaintiffs who were both minors. His application was granted on the condition that he mortgaged his immoveable property. This order was varied by this Court in appeal and Changomal was ordered to give ordinary security, the District Judge, Hyderabad fixing the security at Rs. 29,600 Changomal being a resident of Karachi applied for permission to enter into the bond at Karachi in this Court and his application was granted. The security bond was taken and on the 8th of August, 1916 the Registrar of this Court informed the District Judge, Hyderabad that the security bond had been taken Changomal thereafter deposited the money in his own firm of Messrs. Kushaldas Mangatram, This

firm in those days was in a very flourishing condition; it had 17 immoveable properties and was a firm of good standing. In 1918 Changomal died. The first plaintiff on attaining majority applied to the District Judge, Hyderabad to call on the legal representatives to render accounts and hand over property. In the application it was also mentioned that action would have to be taken against the surety and for this purpose application was made that a search should be made for the bond. On the 14th of June, 1927, an application was made to declare the firm of Messrs. Kushaldas Mangatram insolvents; On the 27th of June, 1927, the District Judge, Hyderabad, requested the Registrar of this Court to send him the security bond; on the 15th of July the Registrar replied that it was missing. On the 3rd of August, 1927, the firm of Kushaldas Mangatram was adjudicated insolvents. On the 22nd of September, 1928, the plaintiff's Pleader asked the District Judge, Hyderabad to move the Judicial Commissioner to have a thorough search made. In January, 1929, plaintiff No. 1 asked the Registrar to make a thorough search but the bond was not found. On the 27th of June, 1927, an application had also been made by the plaintiffs to the District Judge, Hyderabad to assign the bond for proper action being taken against the surety and the order of the learned District Judge was "surety bond to be called for". The Official Assignee investigated the claim of the plaintiffs and found that a sum of Rs. 38,477 was due to them. Interest besides has become due on the amount. The Official Assignee has declared a dividend of one anna and eleven pies in a rupee and he has deposed to the fact that taking the most favourable view another dividend of one anna six pies may be declared

The following issues were raised,

1. Did the deceased Changomal Kushaldas fail to render any accounts to the Court of the estate of the minors?

2. Did the deceased Changomal Kushaldas in contravention of any provisions of law deposit the amount, if any due to the minors with the firm of Kushaldas Mangatram?

3. Did the plaintiff No. 1 apply to the District Court, Hyderabad as stated in para. 8 of the plaint and did the firm of Kushaldas Mangatram become insolvent before anything could be done?

4. What amount, if any, is due by the firm of Khushaldas Mangatram' to the minors?

5. Has the security bond been lost owing to any negligence of the office of the Court of the Judicial Commissioner of Sind?

6. Are the plaintiffs prevented from recovering any amount from the surety?

7. Is the defendant liable to the plaintiffs for the amount of surety bond or any part thereof?

8. Is the suit in time?

9. Is the suit premature for reasons given in para. 13 of the written statement?

10. Is the suit maintainable for reasons given in para. 14 of written statement?

11. Have the plaintiffs any right to sue for reasons given in paras. 14 and 15 of the written statement?

12. Is the defendant liable for the negligence, if any, of the Court of the Judicial Commissioner of Sind?

13. Can the present suit for damages lie against the defendant?

14. Are the legal representatives of the deceased Changomal liable for any loss occasioned to the plaintiff and not the defendant for reasons given in para. 17 of written statement?

15. General.

My findings on the issues are as follows:—

Issue No. 1. In the affirmative.

Issue No. 2. In the affirmative.

Issue No. 3. In the affirmative.

Issue No. 4. A sum of Rs. 38,477 has been proved as due by the firm of Kushaldas Mangatram to the minors. Interest is payable on this amount and at present a dividend of one anna and eleven pies in the rupee has been declared.

Issue No 5. In the affirmative.

Issue No. 6. In the affirmative.

Issue No 7. In the negative.

Issue No. 8. In the affirmative.

Issue No 9. In the negative.

Issue No. 10. The suit is not necessarily premature, because the bond was not assigned. for the suit is for compensation for the damage sustained by the loss of the bond, through the negligence of defendant's servants. Its decision depends on whether the negligent act amounted to a breach of duty towards the plaintiffs themselves, independent of contract, and if so whether defendant is liable.

Issue No. 11. Same as No. 10.

Issue No 12. In the negative.

Issue No. 13. In the negative.

Issue No. 14. Defendant is not liable. The surety was liable.

In dealing with the issues the learned

Government Pleader has not pressed Issue No. 1 which is covered by Ex. 6, nor has he pressed Issue No. 2 The fact that the money remained in the firm of Changomal was admitted in para. 17 of the written statement. The Government Pleader has not pressed Issue No. 3 which is proved by the certified copies which have been put in by the plaintiffs. As regards Issue No. 4 it is not disputed by the defendant that plaintiff has proved that a sum of Rs. 38,477 was established to be due by the insolvent firm of Kushaldas Mangatram to the minors. Issue No. 5 was contested by the defendant. It was contended that no negligence was proved in the office of the Court of the Judicial Commissioner. It seems to me, however, that there was undoubtedly an omission to exercise ordinary care with regard to the surety bond. Not a trace of the bond is to be found, not a trace of any entry in any record or register relating to the bond. Had the bond been forwarded to the District Judge, Hyderabad as suggested by the defence a reference to it would have been made in the letter dated 8th of August, 1916, as being forwarded, but the District Judge was merely informed by the Registrar of this Court that the bond had been taken. The security bond was a valuable document; there was no occasion for its destruction, for the Court Rules provide for the destruction of only useless records. With regard to Issue No 6 it is clear that the loss of the bond has prevented the plaintiffs from taking action against the surety. The evidence shows that the plaintiffs did not know who the surety was. The defendant's Pleader does not press Issue No. 8. The decision of their Lordships of the Privy Council in *Jawahir Singh* v. *Udai Parkash* (1) is in plaintiffs' favour.

I will now deal with Issues Nos. 9, 10, 11 and 14 together. The contention of the defence that the suit is premature because the plaintiff took no steps to ask the District Judge to assign the bond under s. 35 of the Guardians and Wards Act, appears to be due to a misapprehension, for the application made on June 27, 1927, has been put in. I think it is clear that from the point of view of contract, plaintiff would have no cause of action for the loss of the bond *damnum* might have been occasioned to the plaintiffs but the *injuria* was with the Judge It is to be remembered in this connection that the bond prior to assignment enures to the benefit of the Judge. See s. 34, Guardians and Wards Act VIII of 1890. Plaintiffs, however, contend that they have suffered loss on account of the negligence of the defendant's servants in keeping the bond. On behalf of the defendant it is urged that since the firm of Khushaldas Mangatram became insolvent after the death of the guardian and surety was not liable and hence no damage was caused to the plaintiffs by the loss of the bond. It has been pointed out in Mayne on Damages that even before the case of the *'Bernina'* (*Mills* v. *Armstrong*) (2), it was settled law that where the defendant's negligence is the primary and substantial cause of the damage sustained by the plaintiff, he will be responsible for the whole damage though it may have been increased by the wrongful conduct of a third person or though there may have been negligence on the part of such third person which jointly with the defendant's negligence so caused the damage: *Callins* v. *Middle Level Commissioners* (3). The same rule applies where the negligence is that of a person for whom the defendant is liable. In a case where the defendant contracted to supply gas fittings in the plaintiff's house and the fittings were so defective that the gas escaped and a servant negligently brought in a lighted candle, on which an explosion took place, it was held that the defendants were liable, whether the person who introduced the candle was plaintiff's servant or not: *Burrows* v. *March Gas and Coke Co.* (4). Similarly where a District Council employed a contractor to construct a sewer and in the construction the contractor injured a gas main from which the gas escaped into an adjoining house and caused an explosion it was held that the District Council was liable for the result as their primary duty to the public was so to construct the sewer that no injury would ensue. See Mayne on Damages, page 71. In the present case I am of opinion that the omission of the guardian Changomal to invest the minors' property in trustee securities as directed by s. 20 of the Trusts Act, 1882, and the omission of the guardian to file proper accounts was the main cause of the loss caused to the minors. No doubt the action of other persons speculating in sugar partly caused the loss, but on the strength of the

(1) 93 Ind. Cas. 216; 48 A. 152; 24 A. L. J. 97; A. I. R. 1926 P. C. 16; (1926) M. W. N. 197; 50 M. L. J. 344; 3 O. W. N. 365; 43 C. L. J. 374; 30 C. W. N. 698; 28 Bom. L. R. 851; 53 I. A. 36 (P. C.).

(2) (1913) A. C. 1

(3) (1869) 4 C. P. 279; 20 L. T. 442; 17 W. R. 929; 38 L. J. C. P. 236.

(4) (1872) 7 Ex. 96; 41 L. J. Ex. 46; 26 L. T. 318; 20 W. R. 493.

cases to which I have referred I am of opinion that the guardian and his surety would be liable for the whole loss sustained by the minors. The question, however, arises: Can the defendant be rendered liable for negligence displayed in the Judicial Commissioner's office in losing the surety bond? It has been held that if "*A*" breaks his contract with *B*., *C*. a third party, cannot sue him on the contract for any harm resulting to himself, but he may sue him if he has suffered damage for some wrongful or negligent act which amounts to a breach of duty towards himself independently of the contract. A Railway Company owes a duty to its passengers; whether the passenger who has been injured purchased a ticket or had it purchased for him or was allowed to ride gratuitously. Similarly a gas fitter who did his work negligently was liable for damages suffered by a person who was injured by an explosion but who was a stranger to the contract. Lopes, J. there said.

"I think the plaintiff's right of action is founded on a duty which I believe attaches in every case where a person is using or dealing with a highly dangerous thing, which, unless managed with the greatest care, is calculated to cause injury to bystanders."

See *Parry* v. *Smith* (5). In the case of *Heaven* v. *Pender* (6), Brett, M. R laid down the general proposition that,

"Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did use ordinary care and skill in his conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

Cotton and Bowen, L. JJ., however declined to adopt this proposition but rested the defendant's liability on the obligation of the dock-owner to take reasonable care that the appliances provided in the dock were in a fit state to be used. In the present case it cannot be said that the security bonds are highly dangerous objects involving special care, nor can it be reasonably alleged, in my opinion, that there is an invitation to members of the public to come to the Court and deposit security bonds and that care would be taken of such bonds. In the present case the bond was a bond taken by the Court itself. I am of opinion, that the facts relied on by the plaintiffs, as regards the loss of the bond, constitute *damnum sine injuria*.

(5) (1879) 4 C. P. D. 325; 48 L. J. C. P. 731; 41 L. T. 93; 27 W. R. 801.

(6) (1884) 11 Q. B. D. 503 at p. 508; 52 L. J. Q. B. 702; 49 L. T. 357; 47 J. P. 709.

With regard to Issues Nos. 7, 12 and 13 the case seems to me even more clear. The liability of the Secretary of State for acts of his servants was provided for by the Government of India Act, 1858, 21 and 22 Vic. Chap 106 which enacted that the Secretary of State might sue and be sued in India and in England by the name of the Secretary of State in Council as a body corporate and that all persons and bodies politic might have and take the same suits, remedies and proceedings, legally and equitably against him as they would have done against the East India Company. In *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India* (7), where the plaintiff was injured by the negligence of workmen in a Government dock-yard, a broad distinction was drawn between acts done in the conduct of undertakings which might be carried on by persons who enjoy no delegated powers of sovereignity and acts done in the exercise of powers usually termed sovereign. It was held that since the plaintiff was injured by workmen employed in an undertaking which might have been carried on by persons who enjoyed no delegated powers of sovereignity, it was a case in which the old East India Company would have been employed and a case, therefore, in which the Secretary of State could not plead exemption. The learned Judges who decided this suit did not hold that all acts done in the exercise of powers usually termed sovereign were exempt but in *Nabin Chander Dey* v. *Secretary of State* (8), it was held that exemption could be claimed as regards all acts falling under this clause whether the suit was based on contract or tort. This ruling was strongly criticised in *Secretary of State* v. *Hari Bhanji* (9) where it was pointed out that if *Nabin Chander Dey* v. *Secretary of State* (8) was correct it was unnecessary for the Privy Council in *Foster* v. *Secretary of State* (10) to have enquired into the title of the Begum for the resumption of her *jagir* was an act which could under no circumstances have been legally done by a private person. *Secretary of State* v. *Hari Bhanji* (9) sub-divided acts done in the exercise of powers usually termed sovereign into two classes, namely, acts which are entirely outside the province of Municipal Law and acts which fall within the province of

(7) 5 B. H. C. R. App. 1.

(8) 1 C. 11.

(9) 5 M. 273 at p. 283.

(10) 2 Suth P. C. J. 628; 13 M. I. A. 585; 6 B. L. R. 273; 15 W. R. P. C. 16; 2 Suther 388 (P. C.).

Municipal Law. In the former class belong acts such as making of war and peace, the conclusion of treaties, see *Nabab of Carnatic* v. *East India Co.* (11) and acts necessary for public safety not purporting to be justified by any canon of Municipal Law, as for instance, seizing the property of a deceased Raja as Escheat, see *Secretary of State for India* v. *Kamachee Boye Sahaba* (12). It has been held that all that is done under a treaty is as much beyond the domain of Municipal Law as the treaty itself: *Rustomjee* v. *Reg* (13). With regard to the second class, namely, acts within the province of Municipal Law, it was pointed out in *Secretary of State* v. *Hari Bhanji* (9) that where the act which is the ground of the complaint is the act which professes to be done under the sanction of the Municipal law and in the exercise of powers conferred by that law, the circumstances that it is an act done by the sovereign power or by the Deputy of that power does not oust the jurisdiction of the Civil Courts. Thus in *Foster* v. *Secretary of State* (10) where possession was taken not as a seizure by arbitrary power but under colour of a legal title their Lordships of the Privy Council held that the claim of the plaintiff was *prima facie* cognizable by the Municipal Courts. *Secretary of State* v. *Hari Bhanji* (9) was approved of in *Vijya Raghava* v. *Secretary of State* (14) where a Municipal Councillor sued the Secretary of State for wrongful removal from the office and the Court awarded damages. This case was strongly criticised in *Ross* v. *Secretary of State* (15) where the plaintiff sued the Secretary of State for damages for the dismissal of an agent of a labour Association and for alleged libel. It was held in *Ross* v. *Secretary of State* (15) that *Vijya Raghava* v. *Secretary of State* (14) had omitted to give proper consideration to the question whether acts were done in the exercise of powers usually termed sovereign or whether they were done in the conduct of undertakings which might be carried on by persons who enjoyed no delegated powers of sovereignity. *Ross* v. *Secretary of State* (15) sub-divided acts done in the exercise of powers usually termed sovereign into torts committed by Government servants while acting as agents of Government and secondly acts done by Government servants in the exercise of statutory authority, and thirdly acts done by Government servants acting as agents of Government. As regards torts committed by Government servants while acting under colour of Municipal Law, Wallis, J. in *Ross* v. *Secretary of State* (15) observed that the question will not be settled conclusively until their Lordships of the Privy Council have had an opportunity of considering the case of *Rogers* v. *Rajendro Dutt* (16) where irresponsibility was assumed and he expressed the opinion that, as it was a case in which a petition of rights would not lie against the Crown, and as the East India Co. would not have been liable and there had been no ratification, there was no cause of action against the Secretary of State. This was followed in *Secretary of State for India* v. *Cockcraft* (17) in which it was held that there was no cause of action against the Secretary of State for a tort committed by the servants of a Public Works Department, namely, negligence in making a military road In *McInerny* v. *Secretary of State for India* (18), Fletcher, J , held that no suit could lie for negligence with reference to a highway. See also *Shivabhajan* v. *Secretary of State for India* (19). It is quite clear that so far as torts committed by the servants of the Secretary of State in the conduct of undertakings which might be carried on by private persons are concerned exemption from liability cannot be pleaded by the Secretary of State. This was laid down in *Peninsular & Oriental Steam Navigation Co.* v. *Secretary of State for India* (*i*) which was approved of in *Secretary of State for India* v. *Moment* (20). This Court also in *Mathradas Ramchand* v. *Secretary of State* (21) awarded damages for wrongful ejectment of the plaintiff from a 2nd class carriage by Railway servants and in *Jehangir Carsetji* v. *Secretary of State* (22) it was conceded by Government in appeal that such actions of tort as could have been brought against the East India Co, would

(11) 4 B. Cas. Ch 198.
(12) 7 M. I. A. 476; 4 W. R. P. C. 42; 1 Suther 373; 1 Sar. 684; 13 Moo. P. C. 22.
(13) (1877) 2 Q. B. D. 69; 46 L. J. Q. B. 238; 36 L. T. 190; 25 W. R. 333.
(14) 7 M. 466 (F. B.).
(15) 19 Ind. Cas. 353; 37 M. 55; 24 M. L. J. 429; (1913) M. W. N. 758.
(16) 8 M. I. A. 103; 13 Moo. P. C. 209; 2 W. R. P. C. 51; 1 Suther 413; 1 Sar. 755.
(17) 27 Ind. Cas. 723; 39 M. 351; (1915) M. W. N. 39.
(18) 13 Ind Cas. 370; 38 C. 797 at p. 799.
(19) 28 B. 314; 6 Bom. L. R. 65.
(20) 16 Ind. Cas 70; 40 C. 1; 16 C. W. N. 937; 23 M. L. J. 215; 16 C. L. J. 642; 14 Bom. L. R. 1211; 12 M. L. T. 449; 5 Bur. L T. 211; (1912) M. W. N. 1097; 10 A. L J. 486; 6 L. B. R. 119; 39 I. A. 237 (P. C.).
(21) 11 Ind. Cas. 58; 5 S. L. R. 82.
(22) 27 B. 189.

also lie against the Secretary of State. It is also clear that property has been illegally sold or money has been improperly recovered by a public servant acting ostensibly under a Statute and where the money has found its way into the public fund, a suit will lie against the Secretary of State for its recovery: *Kailash Chandra Nag* v. *Secretary of State* (23) and 56 Ind. Cas. 507 *Secretary of State for India* v. *Lown Karan Marwari* (24). See also *Pamulapati Ankinudu* v. *Secretary of State for India* (25) It appears to me, however, established beyond all reasonable doubt that the Secretary of State will not be liable for torts committed by Government servants while performing acts done in the exericse of powers which are usually termed sovereign. The facts in the Bombay case above cited *viz*, *Shivabhajan* v. *Secretary of State for India* (19) seem to me in certain respects very similar to the facts in the present case. The suit was instituted against the Secretary of State in Council to recover damages on account of the negligence of the Chief Constable with respect to goods seized. It appears that 62,500 bundles of hay were attached by the Chief Constable of Mahim in the beginning of November, 1900 while the hay was in the plaintiff's possession. On the 2nd of January, 1901, the plaintiff gave a notice to the District Superintendent of Police for delivery and possession of the hay but only 14,700 bundles were delivered and the remaining 47,800 bundles of hay were missing. In other words, certain acts were performed under colour of Municipal Law, and subsequently loss was caused to the plaintiff owing to the negligence of a public servant. It was held that the seizure of the goods was not in any sense productive of benefit to the Revenues of the Bombay Government, that it was not a transaction out of which profit could be derived and there was no ratification or adoption of the act In order that a suit could lie against the Secretary of State in Council, it must be one in which the East India Co., might have been made liable. It was further held in that suit, where the duty to be performed is imposed by law and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment. The case for the plaintiff was stronger in *Shivabhajan* v *Secretary of State for India* (19) than in the present suit for missing hay in that suit was actually taken from the plaintiffs' possession while the missing bond in the present suit was only to enure eventually for the plaintiffs' benefit. In the present case no appreciable benefit accrued to the Revenues of Government by the taking of the surety bond. The transaction was not one out of which profit could be derived. The transaction does not appear to me in any sense to be one in which the old East India Co, might have been sued. Plaintiffs in my opinion have no cause of action against the Secretary of State, I accordingly dismiss the suit with costs.

A. *Suit dismissed.*

(23) 18 Ind. Cas. 112; 40 C. 452; 17 C. W. N. 315; 17 C. L J. 216.

(24) 56 Ind. Cas. 507.

(25) 28 M. 312.

SIND JUDICIAL COMMISSIONER'S COURT.

Miscellaneous Civil Appeal No. 47 of 1928.

November 26, 1930.

WILD, C. J. AND RUPCHAND, A. J. C.

DR. CHAINRAI AND OTHERS—APPELLANTS

versus

DOLARAM AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 54—Fraudulent preference—Essentials—Consent decree against insolvent more than three months prior to petition for adjudication—Execution proceedings within three months—Proceedings, whether voidable.

The conditions precedent to the applicability of s. 54, Provincial Insolvency Act are that the act complained of which is to be deemed fraudulent and void against the Receiver should have been done by the insolvent with a view to give preference to a creditor over others and that such act should have been done within three months of the presentation of the petition. [p. 523, col. 1]

Where more than three months before presentation of the petition for insolvency, a consent decree has been passed in favour of one creditor, the proceedings taken in execution of that decree cannot be impugned as fraudulent under s. 54, even if the proceedings had been instituted within three months of the presentation of the petition. The execution proceedings taken against the insolvents or the *ex parte* orders for payment passed against them cannot afford fresh starting point for computing the period of limitation of three months under this section. [p. 523, col. 2.]

Miscellaneous Appeal against an order of the District Judge, Sukkur.

Mr. *Assudomal Rewachaad*, for the Appellants.

Messrs. *Tahilram Maniram* and *Dipchand Chandumal* for the Respondent.

Judgment.—These are appeals against orders passed under s. 54 of the Provincial Insolvency Act and arise under the following circumstances:

The appellants are related to the insolvents. They applied for execution of their decrees and were entitled to a rateable distribution in certain proceeds of property which was sold in execution of a decree passed in favour of the Official Assignee, Karachi, against the insolvents.

On January 13, 1927 after the sale proceeds of the insolvents' property had come into Court a petition was made to declare them insolvents. This petition was filed more than 3 months after the consent decrees were passed in favour of the appellants. The Official Receiver did not therefore object to the appellants having a rateable distribution in the sale-proceeds. But the respondents who are certain other creditors applied under s. 54 of the Provincial Insolvency Act to prevent payment to the appellants on the ground that the consent decrees passed in their favour were by way of a fraudulent preference. The learned trial Judge refused to give effect to this plea as the decrees were passed more than 3 months prior to the petition. The learned District Judge, Sukkur, has, however, allowed the application of the respondents and has said:

"Now it is true that these two decrees were passed more than three months before the date of the petition. But the section does not speak only of decrees being suffered. Every judicial proceeding taken or suffered with a view to giving undue preference can be annulled by the Court. Execution proceedings following upon a decree are undoubtedly judicial proceedings. Once a decree is passed a debtor has no choice about submitting to the execution proceedings. But if it be held that the original decree was suffered by him to be passed willingly I think it will be absurd to hold otherwise in respect of the subsequent proceedings which follow as a matter of course . . . . The execution proceedings in the decrees now under discussion were held within three months of the date of petition. . . . That order is a judicial proceeding following on the decrees which are held to have been fraudulent. I think it is perfectly competent to the Court under s. 54 annul at least this order in favour of the collusive decree-holders."

We are afraid we cannot accept the reasoning of the learned District Judge as sound. The conditions precedent to an applicability of s. 54 of the Act are that the act complained of which is to be deemed fraudulent and void against the Receiver should have done by the insolvent with a view of giving preference to a creditor over others and that such act should have been done within three months of the presentation of the petition. Now preference implies freedom of choice and free-will. In this case the preference if any given by the insolvents was given by them when they submitted to decrees being passed against themselves and not when in consequence of those decrees the appellants were able to claim payment of the amounts due to them under the said decrees. The execution proceedings which gave the appellants the advantage of claiming payment of money were no doubt judicial proceedings but they were neither taken nor suffered by the debtors with a view to give preference to the decree-holders. These proceedings were taken by the creditors in consequence of the alleged preference already given to them and they were not suffered by the debtors because the debtors could legitimately do nothing in those proceedings to prevent payment. The fact that they remained absent would not render the payment which they could be compelled to make in execution proceedings, a payment made by them with a view of giving a preference to the appellants. The execution proceedings taken against the insolvents or the *ex parte* orders for payment passed against them could not therefore afford a fresh starting point for computing the period of limitation of 3 months under this section. For these reasons we set aside the orders of the learned District Judge and allow these appeals with costs throughout.

N. K. & A. *Appeals allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

Criminal Appeals Nos. 184 to 190 of 1931.

July 27, 1931.

MILNE, J. C. AND MEHTA, A. J. C.

CHUTO *Wd* SAHIJO AND OTHERS—

APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 162—Statement of accused before Police—Admissibility in evidence.

Where the accused were tried for offences under ss. 399 and 402 of the Penal Code, and the Deputy Superintendent of Police gave evidence as to the explanations offered by the accused soon after their arrest as to the circumstances which brought them to the place where they were arrested, which differed from those given by the accused in the Sessions Court:

Held, per *Milne, J. C.*, that the evidence was admissible as showing that the conduct of the accused was not that of innocent persons. *Hussain Bibi* v. *Emperor* (1), referred to.

Per *Mehta, A. J. C.*—"It is doubtful if in order to discredit the version of an accused person at the trial, the use of his statement before the Police, although it may be substantially of a non-incriminatory character otherwise, is not provided against in s. 162, Criminal Procedure Code." *Umar Daraz* v.

Crown (2) and *Hussain Bibi* v. *Crown* (1) doubted, *Emperor* v. *Vithu Balu* (3) and *Emperor* v. *Issuf Mohammad* (4), referred to

Appeals from Jail against the convictions and sentences passed by the First Additional Sessions Judge, Hyderabad.

Milne, J. C.—The accused were charged under ss. 399 and 402 of the Indian Penal Code with making preparations for committing a dacoity and being among 5 or more persons assembled for that purpose. The accused were convicted and sentenced to undergo rigorous imprisonment for two years for the offences under each section—the sentences to run concurrently.

The prosecution story is that one Jurio reported to the Police that certain of the accused had asked him to join them in committing a dacoity and that they had assembled in the *Mussafarkhana* for that purpose. The Sub-Inspector went to the *Mussafarkhana* and surrounded the people whom Jurio pointed out. One or two of them escaped. The accused were found with hatchets, *lorhs*, *lathes*, chisels and keys in a heap in front of them. One of the accused was made an approver; on this evidence the accused were convicted as stated above.

The accused appealed from Jail and no appearance has been made on their behalf but we have been through the record with the assistance of the learned Public Prosecutor.

The case against the accused depends first on the evidence of the approver Faizu Ex. 16. He was arrested at the scene of the offence and states that he had arranged with the accused to commit the offence. He fully implicates all the appellants in the alleged offence but being an approver his evidence requires corroboration.

The next witness on whom the Public Prosecutor relies is the witness Jurio (Ex. 7) who informed the Police about the intended commission of the offence. He met accused No. 5 and two others on the road who told him that they have been looking for a house which they intend to rob and were going to discuss the matter in the *Mussafarkhana* with their accomplices. They asked the witness to join them He went with the accused to the *Mussafarkhana* and found the appellants and others there It was decided to commit the robbery and the witness promised to join them, but instead of doing so he left and reported to the Police This witness also implicates all the accused.

Kimatrai (Ex. 13) is a Punch Witness of the arrest of the accused and of the finding of the articles in front of them. These articles were not recovered from the possession of any particular accused but they were lying in one heap on the ground under an *Ajrak*. This is general corroboration of the approver's story.

Finally there is the evidence of the Deputy Superintendent of Police (Ex. 39) that the day after they were seized the accused explained the circumstances which brought them to the *Mussafarkhana* and these explanations are different from the explanations given by the accused in the Sessions Court. That evidence is admissible as showing that the conduct of the accused was not that of innocent persons, *vide Hussainbibi* v. *Crown* (1).

I am of opinion then that there is sufficient corroboration of the evidence of the approver against each of the accused and would dismiss these appeals

Mehta, A J. C.—I wish to add a few remarks of my own on one particular point.

It is not quite clear from the judgment under appeal but it appears to me that the mind of the learned Additional Sessions Judge who tried this case must to a certain extent, perhaps to a very great extent, have been influenced by the alleged falsity of the statements made by the accused to the Police soon after their arrest. The sum total of the evidence which weighed with the trial Judge as proving the guilt of the convicted persons is to be found given in a short paragraph towards the end of his judgment which reads as follows:

"The evidence of the circumstances in which accused Nos. 1 to 7 were secured, with the evidence of Jurio corroborated by the report he filed, and the ridiculous defences which some of these 7 accused give leave no doubt however as to the guilt of this accused."

I am not sure that in order to discredit the version of an accused person at the trial, the use of his statement before the Police, although it may be substantially of a non-incriminatory character otherwise, is not provided against in s. 162 of the Criminal Procedure Code. I am aware of the fact that there are two rulings of this Court, *Umer Darez* v. *Crown* (2), *Hussainbibi* v. *Crown* (1), in which it is

(1) 93 Ind. Cas. 248; 20 S. L. R. 74; 27 Cr. L. J. 456; A. I. R. 1926 Sind 151.

(2) 86 Ind. Cas 410; 19 S. L. R. 142; 26 Cr. L. J. 778; A. I. R. 1925 Sind 237.

held that s. 162 of the Criminal Procedure Code does not apply to statements of accused persons before the Police but only to statements of witnesses before the Police. There are contrary rulings of the Bombay High Court given in *Emperor* v. *Vithu Balu* (3) and in *Emperor* v. *Issuf Muhammad* (4).

In the present case, however, I am satisfied that the conviction of the appellants can be supported without relying on their statements before the Deputy Superintendent of Police. The finding of the weapons and house-breaking implements under circumstances rightly justifying the inference of possession is, to my mind, sufficient and cogent corroboration of the statement of the approver Faizu and of the informer Jurio. The statements of the accused before the Police which the prosecution have proved to be false through the evidence of the Deputy Superintendent of Police have not been a determining factor with me.

I, therefore, agree that the conviction of the appellants is not liable to be set aside and that these appeals should be dismissed.

N. K. & A *Appeals dismissed.*

(3) 83 Ind. Cas. 1007; 26 Bom. L. R. 965; A. I. R. 1924 Bom. 510; 26 Cr. L. J. 223.

(4) 133 Ind. Cas 748; 55 B. 435; 33 Bom. L. R. 305; A. I. R. 1931 Bom. 311; Ind. Rul. (1931) Bom. 396; 32 Cr. L. J. 1077; (1931) Cr. Cas. 567.

SIND JUDICIAL COMMISSIONER'S COURT.

Second Civil Appeal No. 2 of 1929.
December 18, 1930.

RUPCHAND AND MILNE, A. J. C.

KOTUMAL MOHANDAS—
APPELLANT
versus
DUR MAHOMED AND OTHERS—
RESPONDENTS.

Deeds—Execution—Registration — Presumption of regular and due presentation—Undue influence—Burden of proof—Shifting of burden—Third party's right to set up the plea—Contract Act (IX of 1872), s. 16—Rectification of deeds—Prayer for rectification and partition in same suit, legality of.

The fact that the Sub-Registrar accepted a document from the executant and duly registered it is *prima facie* proof that the executant was not in an intoxicated condition when he presented it for registration. *Gangamoyi Debi* v. *Troiluckhya Nath Chowdry* (1), relied on. [p. 527, col. 1.]

A document executed under undue influence is not void but only voidable and the onus is in the first instance on the person who raises that plea. Before the onus can shift on the other party to prove that the contract was not induced by undue influence he has to prove not only that the other party was in a position to dominate his will, but that the transaction appeared on the face of it or on the evidence adduced unconscionable. [p. 527, col. 2.]

Plea of undue influence can be raised only by executant of document or his representative in estate, but not by a third party claiming adversely to such executant. [*ibid.*]

It is open to the plaintiff in a suit for partition to pray for rectification of a deed relating to the properties sought to be partitioned. He need not institute a separate suit for rectification. [p. 528, col. 1.]

Mr. *Kimatrai Bhojraj*, for the Appellant.

Mr. *Dipchand Chandumal*, for the Respondent.

Judgment.—This second appeal arises out of a suit filed by the plaintiff-appellant for partition of certain property. It appears that one Ahmed, father of defendants Nos. 1 and 2 died in the year 1906 or thereabouts and that at the time of his death he was indebted to the plaintiff on a decree which had been passed against him in Suit No. 1170 of 1909. At that time defendant No. 1 was a minor. For some years defendant No. 2 managed the whole estate and executed certain documents in favour of the plaintiff and others creating mortgages against the property left by Ahmed. When defendant No. 1 came of age he opened a personal account with the plaintiff. On 20th November, 1918 defendant No 1 executed a registered sale-deed in favour of the plaintiff which forms the foundation of the present suit. By that deed defendant No. 1 conveyed to the plaintiff a four annas share in Survey Nos. 536, 116, 119, 120 and 97-2, a two annas share in Survey No. 111 and a two annas share in a well situated in Survey No. 536. The deed recites that the consideration for the sale was Rs. 300 paid in cash, Rs. 175 due on account by defendant No. 1 and Rs. 425 appropriated towards the decree in Suit No. 1170 of 1909 of the Subordinate Court of Naushahro. Defendant No. 1 appeared before the Sub-Registrar and admitted execution. The plaintiff filed the present suit in 1925, for partition of the property purchased by him and in the plaint he stated that although the sale-deed recited that he had purchased a four annas share in Survey Nos. 436 and 97-2 he had as

a matter of fact purchased a four annas share in Survey No. 536-1 and Survey No. 97-3. His case was that the mistake in these numbers was discovered when the document was presented to the *tapedar* for effecting mutation of names and that the *tapedar* had noted at the foot of the document the following endorsement :

"In the document No. 536 is sold, but in fact 536-1 is sold. (2) In the document No. 97-2 has been sold but 97-3 has been sold. In the record 536-1 and 97-3 have been entered. Signature of the *Tapedar* Dabhro."

He further said that he had been put in possession of the share sold to him at the time of sales and had been dispossessed soon thereafter by defendants Nos. 1 and 2 and their mother, defendant No. 3, having taken away the produce of Survey No. 536-1 and 111, which were cultivated in 1919-20. In the subsequent year certain other numbers were cultivated and their produce likewise taken away. He however claimed mesne profits only in respect of such survey numbers as were cultivated within three years of the date of suit. He further alleged that defendant No. 3 who was a co-sharer in the property had relinquished her interest in the property in favour of her sons and that she had been made a *pro forma* defendant. Defendant No. 4 was joined because he owned a certain interest in Survey No. 111 and was, therefore, a necessary party to the suit.

The defence of defendant No. 1 was that he had no interest in the land at the date of suit as the whole of it had been acquired by his brother, defendant No. 2, by adverse possession. He further said that he was given to taking intoxicating drugs and that he had never executed the sale-deed or received the consideration. Defendant No. 2 claimed the property as his own adversely to defendant No. 1 and further said that if defendant No. 1 was proved to have executed the sale-deed, it was executed by him under undue influence and was therefore of no effect. He further pleaded that the document had been materially altered and the plaintiff could not therefore succeed and that in any case he could not sue for partition unless he had got the document rectified. He also raised the plea that the deceased Ahmed had left a daughter Soni who was dead and whose legal representatives were necessary parties to the suit and that certain lessees from defendant, No. 1 were also necessary parties to the suit. On these pleadings the trial Court framed the following issues:

"(1) Does defendant No. 1 own any interest in the survey numbers in suit? If so, what ?

(2) Is the sale deed in suit with consideration, and was it executed under circumstances shown in para. 3 of the written statement (of defendant No. 2) and could defendant No. 2 raise such a plea ?

(3) Are the persons mentioned in paras. 8 and 9 of the written statement necessary parties ?

(4) Has defendant No. 2 remained in adverse possession of the land in suit? If so, what period and what is its effect ?

(5) Is the plea raised in para. 13 of the written statement true. If so, what is the result ?

(6) Cannot the suit lie in the present form ?

(7) Is the suit time-barred ?

(8) What was the produce of the land in suit ?

(9) Cannot the suit lie without rectification of the deed in suit ?

(10) What should the decree be ?

On the evidence the trial Court came to the conclusion that defendant No. 1 owned no interest in the survey numbers in suit as he had lost his rights therein by adverse possession that the sale deed was without consideration and therefore unenforceable; but that there was no proof of undue influence and that the plaintiff could not succeed as he had made material alteration in the sale deed. With regard to the joinder of Soni and the lessees he said that the joinder of Soni had not been pressed by the defendants but the lessees were necessary parties to the suit. He accordingly dismissed the suit.

On appeal the learned District Judge held that defendant No. 1 had not lost his interest in the property by adverse possession but that the document had been executed by him under undue influence or rather, as he put it, that the plaintiff failed to prove that the document had not been executed under undue influence he being of the opinion that the burden was on the plaintiff to prove want of undue influence. He also upheld the finding of the trial Court that the document having been altered the plaintiff could not maintain the suit. With regard to consideration he said that in a suit based upon a sale deed the decision of the question was not material and therefore recorded no finding on it. Now we have no hesitation in holding that both the Courts have viewed the pleadings and the evidence recorded in the case from a wrong angle of vision.

The document was duly registered. Although in the written statement defendant No. 1, had denied execution of the document his Pleader stated to the Court

that defendant No. 1 had put his thumb-mark on the document and that there was no need to send the document for recording the evidence of an expert There was also evidence of the attesting witness who said that he had executed the document. With regard to the plea that it was executed by defendant No. 1, in a state of intoxication, the fact that the Sub-Registrar had accepted the document from defendant No. 1 and had duly registered it was *prima facie* proof that he was not in an intoxicated condition when be presented the document for registration. As said by their Lordships of the Privy Council in *Gangamoyi Debi* v. *Troiluckhya Nath Chowdry* (1), there is a presumption that all things done before the Registering Officer in his official capacity and verified by his signature have been done duly and in order. Except the bare statement of defendent No. 1, made in his defence that he must have executed the document in an intoxicated condition, there was not an iota of evidence on that point. All that the witnesses called on his behalf and who were interested in him had deposed was that defendant was in the habit of taking intoxicating drinks in larger quantities in former years than about the time of the suit. This evidence was quite insufficient to rebut the presumption that the document was properly executed.

With regard to consideration there were recitals in the deed showing exactly the consideration. The plaintiff had produced his account books to show that he had advanced money to defendant No. 1 as alleged. He had also produced the decree obtained by him against the father of defendant No. 1 and produced a certified copy of a plaint which he subsequently instituted in 1909 against defendents Nos. 1 and 3 wherein he had given credit for the sum of Rs. 425 appropriated as purchase price towards the decree. He was supported by the witnesses and defendant No. 1 had admitted before the Sub-Registrar that he had received consideration.

With regard to the plea of undue influence, the learned Judge of the first appeal Court was in error in throwing the onus of that issue upon the plaintiff. A document executed under undue influence is not void, but only voidable under s. 16, Contract Act, and the onus is in the first instance on the person who raises that plea. His case comes within the four corners of s. 16. Clause (3) of that section reads as follows:

"Where a person who is in a position to dominate the will of another enters into a contract with him and the transaction appears on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other."

Now before the burden could shift upon the plaintiff to prove that the contract was not induced by undue influence, the defendants had to prove not only that the plaintiff was in a position to dominate the will of defendant No. 1 but that the transaction appeared on the face of it or on the evidence adduced to be unconscionable. Whatever may be said with regard to the position of the plaintiff as a creditor and therefore in a position to dominate the will of defendant No. 1, there was nothing on the face of the transaction to show that it was unconscionable. It was a sale for consideration. There was no evidence to show that the property was worth much more than the price paid for it.

Apart from the above it would appear that the plea of undue influence could only be raised by defendant No. 1 or his representative in estate. But it could not be raised by a third party claiming adversely to him. Defendant No. 1 had not taken the plea of undue influence. Defendant No.2 was not his representative in estate but was claiming adversely to him and could not therefore raise this plea, nor could he raise it in the vague form in which he had done, that is to say, by merely stating that if the document was executed, it was executed under undue influence.

With regard to the plea that the plaintiff had altered the deed again we find that it is contrary to the admitted facts. The endorsement on the deed is not by the plaintiff but by the *tapedar* and does not amount to alteration but only purports to be a note made at the foot of it explaining that the proper survey numbers which had been sold were not 536, and 97-2 but 536-1 and 97-3. He had specifically mentioned in the plaint that there was a mistake in the sale-deed with regard to these two survey numbers. The plaintiff could not be puni-

(1) 33 C. 537; 33 I. A. 60; 10 C. W. N. 522; 8 Bom. L. R. 375; 3 Cr. L. J. 349; 1 M. L. T. 131; 16 M. L. J. 161 (P. C.).

shed for the act of the *tapedar*.

The question of limitation has been rightly decided by the Appellate Court. Up to 1917 or 1918 defendant No. 1 was a minor and defendant No. 2 managed the estate on behalf of himself and defendant No. 1. This suit was filed in 1925, that is within seven years of defendant No. 1 attaining majorty. There was also evidence of transactions entered into by defendant No. 2 on behalf of himself and his grandson defendant No. 1 which showed that he never claimed any interest adverse to defendant No. 1 up to 1918.

With regard to the plea whether the plaintiff could not get partition unless he sued for rectification of the sale deed, it is sufficient to observe that it was not necessary for him to file a separate suit for that purpose. It was open to him to claim relief by rectification in this suit. Furthermore his failure to get the rectification in respect of these two survey numbers was no ground for refusing him relief in respect of the other survey numbers. The amendment with regard to rectification was a formal one and should have been allowed. We think that this amendment should now be allowed and opportunity afforded to the parties to prove whether there was a mistake or not as alleged. It is no doubt true that defendant No. 3 did not defend the suit, but no formal proof has been given by the plaintiff even as in an *ex parte* suit that she had relinquished her interest therein, and we think that this should now be done.

With regard to the joinder of Soni's heirs as parties to the suit, we find that some evidence was led by both parties. Plaintiff said that Soni had died before Ahmed. On the other hand defendant No. 2 gave evidence that she died after Ahmed. Although in view of the fact that the defendants having given up the plea that her heirs were necessary parties to the suit, the defendants are out of Court we think that as we are remanding the case to the lower Court on certain points, her heirs may as well be joined so as to put an end to this litigation and prevent any attempt at re-opening the partition made in this suit. As the lease relied upon in the defence has expired, no question arises whether the alleged lessees are necessary parties to this suit.

We accordingly hold that the sale-deed is with consideration, that it has not been induced by unde influence, that defendant No. 1 had a subsisting interest in the property which was validly conveyed by him to the plaintiff, that the plaintiff's suit is not barred by limitation and that the plaintiff has not lost his right to have partition by the alleged alteration in the sale deed and that he is entitled to the share of defendant No. 1 in the survey numbers sold to him; but as partition cannot be completely and finally made without the joinder of Soni's heirs, and the share of the plaintiff cannot be properly ascertained unless the question as to the relinquishment by defendant No. 3 is gone into, we order that the suit be remanded to the lower Court for trial upon both these points. We also order that the plaintiff be allowed to amend his plaint by praying that the sale deed be rectified and relief be given to him in respect of survey numbers actually sold to him. It will be open to the parties to show whether, firstly Soni's heirs and defendant No. 3 have a subsisting interest in the property, and secondly whether there was a mistake in the survey numbers as alleged. But it will not be open to them to reagitate the question of want of consideration or of undue influence or of the document being vitiated by the alleged alteration or the claim of the plaintiff having been lost by adverse possession. Costs to be costs in in the cause.

A. *Case remanded.*

CALCUTTA HIGH COURT.

Civil Appeal No. 127 of 1930.

March 13, 1931.

RANKIN, C. J. AND BUCKLAND, J.

PRAMATHA CHANDRA KAR AND ANOTHER—APPELLANTS

versus

BHAGWANDAS-MADANLAL AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 264—Partnership—Secret dissolution—Liability of retiring partners—Absence of notice that they were partners, effect of—Evidence Act (I of 1872)—Evidence of retirement—Statements made at the time—Admissibility—Witnesses—Failure to examine at early stage—Application for commission at late stage—Discretion of Court—Interpretation of Statutes—Plain meaning.

If a firm is dissolved and no notice is given, people who continue to trade with the firm under the firm's name are not affected by the secret dissolution. Their right to sue the retiring partner upon post-dissolution transactions does not depend on whether they knew that he was a partner prior to the dissolution. *Gisvani Gorio & Co.* v. *Kalyanji Vallabhdas* (2), followed. *Greaves Cotton & Co.* v. *Purshottam Dharmasi & Co* (1) and *Bhai Shankar-Motiram* v. *Lakshmi Dyeing Works* (5), dissented from. *Jwaladutt* v. *Bansilal Motilal* (3) and *Chundee Churn* v. *Eduljee* (4), referred to. [p. 533, col. 1.]

If a person is proving that he has retired from a firm he is entitled to show that immediately after the date of retirement he wrote to the Bank and informed them that he had severed his connection with the firm and could not continue to guarantee its account. If he does that, any statement by him made at the time as the reason for his refusing to continue to guarantee is admissible to explain his conduct. [p. 530, col 2]

When a party elects to go to trial without the evidence of a particular witness who at the time was ill, the Court will be justified in refusing to issue a commission for examining him when the application for that purpose is made at the end of the trial. [p. 531, cols. 1 & 2.]

A section in an Act is *prima facie* to be interpreted according to the plain meaning of the words. [p. 533, col. 1]

Appeal from an order of Panckridge, J, in Suit No. 856 of 1925, dated the 2nd December, 1930.

Messrs *N. N. Sarkar, S. N. Banerji, S. M. Bose, Batra, B. C. Kar* and *N. Chatterji*, for the Appellants.

Messrs. *Pugh, N N. Bose* and *S. C. Ghose*, for the Respondents.

Rankin, C. J.—This is an appeal from a decision of my learned brother Panckridge, J., upon an issue whether two persons, Mr. Pramatha Chandra Kar and Sir Hari Sankar Paul, are liable as partners of the defendant firm of Dawn & Co., on a money-decree obtained against the firm by the plaintiffs Bhagwandas Madanlal, dated 28th January, 1927. The suit was for a sum of Rs. 4,592 in respect of two contracts which were made in 1923 and 1924 respectively and it was brought on 27th March, 1925.

It appears that the case for the appellants Mr. Pramatha Chandra Kar and Sir Hari Sankar Paul is that, in April, 1922, there was a dissolution of the partnership and Mr. Dawn, after that date, continued to carry on the business under the name of the old firm, Dawn and Co., the appellants having retired. It is clear that before April, 1922, the plaintiffs had transactions with Dawn and Co. at a time when admittedly the appellants were partners of the firm then trading under that name. The plaintiffs brought their suit, as I have said, against the partnership firm in the name of Dawn and Co. in March, 1926, and very soon after that, namely, in April, 1926, Mr. P. C. Kar brought a suit against Mr Dawn, Sir Hari Sankar Paul and some other members of Sir Hari Sankar Paul's family for a declaration that the partnership had been dissolved as from April, 1922. On 15th July, 1926, he obtained a preliminary decree declaring that the partnership had been dissolved as from that date and providing for the usual accounts. The plaintiffs having got their decree in January, 1927, made no attack upon the appellants as liable under the decree until February, 1930, namely, for a period of some three years. Now, an issue having been directed as to whether the appellants are liable under the plaintiffs' decree as partners of the firm of Dawn and Co., the learned Judge has tried certain questions necessary for the solution of that matter. The plaintiffs maintain that not only did they do business with Dawn and Co., prior to April, 1922, but that they made enquiries and came to know that the appellants were partners of the firm of Dawn and Co, that their dealings with Dawn and Co., were dealings upon which they gave credit to the appellant. It is quite clear that neither in April, 1922, nor at any subsequent period was any public notice of the dissolution of the partnership given.

In the circumstances the learned Judge has tried the question whether it is true that the plaintiffs knew at any time prior to April, 1922 that the appellants were members of this partnership and he has come (to the conclusion that *sic*) the plaintiffs' evidence on that question cannot be believed and he has, in my judgment, rightly refused to hold that it has been shown that the plaintiffs at the time they gave credit to the firm upon the contracts in suit knew of the status of the appellants as partners of this

firm. That being settled, the learned Judge has addressed himself next to the question whether, in the absence of knowledge on the plaintiffs' part these individuals—Mr. P. C. Kar and Sir Hari Sankar Paul were partners—the plaintiffs would be entitled to succeed assuming that the partners as between themselves did dissolve the business in April, 1922. This question in India turns upon the correct construction of s. 264, Contract Act. The learned Judge has come to the conclusion that the authorities to which I will refer in a moment require him to hold that, notwithstanding the provisions of s. 264, a person cannot hold a retiring partner liable unless he knew that that individual person was a partner prior to the dissolution. Accordingly the learned Judge has addressed himself to the question of fact whether or not in April, 1922, the appellants did retire from this firm as alleged. I will deal first with this question of fact.

Now, the defendants called, first of all in importance, Sir Hari Sankar Paul to prove the dissolution. Sir Hari Sankar Paul turned out to be an almost useless witness because, while he had been a partner of the firm, it appears that he took little interest in the matter, and never even drew any money from the firm. When he was called to prove that there was a dissolution of the partnership, he was found to be under the impression that in 1922 the firm had been dissolved by a letter being written. The letter was not in his hand at the time and it turned out that the letter he was thinking of was a letter written on 3rd April, 1925, by himself to Mr. Dawn in the course of which he begged Mr. Dawn to come to a settlement of the accounts of the firm with Mr. Kar, and in that connexion he said that the partnership had been dissolved by mutual consent on 30th April, 1922. He gave no tangible evidence of anything that happened in 1922 amounting to dissolution of the partnership. It is not really contended that upon this evidence the learned Judge could reasonably be asked to hold that there was a proof of dissolution. So far as the letter is concerned, it is to be observed that the letter of 3rd April, 1925, which was after the plaintiffs had brought their suit against Dawn and Co., and shortly before Mr. P. C. Kar had brought his suit for dissolution of partnership, is not in itself at all convincing evidence.

The next evidence of importance produced before the learned Judge is the evidence of a brother of Mr. P. C. Kar, who appears to have been employed as an assistant or clerk in the firm of Dawn and Co. This brother of Mr. P. C. Kar gives no evidence of any conversation and produces no letter between the partners which would amount to clear and direct evidence of dissolution, but he says that he was authorized to sign the firm's name *per pro* and he says, though curiously enough not in his original examination but in further examination-in-chief, that there was the old firm and then there was the new firm in April, 1922. He produces a book in which he says entries were made with reference to the business of the old firm and that book on examination turns out to be of this character: that, while the entries in it may well have reference to a dissolution of partnership about that time, there is nothing in themselves from which the Court can make certain that there was a dissolution in April, 1922. There was also produced the last book of accounts, the largest book of accounts, and the entries are found to come to an end after the first two or three pages. Mr. Dawn was not produced as a witness, and none of the books after April, 1922, were produced to show what was happening in the firm after April, 1922. In addition to that a letter was produced dated 27th June, 1922, written by Mr. P. C. Kar to the Agent of the Chartered Bank of India, Australia and China. In that letter, Mr. Kar said that he was writing at the request of Babu Rajendra Lal Dawn of Messrs. Dawn and Co. and was writing to confirm that he had severed his connexion with the said firm of Dawn and Co. as from 1st May, 1922, and had not, therefore, signed the letter of guarantee which Babu Rajendra Lal Dawn had signed in favour of the Bank on behalf of Messrs. Dawn and Co. In my opinion that letter is evidence for the appellants. If I am asked to say under what section of the Evidence Act it is evidence, I think it is evidence under s. 8. If a person is proving that he has retired from a firm, he is quite entitled to show that immediately after the date of retirement he wrote to the Bank and informed them that he had severed his connexion with the firm and could not continue to guarantee its account. If he does that, I think any statement by him made at the time as the reasons for his refusing to continue to guarantee is admissible to explain his conduct.

The evidence of the witness Naresh Chunder Kar is not very satisfactory in some respects. He does not appear to have given very complete or intelligent answers to certain questions: and when he is asked about the books it turns out that he knows rather less about them than one would suppose from some of his answers at the beginning of his examination. As regards the small book, at the end, questions were put to him as to the meaning of the entries and he says:

"I cannot say anything about that. It was Rajen Babu who kept these books. All that I can say is that this particular book was kept to ascertain in fact if there was any sale of any goods relating to the old partnership business and on such occasions I used to refer to that book."

Question.—"The last two entries in the opening page show 'received from Rajendra Lal Dawn as loan Rs. 1,395 and that is shown as expenditure on the other side; you find another entry like that of Rs. 1,350."

Answer.—"I cannot say anything about it."

The evidence of Sir Hari Sankar Paul having proved to be of little or no service, the learned Counsel for the appellants before us applied to the learned Judge to stop the trial and direct that the evidence of Mr. P. C Kar should be taken on commission. It is quite clear that these appellants elected to go to trial without the evidence of Mr P. C. Kar just as they deliberately went to trial without the evidence of Mr. Dawn and without the books of the firm of Dawn & Co after the alleged dissolution. Mr. P. C. Kar, I am satisfied, was at the time lying seriously ill and when it appeared that the evidence of Sir Hari Sankar Paul manifestly came to nothing the Court was asked to issue a commission to examine Mr. P. C. Kar himself. No previous application of this sort had been made and it is quite clear that with their eyes open the appellants were prepared to go to trial without his evidence. It seems that the learned Judge concluded the hearing of the suit and reserved his judgment and then notice was given of a formal application for the issue of a commission to examine Mr. P C. Kar. The learned Judge seems to have some doubt as to his power to entertain it. I cannot say that I have any doubt for myself. But the learned Judge did consider the application on its merits and refused it He thought that to issue a commission at that stage would be a very exceptional order and that as the appellants elected to go to trial without taking any steps at all to have Mr. P. C. Kar examined it would not be fair at the end of the trial to make such an order such as was asked for.

In these circumstances, the first matter which is pressed upon us is that it is unfortunate and unjust that this matter should be disposed of without taking the evidence of Mr. P. C. Kar and that this Court ought now to give a direction which would enable that gentleman to be called and to give his evidence. I find it very difficult to hold that the learned Judge erroneously exercised his discretion when he refused an application of this character made at the time and in the circumstances in which that application was made to him. It has to be remembered that the position now is considerably worse. If we were to make an order which would have the effect of letting in the evidence of Mr. P. C. Kar, then this Court would have to decide upon the reliability and the value of the evidence of the witnesses whom the learned Judge saw and whom we have not seen. The whole case would have to be canvassed afresh and it would be very difficult to conduct the evidence of Mr. P. C. Kar in such a way as to make the taking of his evidence at this stage fair to the plaintiffs without something in the nature of a re-trial. Upon the whole, as the learned Judge has not thought fit to exercise his discretion in favour of the appellants, it would not be right in my opinion, for the Court of Appeal to say that the learned Judge was wrong.

The difficulty I find upon this matter arises chiefly in connexion with the second question, namely, whether the learned Judge is right in refusing to be satisfied with the evidence as a whole called for the appellants. The case from that point of view is very much on the border line. There is the hazy evidence of Sir Hari Sankar Paul and there is the letter to the Bank dated 27th June, 1922.

The books while they do not prove a dissolution suggest that something of that sort was happening at the time and, although Mr. Dawn has not been called, it does appear to be true that in the partnership suit he was professing to be the sole proprietor of Dawn & Co. On the other hand, one has to admit the force of what the learned Judge says that, in the absence of some direct evidence by one or other of these partners as to the dissolution of the partnership, it is difficult to say that the Court is bound to be satisfied with scraps and suggestions of the kind to which I have referred. If this matter rested there, I

should find it a difficult matter indeed to be quite certain that, in the absence of any evidence to the contrary given by the plaintiffs, the learned Judge in a case of this sort has given full value to the cumulative evidence, such as it was, produced by the appellants. On the whole, I am however, bound to say that it was the duty of the appellants on whom the onus rested to satisfy the learned Judge in a reasonable sense. I find it difficult to divest my mind of the idea that the evidence points to a dissolution in 1922 but at the same time I cannot say that, as a matter of right judgment the learned Judge was obliged to be satisfied with the evidence.

In these circumstances, it seems to me to be necessary to come to a decision upon the contention that was raised as regards s. 264, Contract Act. Now, the cases on the point in favour of the appellants are cases in the High Court of Bombay and the learned Judge has referred to them shortly and very clearly in his judgment. It comes to this that there is a decision in favour of the appellants by Tyabji, J., in the case of *Greaves Cotton & Co.* v. *Purshottam Dharmasi & Co*, (1), and there is an opposite decision of Beaman, J, in the case of 30 Ind. Cas 864. *Gisvani Gorio & Co.* v. *Kalyanji Vallabhdas* (2) Then there is a case which went to a Division Bench on appeal, the case of *Jwaladutt* v. *Pansilal Motilal* (3). In that case, it was conceded before the Bombay High Court that, unless the plaintiff knew that a particular person was a partner prior to the dissolution, he could not get the benefit of s. 264. That was conceded before the Appeal Court in Bombay and the case went to the Privy Council upon another point, namely, upon the point whether an old customer, as it is said, requires to have an express notice of the dissolution—a point which has been decided in this Court in the case of *Chundee Churn* v. *Eduljee* (4). The Privy Council in their judgment upheld the decision in that Calcutta case but in no way dealt with the question whether a person who did not know that a certain man was a partner of the firm prior to the dissolution could under s. 264, in the absence of any notice of any kind, claim to hold him liable upon transactions entered into after the dissolution. There was thereafter a case *Bhai Shankar Motiram* v. *Lakshmi Dyeing Works* (5), where the Appeal Court in Bombay again took the view that a person who was not known to be a partner was not within the scope of s. 264. In that case, the learned Judges of the Bombay High Court appear to have been under a misapprehension to the effect that, in the Privy Council in *Jwaladutt's case* (3), it was admitted that the view taken by the Bombay High Court on this matter was correct. Now, the learned Judge probably acted very judiciously and rightly in preferring to follow these decisions sitting as a Court of first instance.

The matter is however now in this Court and, in the circumstances of this particular case, it is unfortunately necessary, in my judgment, that we should deal with the point. It is quite clear that, in *Eduljee's case* (4), the view ultimately accepted was that the section does not profess necessarily to deal exhaustively with the question of notice arising upon a dissolution. It was held that even if public notice had been given, the section did not govern the case so as to decide that express notice was unnecessary in the case of old customers. The case before us, however, is directly within the section. It is not a question of arguing from one proposition to the converse of that proposition. The section does purport to deal with cases where no public notice has been given and the plaintiff has no notice of the dissolution; and the proposition enunciated by the section is that a person dealing with a firm will not be affected by the dissolution in these circumstances. Are we then to say that the section only applies to cases where particular individuals who are sought to be made responsible as partners were known to have been partners to the parties seeking to make them so responsible? I will not enlarge upon the principle that a section of an Act is *prima facie* to be interpreted according to the plain meaning of the words, nor will I trouble here with the cases now somewhat numerous in which the Judicial Committee has affirmed and applied this doctrine notwithstanding that the result is to make the law in India somewhat different from the law that would obtain according to the English principles. If it were in any way clear to me that to take the language of the section at its face value was to make the section say something paradoxical or

(1) 5 Bom. L. R. 366.
(2) 30 Ind. Cas. 864; 17 Bom. L. R. 762.
(3) 104 Ind. Cas. 520; A. I. R. 1927 Bom. 560; 29 Bom. L. R. 1244.
(4) 8 C. 678; 11 C. L. R. 225.
(5) 129 Ind. Cas. 588; A. I. R. 1930 Bom. 449; 32 Bom. L. R 1031; Ind. Rul. (1931) Bom. 188.

plainly inconvenient or disastrous to commerce I might not be prepared even yet to forego the claim that in such a case the Statute ought to be interpreted if possible to leave room for an implication that would render the provisions reasonable. I do not agree with all that was said by Beaman, J., but I am entirely unable to say that there is any sufficient reason to cut down the *prima facie* and direct meaning of the words of this section so as to exclude from its operation persons who were not known to be partners.

It is quite true that the principles of agency to be found in the Contract Act and in s. 115, Evidence Act, would not by themselves take one so far as s. 264 on this footing takes us. That is very likely why s. 264 were specially enacted with reference to the particular case of partnership. It may well be that a person in India is dealing with a firm; it may well be that the firm has a good reputation; it may also be that a person dealing with the firm made considerable enquiry as to its position; still it may well be that he may not know exactly who are the individuals who compose the partnership. Again, so many people in India and elsewhere trade under names which give no indication of the individuals who compose the partnership that the Legislature may have been minded to cut down to the minimum any kind of enquiry as to the composition of the firm by a person who has to deal with it. Again, I think it may be that the draftsman of the section gave effect to a desire on the part of the Legislature to encourage in every way giving public notice when a change in the constitution of the firm takes place. It is to my mind not paradoxical or in any way impossible to suppose that the Legislature meant to say that if a firm is dissolved and no notice is given and people continue to trade with the firm under the old firm's name they are not to be affected by a secret dissolution. After considering this matter somewhat carefully, while I quite appreciate that the section so construed is from the point of view of accepted English principles an anomaly, I am not prepared to hold that the question under s 264, Contract Act can be dealt with on the footing that there is any implied exception saving the liability of some persons. That being so it would be entirely unnecessary, on any view taken of these facts, to think of issuing a commission and it is entirely unnecessary to examine further the state of the evidence on the question whether there was in fact a dissolution of partnership in April 1922.

For these reasons, I think the appeal fails and must be dismissed with costs.

Buckland, J.—I agree

A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Civil Appeal No. 185 of 1930.

April 22, 1931.

SUHRAWARDY AND GRAHAM, JJ.

HARI DAS BASU—PLAINTIFF—APPELLANT

versus

NATIONAL INSURANCE COMPANY, LTD.—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 908), s. 39, O. XXI, r. 46—Attachment of debt—Jurisdiction of Court—Conditions—Want of jurisdiction—Validity of sale—Procedure—Debt, location of—Insurance policy, attachment of.

The invalidity or absence of attachment would not invalidate a sale inasmuch as an order of attachment is only a prohibitory order issued on the judgment-debtor and the public in order to protect the decree-holder. [p. 534, cols. 1 & 2.]

But if a property cannot be attached being outside the jurisdiction of a Court it can neither be sold by that Court. [p. 535, col. 1.]

It is not competent in execution of a decree for money to attach at the instance of the decree-holder a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court. *Begg Dunlop & Co.* v. *Jagannath Marwari* (3), followed, *Bank of Bengal* v. *Sarat Ch. Mitra* (2), referred to. [p. 535, col 1.]

The proper procedure in such cases is to transfer the decree for execution to the Court which has jurisdiction to attach the debt. [p. 535, col 2.]

It makes no difference so far as the consideration of the present question is concerned as to where the money is pay able. [*ibid.*]

The location of a debt is where the debtor resides. [p. 535, col. 1.]

Appeal from appellate decree of the District Judge, Birbhum, dated the 0th August, 1929.

Messrs. *Sarat Ch. Roy Chowdhury* and *Tarakeshwar Nath Mitra*, for the Appellants.

Mr. *Rupendra Comar Mitter*, for the Respondents.

Suhrawardy, J.—One Sasi Bhusan Bhattacharya living within the jurisdiction of the Munsif of Bolpur in the District of Birbhum insured his life with the defendant company for Rs. 2,000 by Policy No 7218 He borrowed some money from the plaintiff who obtained a decree for the amount against his legal representatives after his death, and put it in execution in the Court of the Munsif at Bolpur who had passed the decree In execution of the

decree, the policy or more correctly speaking the amount due under the policy was first attached by the Munsif of Bolpur under O. XXI, r 46, Civil Procedure Code, and subsequently sold by him and purchased by the plaintiff. Not having obtained satisfaction from the defendant, the plaintiff brought the present suit to recover the amount to which he said he was entitled by his purchase of the debt as aforesaid. The plea of the defendant company was that the Bolpur Court had no jurisdiction to sell the debt due under the policy and, so the purchase by the plaintiff did not give him the right to recover it from the defendant. The defendant further objected that the suit did not lie in the Court of the Subordinate Judge of Birbhum. As to the second ground of objection, the trial Court held that it had jurisdiction to entertain the suit and the learned District Judge on appeal did not consider this point, as in his opinion the plaintiff's suit failed on other grounds. The defendant however desires to support the decree of the Court below on this ground also.

On the first objection of the defendant both the Courts have held that the Bolpur Court had no jurisdiction to attach the debt due from the defendant company and had consequently no jurisdiction to sell it and that by his purchase at such sale the plaintiff did not acquire any right to recover the money. The learned District Judge after discussing the law and facts of the case has recorded his findings in these words:

"I fully agree with the conclusions arrived at by the learned Subordinate Judge and hold that the order of attachment was *ab initio* void and the alleged sale subsequently held gave no right, title or interest to the decree-holder the plaintiff in this case."

In this view of the matter both the Courts below have dismissed the plaintiff's suit and the plaintiff has appealed.

It has not been seriously passed that the attachment under O. XXI, r. 46, Civil Procedure Code, of the debt was a valid attachment. But it has been argued that any irregularity in or even absence of attachment does not vitiate the sale and in support of this contention several cases have been cited of which the latest is *Naresh Chandra Mitra* v *Molla Atul Haq* (1) in which all the earlier cases have been considered. As a pure question of law there can be no dispute that the invalidity or absence of attachment would not invalidate the sale, inasmuch as the order of attachment is only a prohibitory order issued on the judgment-debtor and the public in order to protect the interest of the execution creditor. But this view of the law is of no help to the plaintiff in the present case. In all those cases the Court had jurisdiction to sell the property. The executing Court, like the Court entertaining a suit (except in case of breach of contract), must have territorial jurisdiction over the subject matter against which execution is sought Where it has no such jurisdiction the provisions of s 39, Civil Procedure Code, must apply that is to say, the executing Court should send the application for execution to any other Court which has such territorial jurisdiction. The word "may" used in s. 39 does not mean that it is in the discretion of the Court which passed the decree either to execute the decree itself or to send the application for execution to another Court where the property against which execution is sought is situated outside the jurisdiction of the Court which passed the decree. The discretion given there indicates that the Court should send the application for execution to another Court where it thinks that the decree is executable in the way prayed for:

"Speaking generally, it is an accepted principle of international jurisprudence that the jurisdiction of a Court in enforcing execution of its decree is restricted by its territorial limitations. That is to say, the jurisdiction of the Court is circumscribed by, and is co-extensive with its territorial limits. Thus a Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, and where such property is in the hands of, or the custody of another, also outside the jurisdiction, such property sought to be attached in aid of the execution can only be reached by a regular method of procedure which has been prescribed by the rules of the Civil Procedure Code and similar Codes which prevail in all countries, *viz*, the decree of the executing Court must be transferred to the local limits of the jurisdiction of the external Court within which the property sought to be attached is for the time being." Per Atkinson, J., in *Bank of Bengal* v. *Sarat Ch. Mitra* (2).

If the moveable property such as money against which execution is asked for is not within the territorial limits of the executing Court, the only other way in which that Court may have jurisdiction to execute the decree is when the person against whom execution is sought is or resides within the jurisdiction of that Court. Except where these or one of these circumstances exist, or exists, the executing Court has no jurisdiction to seize property which

(1) 129 Ind. Cas. 779; A. I. R. 1931 Cal. 35; 57 C. 1206; Ind. Rul. (1931) Cal. 251.

(2) 48 Ind. Cas. 943; 4 Pat. L. J. 141; (1919) Pat. 155.

is not within its territorial jurisdiction and where the person against whom execution is sought does not reside within its territorial jurisdiction. This point has been settled by the decision in *Begg Dunlop & Co.* v. *Jagannath Marwari* (3), where the question arose with regard to the validity of attachment of a certain sum of money lying outside the jurisdiction of the executing Court. The learned Judges say:

"It is not competent to the Court in execution of a decree for money to attach at the instance of the decree-holder a debt payable to the judgment-debtor outside the jurisdiction by a person not a resident within the jurisdiction of that Court."

But Mr. Roy Choudhury on behalf of the appellant argues that even though the attachment was bad in law and the Court at Bolpur had no jurisdiction to attach the money in the hands of the defendant, it had still the jurisdiction to sell the debt due to the deceased judgment-debtor. The condition that in order to give jurisdiction to the executing Court the debt must be either within the jurisdiction of the executing Court or the person against whom it is claimed is a resident within its jurisdiction applies equally to attachment and to sale. If a property cannot be attached being outside the jurisdiction of a Court it can neither be sold by that Court. In *Surendra Nath* v. *Bansi Badan* (4) the view expressed in *Begg Dunlop & Co.* v. *Jagannath Marwari* (3) was confirmed and it was further observed that an inferior Court should not be allowed to usurp jurisdiction it did not possess, and the order passed by a Court by usurpation of jurisdiction cannot be allowed to stand on a consideration that similar order would have been made on the merits by a Court of competent jurisdiction.

In the present case there can be no quarrel about the facts. The debt is due from the Company which carries on its business at Calcutta. According to the decision in *Begg Dunlop's case* (3), the location of the debt is where the defendant resides. The debt and the debtor both being outside the jurisdiction of the Bolpur Court, that Court was not competent to sell the debt and the plaintiff did not acquire the right to recover it by his purchase at Court sale.

A further question is raised, namely, that under the contract evidenced by the policy money is payable to the legal representatives of Sasi Bhusan at Bolpur and so the Bolpur Court had jurisdiction over it. That question is relevant only with reference to the objection raised on behalf of the respondent that the suit is not maintainable in the Birbhum Court. It makes no difference so far as the consideration of the present question is concerned, as to where the money is payable. The point is where the money was lying when execution was taken. I agree with the learned District Judge in holding that the attachment and sale are both void and that the plaintiff has no title to the money in the hands of the defendant. In this view of the matter it is not necessary to consider whether the Bolpur Court had jurisdiction to entertain the suit. The result is that the appeal is dismissed with costs.

Graham, J.—I agree. In my judgment the appeal fails on the ground that Bolpur Court had no jurisdiction to attach or sell any property outside its territorial jurisdiction. The sale was, therefore, a nullity and could confer no right or title upon the plaintiff: see *Begg Dunlop & Co.* v. *Jagannath Marwari* (3). As was pointed out in that case the proper procedure for attachment of the policy would have been to transfer the decree to the Court within whose jurisdiction the debtor of the judgment-debtor resided. That course was not adopted. As my learned brother has stated the case referred to above was subsequently followed in another case in this Court; 36 Ind. Cas. 457 *Surendra Nath* v. *Bansi Badan* (4).

A. *Appeal dismissed.*

(3) 111 Ind. Cas. 417; 39 C. 104; 14 C. L. J. 228; 16 C. W. N. 402.

(4) 36 Ind. Cas 457; 24 C. L. J. 533, 22 C. W. N. 160.

CALCUTTA HIGH COURT.

Civil Appeal No. 11 of 1930.

March 13, 1931.

RANKIN, C. J. AND BUCKLAND, J.

GHASIRAM GOENKA—PLAINTIFF—APPELLANT

versus

HARIBUX GOVERDHONEDAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Counsel and client—Compromise by Counsel—Party present in Court not objecting—Validity of compromise—Allegation of misunderstanding of Counsel, effect of.

If a Counsel gives his consent to a decree on a misunderstanding, that may be good reason for the Court refusing to enforce the agreement. Where, however, the Counsel himself does not complain of having acted on a misunderstanding the Court cannot presume that he had acted on a misunderstanding. If the client is negligent in giving instructions and if the Counsel's exercise of judgment is not very

sound the agreement arrived at cannot be impeached on those grounds. [p. 537, col. 2; p. 538, col. 1.]

When the case was opened the Counsel for defendant in view of certain documents mentioned to the attorney that the defendant should consent to a decree and he also consulted the person who was standing behind his back, but it appeared that the Counsel's was under the impression that the person consulted was a relative of the party and not the party himself. The decree that was passed on the basis of the Counsel's representation was sought to be impugned on the ground that the Counsel did not have the requisite authority:

Held, that the party present having in fact been consulted, the agreement was binding on him. [p. 538, col. 1.]

Per *Rankin, C.J.*—If the party present in Court was not properly and adequately consulted then his duty was to refuse, when his Counsel was proposing to consent to a decree, to allow that to happen and if necessary to give notice to the other side and the Court that he was withdrawing the authority which the Counsel had on his behalf. If any right is to accrue to the client from the fact of his being in Court he must at least make his presence known to the Counsel in order that the Counsel may act accordingly and it cannot be supposed that because he keeps quiet and does not even instruct his Counsel as to who the client is or take any steps to inform the Counsel of his presence, the Counsel has got to carry on upon the footing that he has no authority to deal with the case as circumstances may require [p. 537, cols. 1 & 2.]

Appeal against original decree of Mr. Justice Panckridge, reported as 126 Ind. Cas 765.

Messrs. *A. K. Roy* and *S. C. Roy*, for the Appellant.

Messrs. *I. P. Mukerji* and *T. Ameer Ali*, for the Respondent.

Rankin, C. J.—In my opinion this appeal must be allowed. The question is whether a certain decree which was passed by consent should be set aside

It appears that the suit was brought against defendant No. 2 firm for the price of goods sold and delivered amounting to Rs. 3,000 and the present applicants Haribux Goverdhonedas were impleaded as defendant No. 1 on the footing that they had guaranteed the payment of the price of the goods. At the hearing defendant No 2 did not appear and as against them the plaintiff proved his case *ex parte* and obtained a decree. As regards defendant No. 1 the Firm Haribux Goverdhonedas they did appear by learned Counsel Mr. B. C. Ghose. It appears, according to themselves, that they had taken no pains whatever to give instructions to anybody until the case was actually called on and their learned Counsel had not even read the pleadings when the case started. The facts have not been inquired into but the case with which the present respondents came before the learned Judge was shortly this: a short time after the case had been opened Counsel for the plaintiff tendered a Nagri letter of which he had an English translation That translation was shown to Mr. B. C. Ghose who did not know Nagri and Mr. B. C. Ghose on reading it turned round and asked defendant No 1 firm's attorney to tell the petitioners to consent to a decree and, just as the attorney was conferring with one Goverdhonedas, Mr. B. C. Ghose got up and told the Court that the petitioners consented to a decree for the amount claimed. That was the story with which the learned Judge was presented The learned Judge has investigated the facts and he has followed the course that has been adopted more than once in these circumstances. The learned Counsel Mr. B. C. Ghose made a statement from the Bar and the learned Judge has decided this case upon the basis of that statement.

It seems clear enough that defendant No. 1 firm were represented in Court in addition to their Counsel, first of all, by their attorney and, secondly by one of their partners Goverdhonedas Deora. It is also quite clear that Goverdhonedas Deora is the son of Haribux Deora. It further appears that Mr. B. C. Ghose did not know at the time he had to begin this case who Goverdhonedas Deora was When he got the letter in Nagri, he handed it back to this Goverdhonedas Deora and asked him who he was and if this was his letter. It turns out that in this way he discovered that Goverdhonedas was not Haribux but the son of Haribux the writer of the letter. It further turns out that, although Goverdhonedas was a partner of defendant No. 1 firm, Mr. B. C. Ghose was never made aware of this fact. So one of his clients was sitting behind his back in Court though he did not know that: as a matter of fact, so far as we are informed, he had no other client present in Court at the time. Now, Mr. Ghose's narrative of the matter is that when he heard about this letter, as he was unable to read Nagri, he handed the original letter over where the Solicitor and Goverdhanedas were sitting and in the meantime he read the pleadings. When the letter had been read and Mr. Ghose had the advantage of hearing it read and seeing the English translation, he asked Goverdhonedas whether he admitted that the letter bore the signature that it purported to bear. He further asked whether his client meaning Haribux was present in Court and was going to give evi-

dence. He then discovered that the man behind him and to whom he was talking was not Haribux but his son and the son admitted that the letter bore his father's signature. On that Mr. B. C. Ghose doing his best came to the conclusion that the case was hopeless and then he turned round and said that there was no case and he would consent to a decree. It appears that Goverdhonedas did not object to his so doing. He did not get up to say that he withdrew his authority nor did he take any steps of that sort when Mr. B. C. Ghose got up and consented to a decree and the decree was recorded. That is not the end of the matter. At no time did Mr. B. C. Ghose then or afterwards come before the Court and suggest that when he consented to a decree or advised his client to consent to a decree he was labouring under a mistake or misapprehension of any sort or kind. In these circumstances, the learned Judge having quoted the observations of Lord Esher M R, in the case of *Mathews* v. *Munster* (1), has come to the conclusion that, even although Mr. B. C. Ghose did not know that the man sitting behind him was one of his clients, the presence of his client necessarily meant that Mr. Ghose had no authority to compromise the case without consulting his client. It seems to be a little hard if the law stands as the learned Judge thinks. But before considering the question of law, the first point, in my judgment, to consider is whether within any reasonable meaning of the expression Goverdhonedas can be heard to say that he was not consulted. In my opinion, it is abundantly plain that he was consulted and, if he is heard to say that he was not properly and sufficiently consulted, then his duty was to refuse when his Counsel was proposing to consent to a decree to allow that to happen, to object to anything of the sort being done and, if necessary, to give notice to the other side and the Court that he was withdrawing the authority which the learned Counsel had on his behalf. Why this case should be dealt with on the basis that the client was not consulted, I fail to understand on the statement made by Mr. B. C. Ghose which the learned Judge has accepted. But apart altogether from that, the learned Judge's judgment apparently goes to the length of saying that, if the client is in Court even although he is not known to the Counsel, unless the client consents, the Counsel's ostensible authority is non-existent. I do not understand why this proposition should be laid down. If any right is to accrue to the client from the fact of his being in Court, he must at least make his presence known to the Counsel in order that the Counsel may act accordingly, and it is monstrous to suppose that, because he keeps quiet in a back seat and does not even instruct his Counsel as to who the client is or take any steps to inform the Counsel of his presence, the Counsel has got to carry on upon the footing that he has no authority to deal with the case as circumstances may require. It seems to me that this case is amply and sufficiently governed by the very pertinent observations which are quoted by the learned Judge of Lord Esher M. R, in *Mathews* v. *Munster* (1):

"If the client is in Court" and Lord Esher is not talking of concealed or unknown client "and desires that the case should go on and Counsel refuses, if after that he does not withdraw his authority to Counsel to act for him and acquaint the other side with this he must be taken to have agreed to the course proposed."

That is all the law which, in my judgment, need be considered in this case.

Mr Mukherjee has in addition to defending the principle of the decision of the learned Judge, contended before us that, apart from that, he has in this petition made out a case of an entirely different character. What he says is that it is quite true that his client gave Mr. B C. Ghose no time to appreciate his case and Mr. B. C. Ghose had very little chance of judging accurately what the fortune of the case would be or the point that would turn out to be material and accordingly, when Mr. B. C. Ghose saw the Nagri letter, he failed to appreciate that it was not so fatal to his client as he obviously thought. The contention is that, if he had looked at that letter carefully never mind that it is perfectly true that that letter was written by Haribux he would have seen that it did not help the plaintiff very much and it did not hurt defendant No. 1 very much and it is said that Mr. B. C. Ghose made a mistake in judgment in thinking that this letter was likely to be fatal to his clients. It is said that on that there was a misapprehension and consequently the case comes under the principle that, if learned Counsel gives his consent on a misunderstanding, that would be a good reason for the Court refusing to enforce the agreement. If Mr. Ghose had come before the Court and stated that he had acted upon a misunderstanding, it might be that that was a case worth considering. But why should we assume that Mr. Ghose who has never complained of

(1) (1887) 20 Q. B. D. 141.

having acted on a misunderstanding and has never confessed to any misunderstanding acted on a misunderstanding? The only reason is that his clients were hopelessly neglectful in giving proper instructions to him. Mr. Ghose acted to the best of his judgment and, even if it be shown that his judgment was not very sound because he had no good opportunity of appreciating the situation I should be very sorry indeed to regard that as a reason why the party on the other side should be told that the agreement which has been come to ought not to be enforced. In my judgment, the appeal should be allowed, the order of the learned Judge should be discharged and the decree as against both sets of defendants must be restored. The costs before us and before the learned Judge must be paid by the applicants.

It would appear that the decree was by mistake set aside as against defendant No. 2 also. There appears to be no excuse as to this and the decree is restored as a whole.

Buckland, J.—I agree.

A. *Decree restored.*

CALCUTTA HIGH COURT.

Civil Appeals Nos. 1662 and 1663 of 1929.

March 13, 1931.

MITTER, J.

HARAN CHANDRA ROY—PLAINTIFF—APPELLANT

versus

RAM KUMAR ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66—Sale in execution—Suit to enforce agreement to sell against purchaser—Maintainability.

A suit against a purchaser in Court auction to enforce an alleged agreement entered into by him before the confirmation of the sale to convey to the plaintiff a share in the property purchased is barred under s. 66, Civil Procedure Code.

Obiter.—An agreement subsequent to the purchase is not affected by the section. *Ramathai Vadivelu Mudaliar* v. *Peria Manicka Mudaliar* (1), explained, *Venkatappa* v. *Jalayya* (2), referred to.

Civil Appeal from a decree of the First Additional Sub-Judge, Mymensingh, dated the 29th January, 1929.

Messrs. *Gopal Chandra Das* and *Bhuban Mohan Saha*, for the Appellant.

Messrs. *Bhagirath Chandra Das* and *Ramendra Nath Roy*, for the Respondents.

Judgment.—These are two appeals by the plaintiffs and arise out of two suits for specific performance of a contract of sale. The plaintiffs' case is that the suit land originally belonged to one Abedul and his co-sharers who were *jotedars* in respect of the land. There were three money decrees against them in favour of the plaintiffs in the present suit. The parties were brothers and when each of these persons executed the decrees there were some questions of ratetable distribution of assets amongst them. Then on 19th of *Kartik* 1328 *B. S* there was an agreement between them that the plaint lands would be purchased in auction in the name of Ram Kumar Roy for Rs. 120 if there were no other bidders for more value and that Ram Kumar Roy would have 8 annas share, Haran Roy 4 annas share and Ananda Roy 4 annas share in the plaint lands so purchased and that subsequently the purchase money, costs of sale certificate and delivery of possession would be paid by them in proportion to their aforesaid shares by the three brothers and in that case Ram Kumar, was to be made to execute and register deeds of relinquishment in respect of their shares in favour of the plaintiffs in the present suit. It is said in the plaint that after the confirmation of the sale the plaintiffs demanded the execution of the deeds from the defendants which was not responded to with the result that the present suit had been brought. The defence of the defendants was that the suits were barred by the Statute of limitation. It was further contended that the contract was vague and cannot be given effect to. The Court of first instance negatived the defence and decreed the suits of the plaintiffs. Against this decision an appeal was taken to the Court of the Subordinate Judge of Mymensingh and the Subordinate Judge has reversed these decrees of the Munsif in both the suits and has dismissed the plaintiffs' suits. He rested his decision in the two suits on two grounds: first that the suits were barred by s. 66, Civil Procedure Code, and secondly that the suits are barred by the Statute of limitation having regard to the provisions of Art. 113, Sch. I, Limitation Act.

In second appeal by the plaintiffs it has been contended by Mr. Das who appears for the appellants in both the cases that the Subordinate Judge has gone wrong on both the points. It is said that s. 66 was never taken as a ground of bar of the two suits in the written statement of the defendants and, therefore, should not have been allowed to be raised before the lower Appellate Court. The answer to this contention is

this: that the plea of bar under s 66 which goes to the root of the suit does not depend upon disputed facts and may be allowed to be taken at any stage and the Court is bound to give effect to this plea. It appears that the agreements were made either before the sale or before the confirmation of the sale. In a case of this kind it is difficult to say that s. 66 does not apply. Mr. Das sought to spell out of the plaint an agreement after the sale and asked me to apply the decision of the Judicial Committee in the case of *Ramathai Vadivelu Mudaliar* v. *Peria Manicka Mudaliar* (1) which approved of the Full Bench decision in the case of *Venkatappa* v. *Jalayya* (2). An examination of the decision of the Judicial Committee will show that their Lordships held that where the contract is subsequent to the purchase such a purchase is not affected by the provisions of s. 66. It is necessary to quote a portion of the judgment delivered by Lord Cave in that case to show that if the contract was, as in the present case, before the sale, the provisions of s. 66 can be attracted to the case. At page 649 * In *Ramathai Vadivelu Mudaliar* v' *Peria Manicka Mudaliar* (1), their Lordships of the Judicial Committee say:

"It was argued by Counsel for the appellant that the agreement relied upon by the plaintiffs even as found by the High Court amounted in substance to an agreement that the appellant should purchase as to certain parts of the property on behalf of the respondents or of the persons whom they represent and he was able to point to certain expressions both in the plaint and in the evidence of some of the plaintiffs' witnesses which supported that view of the transaction. If the agreement entered into before the auction stood alone there would be considerable force in this contention. The object of s. 66 was to put an end to purchases by one person in the name of another and the distinction between a purchase on behalf of another and the purchase coupled with an undertaking to convey to another at the price of the purchase is somewhat narrow. But whatever doubt might be caused by the character of the original agreement is removed by the events which happened after the sale. It was decided in *Venkatappa* v. *Jalayya* (2), that an agreement subsequent to a purchase is not affected by the section and there can be no question as to the correctness of that decision. In the present case agreements were entered into after the sale".

It will appear, therefore, from the earlier passage in the quotation just made from their Lordships' decision that if the agreement is regarded as one which was made before the purchase, in that case s. 66 would apply. Of course these are the observations which were not necessary for the decision in the particular case. But an *obiter dictum* of their Lordships is entitled to very great weight. In the circumstances it appears that there being no statement in the plaint to show that there was an agreement subsequent to the sale, s. 66 bars the suits on the question of limitation; the Subordinate Judge has also come to a right conclusion. From the receipts which have been executed prior to the sale or confirmation of the sale it appears that the intention of the parties was that the agreement should be given effect to after the confirmation of the sale, that is to say, that the deed of relinquishment mentioned was to be executed after the confirmation of the sale which took place on 10th January, 1922, and none of these suits are filed within three years from that date.

The result is that both the points raised by Mr. Dass fail and the appeals fail and must be dismissed.

There will however be no order as to costs having regard to the relationship of parties.

A. *Appeal dismissed.*

(1) 56 Ind. Cas. 395; A. I. R. 1920 P. C. 30; 47 I. A. 108; 43 M. 643; 24 C. W. N. 699; 18 A. L. J. 584; 23 M. L. T. 13; 39 M. L. J. 1; 12 L. W. 1; (1920) M. W. N. 389; 2 U. P. L. R. (P. C.) 90 (P. C.).

(2) 51 Ind. Cas. 111; 42 M. 615; 9 L. W. 598; 26 M. L. T. 46; (1919) M. W. N. 355; 37 M. L. J. 98 (F. B.).

*Page of 43 M.—[*Ed.*]

CALCUTTA HIGH COURT.

Civil Appeal No. 75 of 1930.

March 5, 1931.

RANKIN, C. J. AND BUCKLAND, J.

RAMJASH AGARVALLA AND ANOTHER —APPELLANTS

versus

MESSRS. ORR, DIGNAM & CO., AND OTHERS—RESPONDENTS.

Calcutta High Court (Original Side) Rules, Chap. XXXXVI, rr. 32, 71 to 73—Taxation of costs—Power to allow more than maximum prescribed—Written consent, whether necessary—Procedure for revision—Application to Court before taxation is completed, propriety of.

Under Chap. XXXVI, r. 32, of the Calcutta High Court Original Side Rules the Taxing Officer has power to allow fees in excess of the maximum on production of a written consent of the client and just as the Taxing Officer has jurisdiction to allow fees in excess when a written consent is produced, the Court has jurisdiction to allow fees in excess where consent is proved although it is not proved in every instance by a consent in writing. [p. 541, col, 1.]

Although as a rule the proper procedure to apply for a revision of taxation is to wait till the completion of the taxation and then apply for a review under rr. 71 to 73 of Chap. XXXVI, where the discretion is not vested in the Taxing Officer at all, there is no objection whatever and it is more

convenient to approach the Court at a stage before the taxation is finally concluded. [p. 541, col. 1.]

Civil Appeal against an order of Mr. Justice Lort-Williams, dated the 22nd May 1930.

Messrs. *N. K. Bose* and *B. B. Sarkar*, for the Appellants.

The Advocate-General and Mr. *S. N. Banerjee*, for the Respondents.

Rankin, C. J.—This is an appeal from an order made by my learned brother Lort-Williams, J., on an application made by the attorneys with reference to the taxation of their bill against their clients for whom they had acted in the course of a partnership suit. The partnership suit appears to have proceeded to a stage at which a reference was being conducted in this Court. The bill was carried on and the taxation before the Taxing Officer arrived at a stage at which the officer was about to complete the taxation. It appears that certain learned Counsel had been employed from time to time in connexion with the suit and the reference and the attorneys acting for the clients were objecting to this taxation to the allowances of sums which had been paid to Counsel on account of Counsel's fee. Thereupon the Taxing Officer having come to the end of his duties recorded an order and said that he would deal with Counsel's fee finally at the next meeting and that he understood that the attorneys were applying to the Judge for an order which would authorize allowance of Counsel's fee. The Taxing Officer intimated with regard to the different fees charged in the bill which of them he considered he was entitled under r. 32, Chap. XXXVI, of the Rules of this Court to allow and which of them he considered should not be allowed by him, at all events, without a further order from the Court. Thereupon the attorneys moved the learned Judge and obtained from him an order directing the Taxing Officer to allow all fees paid to Counsel including the charges incurred in preparation of briefs to Counsel and all other charges and expenses incurred herein and set out in the applicant's bill of costs. The intention of the summons is not entirely clear; but when we come to consider the affidavits and the materials, it is not difficult to see what is intended by the order of the learned Judge. The fact is that on all the questions as to which Counsel's fee which has been paid, were disallowed or about to be disallowed by the Taxing Officer the attorneys had given specific and detailed information in their affidavit. They had given several pages of items of Counsel's fees which the Taxing Officer as at present advised was not prepared to allow on the ground that it was not within his power. By that affidavit they claimed to show partly by the oath of the defendant and partly by letters received from the clients and from Counsel that in each case the amount of the fees had been agreed upon by the clients, and that the clients knew and intended that these fees should be paid. There was a question in some cases whether one Counsel or two Counsel should have been employed and in these matters also the affidavit of the attorneys is of very great detail and, speaking for myself, very convincing. In my judgment, the learned Judge was minded to make an order that in view of the client's consent although in some cases the consent was not in writing the amount paid to two Counsel with the client's consent should be allowed and the first question logically for our consideration is whether, in these circumstances the learned Judge had any power to allow the fees.

It is anything but clear to me that it was argued before the learned Judge that the Court had no power at all to allow fees above the maximum mentioned in r. 32 in the absence of a written consent. The contention seems to have been that the application was premature rather than that the application asked for something which the Court had no power to allow. It seems to me that while it is quite true that the words referring to the order of the Court or a Judge were in 1924 left out of r. 32 when that rule was redrafted that was not because the absence of these words could effect or was intended to effect a total destruction of the power of the Court in any case to permit the maximum to be exceeded. The position is that the Taxing Officer himself can allow fees to any extent in excess of the maximum not that he is obliged to but he may allow fees to any extent in excess of the maximum on production of a written consent of the client or his representative or recognized agent. When we look at Chap. XXXVI, we find that that Chapter leaves a certain amount of discretion to the Taxing Officer and in certain respects leaves further discretion to the Court. In particular we see by r. 9 that:

"where in the opinion of the Taxing Officer the maximum fee allowed by these rules is insufficient or a fee ought to be allowed for any matter not

provided for in the rules or table of fees he may, upon the application of a party, refer the matter to the Court stating what amount in his judgment ought to be allowed and by whom the same ought to be paid and the Court shall make such order thereon as to the allowance of the whole or any part of the amount proposed by the Taxing Officer as it shall think fit."

and it is quite clear that the Court can make an order authorizing the maximum to be exceeded. In the same way when we look at the rules which deal with the proper procedure for a review of taxation when taxation has been completed we find that the Judge may make such order as to him may seem just. It appears to me that the omission of an express reference to an order of the Court in r. 32 is not because in the absence of such reference the rule by itself would bind the hands of the Judges but because the matter is left to the general principle which is that the limits marked out by r. 32 are meant to be provisions defining the power of the Taxing Officer and are not intended to take away and cannot by implication to take away the power of the Court in a proper case to allow fees greater than the maximum authorized by the rules. I therefore hold that just as the Taxing Officer has jurisdiction to allow fees in excess when a written consent is produced, the Court has jurisdiction to allow fees in excess where consent is proved although it is not proved in every instance by a consent in writing.

I now come to the next question. It was contended that the procedure was wrong because the attorneys should have waited until the completion of the taxation and applied for a review of the taxation under rr. 71 to 73, Chap. XXXVI. In many cases of course it is only reasonable to wait till the very end and apply in that manner because it is a way which provides that the Taxing Officer shall if specific objections are brought before him, deal with these specific objections, and then the matter goes to the Judge on proper materials That is quite right as regards many questions, but in a matter where the decision is not vested in the Taxing Officer at all as in the present case it seems to me that there is no objection whatever and it is more convenient to approach the Court at a stage before the taxation is finally concluded. There is no reason to think that it is not open to the learned Judge to entertain the application in the circumstances.

Then comes the question of the merits of the application. I am satisfied that as regards the payment of the fees to Counsel in excess of the maximum which is laid down th se attorneys have shown thoroughly and to the hilt that they were acting throughout with the consent of the clients, that the clients knew that the fees paid were in excess of the usual and that the clients were from time to time discussing with the solicitors what fees should be paid and knew what fees would be paid and satisfied themselves that they were no more than what was desirable. In these circumstances, it seems to me that as regards the specific fees of Counsel which are mentioned in the affidavit in support of this application they should all be allowed and it seems to me further that this is equally so as regards those cases were two Counsel's fees were paid. These matters of Counsel's fees have I think been most satisfactorily cleared up in the application.

There remains only the question of incidental charges for preparation of two briefs instead of one and matters of that sort. As long as it is understood that the Court has satisfied itself that the fees mentioned in the affidavit were consented to and that where two Counsel were employed the employment of these Counsel was consented to any matter of detail must be left to the Taxing Officer. It is quite evident that there is no difficulty in carrying out properly the consequences of this order. If any question does arise in consequence of this order in that respect then it is better that the matter should come again before the Court on a proper reference under rr. 71 to 73, Chap. XXXVI.

I think that in substance the order of the learned Judge is right. It is however somewhat loosely drawn up and I think it should be altered so as to read as follows:

"It is ordered that the Taxing Officer be directed in taxing the bill of costs of the said Messrs. Orr, Dignam and Co., to allow all fees to Counsel and the proper charges incurred in preparation of briefs to Counsel and other incidental charges and expenses found to be proper."

But it is not intended that the order is to be an order enquiring the Taxing Officer to allow the whole bill as it stands. The appeal must be dismissed with costs.

Buckland, J.—I agree.

A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

Civil Appeal No. 1631 of 1930.
February 19, 1931.
GUHA, J.

JESRAJ JAICHANDLAL BAID—
APPELLANT
versus
CHAIRMAN OF THE COMMISSIONERS OF THE MUNICIPALITY OF NATORE
—RESPONDENT.

Bengal Municipal Act (III of 1884), s. 261—Assessment of license-fee—Suit for declaration of illegality of assessment—Jurisdiction of Civil Court.

A suit for declaration that a certain sum of money which has been assessed as license-fee by a Municipality in respect of a yard or depot for trade is not legally recoverable from the plaintiff inasmuch as the entire area in respect of which the fee was levied was not used as a yard or depot for trade and as such the levy was *ultra vires*, can be entertained by a Civil Court.

Appeal against appellate decree of the District Judge, Rajshahi, dated the 10th April, 1930.

Messrs. *Sachindraprasad Ghose* and *Bibhutibhushan Lahiri*, for the Appellant.

Messrs. *Debendranarayan Bhattacharya* and *Phanindramohan Sanyal*, for the Respondent.

Judgment.—The question involved in this appeal is whether the Civil Court has jurisdiction to try the suit, in which the appeal had arisen. The suit, as laid, was for declaration that a sum of Rs. 326 was not legally recoverable from the plaintiff as license fee. The allegation made in the plaint was that:

"the Chairman of the defendant Municipality while illegally measuring the jute godown of the plaintiff, had wilfully measured all the places outside the godown, where no jute business was effected, and could not be effected; and inside the godown also (measured) places, where on account of press, etc., being located, no jute was stacked and could not be stacked, and had not given allowances for all these places."

The defendant's case, as made in the written statement, filed in Court, was that:

"the defendant Municipality measured the plaintiff's godown, and all the places for stacking jute in presence of properly authorized agent on behalf of the plaintiff."

The defendant further pleaded that the plaintiff's suit was not maintainable.

The Courts below have dismissed the plaintiff's suit on the ground that the amount of license fee assessed by the Municipality was in question, and that the case was not one in which the Municipality had acted illegally or one in which the action of the Municipality could be said to be *ultra vires*. There can be no doubt that the Municipality purported to act under s. 261, Bengal Municipal Act, in the matter of levying of the license-fee in question; and the position cannot be disputed that the plaintiff, the licensee, could not challenge the action of the Municipality, unless it was found that such action was illegal or *ultra vires* of the statutory provision as contained in the Bengal Municipal Act. The Courts below have proceeded upon the footing that only the amount of assessment of the license fee was in question in that suit. The question before the Court in the present case was whether, on the facts stated in the plaint, and upon those stated in the written statement in the suit, it could be said that the entire area, in respect of which license-fee was levied by the Municipality, purporting to act under s. 261, Bengal Municipal Act, was "a yard or depot for trade in jute." The action of the Commissioners of the Municipality, acting through their Chairman, complained of, was that they had exceeded their statutory powers, and as such the levy of license fee of Rs. 326, by the Municipality, was *ultra vires*. The suit as laid was not merely for the purpose of reducing the amount of the assessment.

The question of the principle of assessment was disputed; the basis of assessment was questioned by the plaintiff in the suit, on allegations of fact made in the plaint.

In the above view of the case, it was incumbent upon the Courts below to determine, on evidence, the question of fact whether the entire area in respect of which the license fee of Rs. 326 has been levied, was or was not used as "a yard or depot for trade in jute." If in point of fact, the entire area was so used, the principle of assessment and the basis, on which the license fee has been levied, would be correct; if, on the other hand, the entire area was not used as a yard or depot for trade in jute, the levy of license fee, as made of the Municipality, in the present case, would be *ultra vires* of the statutory provision referred to above, and the Civil Court would have jurisdiction to entertain the plaintiff's suit and give the plaintiff the relief he has prayed for in the suit.

The decisions of the Courts below are set aside, and the case is remanded to the Court of first instance for a fresh trial in the light of the observations made in this judgment. The parties will be at liberty to adduce evidence in support of their respective cases, as stated in their pleadings in the suit. Costs in the litigation

up to the present stage, including the costs of the appeal to this Court, will abide the result.

The records of the case are to be sent down as soon as possible.

A. *Case remanded.*

CALCUTTA HIGH COURT.

Miscellaneous Civil Appeal No. 469 of 1929.
May 8, 1931.

SUHRAWARDY AND GRAHAM, JJ.

CHANDRAMANI MAITY—PETITIONER
versus
BIPIN BEHARI SASMAL AND OTHERS—
—OPPOSITE PARTIES.

Probate proceedings—Application by legatee—Death of party—Right to continue, whether survives to donees of legacy—Civil Procedure Code (Act V of 1908), s. 2 (H)—'Legal representative', meaning of.

A person applied for probate under a will. The widow of the testator produced a codicil under which she was a legatee and claimed probate. The District Judge granted probate of the will holding that the codicil was not genuine. The widow appealed and during the pendency of the appeal she made a gift of the legacy to *A* and then died. *A* applied for being subsituted in place of the widow

Held, that as the right to the legacy had vested in *A*, he was a 'legal representative' of the widow within the definition in s. 2, Civil Procedure Code, and was entitled to be substituted as party under O. XXII, Civil Procedure Code. *Sarat Chandra Banerjee* v. *Nani Mohan Banerji* (1), distinguished. [p. 543, col. 2.]

The right to obtain a probate does not ordinarily survive but in an appeal in a case where the judgment appealed against may operate as one *in rem* different considerations will arise. [p. 544, col. 1.]

Miscellaneous Appeal against an order of the District Judge, Midnapur, dated the 26th August 1929.

Messrs *Hiralal Chakraburty* and *Sarat Chandra Jana*, for the Petitioner.

Messrs. *B. M. Sasmal* and *Bireswar Chatterjee*, for the Opposite Parties.

Judgment.—One Radha Krishna Maity died in 1926 leaving a will of which probate was applied for by the opposite party. His window Chandramani Maity produced a codicil by which the original executor appointed under the will was removed and she became legatee for Rs. 10,000 due to the deceased on account of his life policy. Both the will and the codicil were subject of the suit before the lower Court and the learned District Judge granted probate of the will, and refused probate of the codicil which he found not to be genuine. Against that decieion the present appeal was preferred by Chandramani and during the pendency of the appeal she made a gift of the legacy she was to receive under the codicil to the two sets of applicants before us. She died on 21st January last and the present applications are made one by Sachindra Nath Maiti, a grandson of Radha Krishna Maity, and Amala Dassi his daughter and, the other by one Anilbaran Maity another grandson of Radha Krishna by another son, for substitution in place of the deceased appellant and for permission to carry on the appeal.

The applications are opposed and it is argued by the opposite party respondent in the appeal that the right to sue in the present suit does not survive to the applicants and that, therefore, they are not entitled under the law to be substituted in the place of the deceased appellant. It should be mentioned that under the codicil the first executor was a son of the testator, named Barendra Nath Maity, who predeceased him, and that the next executor was Sachindra Nath Maity, one of the applicants before us, and the executor after him, as named in the will was Chandramani the widow of the testator. When Chandramani applied for probate of the codicil, Sachindra Nath who was the executor named in the codicil before her renounced his appointment as executor and "so, in a sense opposed the application" as the learned Judge says, but it is not clear it what sense he did so. However, the fact remains that he renounced his position as executor under the codicil.

The only question therefore we will have to consider is whether the applicants are entitled to be substituted in place of the deceased appellant under O. 22, Civil Procedure Code. Under r. 3 of that order where the sole plaintiff (or appellant) dies and the right to sue survives the Court shall cause the legal representatives of the deceased plaintiff (or appellant) to be made parties. "Legal representative" is defined in s. 2 as a person who in law represents the estate of deceased person and includes any person where the party sues in a representative character and on whom the estate devolves on the death of the party suing. Now one of the applicants Amala Dassi is an heir of the deceased Chandramani being her daughter and if the codicil is proved (as we will, for our present purpose assume) then she will succeed to the legacy of Rs. 10,000 given to Chandramani as to her *stridhan*. Then we have it that in August 1930, Chandra mani executed a deed of gift of the legacy in favour of all the applicants and if the codicil is proved all these persons are entitled to succeed to the legacy to Chandra-

mani. They are therefore, clearly within the definition of "legal representative," in s. 2 of the Code.

It is true that the right to obtain probate of a will does not survive; *Sarat Chandra Banerjee* v. *Nani Mohan Banerji* (1) but in an appeal in a case where the judgment appealed against may operate as one *in rem* different considerations will arise. In the event of the codicil being proved the Court may pass appropriate orders orders for the administration of the estate of the deceased.

We are of opinion that these applications should be allowed and we accordingly direct that the substitution be made as prayed for. There will be no order as to costs.

A. *Application allowed.*

(1) 3 Ind. Cas. 995; 36 C. 799.

CALCUTTA HIGH COURT.

Civil Revision No 311 of 1931.

June 26, 1931.

JACK, J.

KHOSAL CHANDRA DAS—PETITIONER

versus

UPENDRA NATH GHOSE AND OTHERS —OPPOSITE PARTIES

Bengal Tenancy Act (VIII of 1885), s 26-F (4) (a)—Pre-emption—Person purchasing share during pre-emption proceedings, whether can join as co-applicant—Division of shares—Principles—Unequal division—Error in exercising jurisdiction—Revision.

Under s 26-F cl. (4) (a), Bengal Tenancy Act, a person who was not a co-sharer landlord at the time when the original application for pre emption was made is entitled to make a purchase and, therefore, to join as a co-applicant if he becomes a co-sharer at any time within two months of the service of notice under s. 26-C.

In the ordinary course co-sharer landlords applying to pre-empt should be entitled to pre-empt to the extent of equal shares, but in any case a co-sharer landlord should have a share corresponding to his interest in the superior right compared with the interest of the opposite party.

If the ordinary rule of equal shares is to be departed from it must be done on some basis or principle.

An unequal distribution without sufficient reason amounts to an irregularity in the exercise of jurisdiction justifying revision.

Civil Revision against an order of the Munsif, First Court, Barisal, dated the 20th December, 1930

Mr. *Bijan Kumar Mukherji*, for the Petitioner.

Mr. *Sirish Chandra Dutt*, for the Opposite Parties.

Judgment—This Rule has been issued on the opposite party to show cause why the orders nade by the Munsif of the First Court of Barisal, dated 9th December, 1930, and 20th December 1930, should not be set aside. The orders in question are that the applicant is to be allowed to join in the co-sharer landlord's application for pre-emption of the transferred holding to the extent of 16 *gandas* only. The petitioner claims that he ought to have been allowed to purchase 8 annas share of the holding or at least his share in proportion to the share in the superior right, which he has purchased, as compared with the share in the superior right held by the opposite party.

It is contended on behalf of the opposite party, that the petitioner should not have been allowed at all to purchase inasmuch as he was not a co-sharer landlord at the time when the original application for pre-emption was made. But I think that, under the terms of s. 26 F. cl. 4 (*a*) Bengal Tenancy Act, he is entitled to make the purchase, if he becomes a co-sharer landlord at any time, within two months of the service of notice under s. 26-C, namely within the period of limitation stated in s. 26-F, cl. 4 (*a*). s. 26 F, does not state what share a cosharer landlord coming in under cl 4 (*a*) is entitled to get and it would seem that in the ordinary course, co-sharer landlords applying to pre-empt should be entitled to pre-empt to the extent of equal shares, but in any case I think that the contention of the applicant is not unreasonable in this case, *i. e.*, that he should have a share corresponding to his interest in the superior right as compared with that of the opposite party.

It is urged on the other hand that this Court should not interfere under s. 115, Civil Procedure Code, with the order of the Court below inasmuch as there is no question of jurisdiction. It is doubtful indeed whether this Court ought to interfere. But the way in which the lower Court has ordered distribution of shares may be regarded as an irregularity in the exercise of jurisdiction. If the ordinary rule of equal shares is to be departed from, it must be done on some basis or principle, and the applicant appears to have been perfectly reasonable when he claimed that he ought to get a share corresponding to his interest in the superior right.

The Rule is made absolute. The order complained of is set aside and the applicant will get a share corresponding to his interest in the superior right as compared with the interest of the opposite party. Each party will bear his own costs in this Court. The application is rejected.

A. *Rule made absolute.*

LAHORE HIGH COURT.

First Civil Appeal No. 1248 of 1925.

October 27, 1931.

ADDISON AND HILTON, JJ.

FAZAL-I-HUSSAIN—DEFENDANT —APPELLANT

versus

TAFAZIL HUSSAIN AND ANOTHER—PLAINTIFFS AND OTHERS—DEFENDANTS—RESPONDENTS

Customary Law (Punjab)—Succession—Bhatti Rajputs *of Batala Tahsil—Mode of succession*—Chundawand *or* pagwand—*Change of custom—Evidence*—Riwaj-i-am—*Record of custom contrary to general custom—Evidentiary value—Onus of proof—Agreement to give up old custom—Validity—Successive records—Later record, whether abrogates earlier.*

Amongst the *Bhatti Rajputs* of Tahsil Batala the *chundawand* rule of succession has been followed from time immemorial and though at the attestation of the *riwaj-i-am* of the Tahsil in 1911-12, an attempt was made to make out that the *pagwand* rule should be followed in preference to the *chundawand*, no new custom of *pagwand* has arisen abrogating the older *chundawand* custom. [p. 546, col 1.]

Where custom is the rule of law it is not open to the parties to agree that they would give up their old custom and follow a new one which they, for some reason, prefer; the parties have no power to legislate for themselves by mean of a *riwaj-i-am*. [p. 547, col. 1.]

Where a *wajib ul-arz* contains merely a record of the wishes and opinions of the parties it could not be regarded as establishing any binding custom at variance with the personal law of the parties or an old established custom *Anant Singh* v *Durga Singh* (1) and *Muhammad Ali Khan* v. *Ghazanfar Ali Khan* (2), relied on. [p 547, col. 2.]

The parts of a *wajib ul-arz* referring to a custom are not provisions intended to be in force for a limited period only, but are statements that a certain custom existed and if the statements are correct there would be a natural presumption that the custom continued to exist and it would be for those alleging that a change had subsequently taken place to prove the allegation. Though the production of a later Record of Rights containing entries opposed to the earlier ones would be some proof of such a change, there would merely be a balance of evidence on either side and it could not be said that the second record destroyed or abrogated the earlier one. *Rahiman* v. *Bala* (3), *Hassan* v. *Jahana* (4), *Hira* v. *Molar* (7), relied on. *Ranjha* v. *Bulanda* (6), not followed. [p. 547, col. 2; p 548, col. 1.]

An entry in a *riwaj-i-am* is a strong piece of evidence in support of a custom even though it is against the general custom and the burden of proof of a custom contrary to the entry cannot be said to be light even in cases where the entry is against general custom. *Beg* v. *Allah Ditta* (8), *Labh Singh* v. *Manga* (9), *Labha Ram* v, *Raman* (10), relied on. *Bhag Singh* v. *Jai Singh* (11), commented upon. [p. 549, col. 1.]

First Appeal from a decree of the Senior Subordinate Judge, Gurdaspur, dated the 17th March, 1925.

Lala *Badri Das*, R. B. and Mr. *Ghulam Mohi-ud-Din*, for the Appellant.

Messrs. *Jagan Nath Aggarwal* and *Asa Ram Aggarwal*, for the Respondents.

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Addison, J.—One *Khan Sahib Mian* Hussain Bakhsh, a *Bhatti Rajput* of Batala in the Batala Tahsil of the Gurdaspur District, died on the 1st August, 1910, leaving him surviving by his first wife, *Mian* Fazl Hussain, aged about 31, (defendant No. 1) and two daughters and, by his second wife, Afzal Hussain, aged 21-22, Amjad Hussain, aged 18-19, (defendants Nos. 2 and 3), Tafazzal Hussain and Fazil Hussain, then minors, (plaintiffs Nos. 1 and 2), and four daughters. This suit was brought by Tafazzal Hussain in 1922, when he was about 20½ years old, on his own behalf and on behalf of his brother Fazil Hussain, who was still a minor though he attained majority while the suit was proceeding. The suit was for a declaration that, according to the custom which the family followed, each son should have succeeded equally on Hussain Bakhsh's death (*pagwand* succession), and that defendant No. 1 was not entitled to one-half and the other four sons only to one half under the custom that the son or sons of each wife were entitled to one moiety of the estate, no matter what their number was (*chundawand* succession). In other words, it was claimed that the distribution should have been per *capita* and not per *stirpes* the latter mode having been followed by reason of the fact that defendant No. 1 took advantage of the minority of the plaintiffs There was also a subsidiary prayer for accounts.

Defendants Nos. 2 and 3, who are full brothers of the plaintiffs, did not appear to plead though later they were examined as witnesses. They were majors when their father died and since then (that is, for more than twenty years) they have been receiving their share of the income from the bulk of the estate left, that is, the landed property, in accordance with the *chundawand* rule, and it is futile their denying that they did not know that this was so or that the distribution from the beginning was per *stirpes*. Defendant No. 1 pleaded that the rule of custom in their tribe was *chundawand* from time immemorial; that on the death of Hussain Bakhsh, one *Khan Bahadur Mian* Ghulam Farid, who was closely connected with their family, held this to be the case, his decision amounting to a settlement of a family dispute, which was acquiesced in by all the major members and which was binding on the two minor members; that a part of the settlement was that defendant No. 1 should have no share in the moveables and should pay half of the mar-

riage expenses of his unmarried half-brothers and half-sisters; that accordingly the moveables were divided to the exclusion of defendant No. 1 who also arranged the marriages of the plaintiff as well as of the ladies mentioned; and that plaintiff No. 1, after becoming a major at age 18, had accepted one-eighth as being his share of the income and was estopped from denying after having done so far two and a half years that he had a larger share. As regards the claim for accounts defendant No. 1 pointed out that the accounts of the property in dispute had been kept by *Mian* Ali Ahmad, an attorney and relative of the parties, since the death of their father and even before that, and that the property had been looked after and managed by the same person.

The Subordinate Judge, who tried the suit, held that the custom as to succession was per *capita*; that it had not been proved that there was a family settlement; that there was no estoppel; and that the prayer for accounts was a good one. He accordingly decreed the suit and this appeal has been preferred by defendant No. 1.

The main question in the appeal is that of custom. Apart from the mass of evidence on the record, the question appears to me to be comparatively a simple one and the answer to be in no doubt. On the record it is amply established that, amongst *Bhatti Rajputs* of this Tahsil, the *chundawand* rule of succession has been followed from time immemorial and that, though at the attestation of the *riwaj-i-ams* of the Tahsils of the district in 1911-12 after this succession fell in, there was an attempt to say that the *pagwand* rule should be followed in preference to the *chundawand*, it cannot be held that a new custom of *pagwand* has arisen, abrogating the older *chundawand* custom.

The extract of the *riwaj-i am* of Tahsil Batala for the yerr 1865 (page 472 of the paper-book, shows that, among the various sub-divisions of the Muhammadan Rajput tribe, including the *Bhattis*, succession was per *stirpes* (*chundawand*) except in the two villages of Sohala and Mari Bachchian with which we are not concerned. Various instances are also given. The mere fact that two villages were differentiated shows the care with which the document was compiled. Similarly in the neighbouring Tahsil of Pathankot in the same district the Muhammadan Rajput tribe, including the *Bhattis*, stated in 1865 (page 470) that the division was *chundawand*. Apparently the same rule was observed in the Shakargarh Tahsil, but in the Gurdaspur Tahsil in 1865, according to the *riwaj-i-am* (page 474) Muhammadan Rajputs followed the *pagwand* rule. Thus in three out of the four Tahsils of the district in 1865 the rule was emphatically stated to be *chundawand*.

No book containing the customary Law of the district in English was prepared at the 1865 Settlement, but this was done at the Settlement of 1892 by Mr. (now Sir Louis) Dane. At page 13 of his book it is said that in the Pathankot Tahsil all tribes except one sub-division of Rajputs in one village followed the *chundawand* system, while in Tahsil Batala (with which we are concerned) it was said that all tribes except *Gujjars* and *Dogars*, amongst whom the *chundawand* rule prevailed, followed the *pagwand* system; but Rajputs, except those of the two villages mentioned in the 1865 document, said that their custom was *chundawand*. It is clear, therefore, that in 1862 as well as in 1865, there was a clear statement that Muhammadan Rajputs in this Tahsil, with the exception of the two villages noted, followed the *chundawand* rule.

With respect to the two Tahsils o Gurdaspur and Shakargarh, Sir Louis Dane's compilation appears to be inaccurate. He stated that Muhammadan Rajputs in the Gurdaspur Tahsil are said to follow the *pagwand* custom, contrary to what is quoted in the 1865 *Riwaj-i am*. I have already shown that according to the 1865 document, they are reported as following the *pagwand*, not the *chundawand* rule. He also said that in Shakargarh Tahsil Muhammadan Rajputs followed the *pagwand* rule but this is another mistake.

For, the *riwaj-i-am* of Muhammadan Rajputs in Tahsil Shakargarh during the Settlement of 1911-12 is printed at page 709. This time they are reported as saying that the *chundawand* custom had been in vogue previously but now they wanted the *pagwand* custom (*sic*).

The *riwaji-i-am* for Tahsil Gurdaspur in 1911-12 correctly records that Muhammadan Rajputs therein had followed *pagwand* from the beginning (page 688); while amongst those of Tahsil Pathankot it was said that there was a difference of opinion (see page 706). It is recorded in the *riwaj-i-am* of this Tahsil in that year that, of those Muhammadan Rajputs present 23 wanted *pagwand* to be followed in the

future though up to the present the *chundawand* system had been practised.

Finally, the *riwaj-i-am* of Muhammadan Rajputs in Tahsil Batala (with which we are more immediately concerned) for 1911-12 is printed at page 686. Apparently the first paragraph of the reply quotes the rule in vogue in 1865 and 1892, *viz.*, the *chundawand* rule; while below this is written the reply then given, to the effect that the *chundawand* system was previously in vogue in some villages but that they *all now agreed* to the *pagwand* system. This is not strictly a correct statement as regards the past, as it is clear that in all villages except two and not merely in some villages the *chundawand* system had previously prevailed.

As I have referred to the original documents of 1911-12, it is scarcely necessary to quote Mr. Kennaway's compilation of the Customary Law of the district (1912), except to point out that it is not quite accurate. The sentence commencing at line 13, page 23 of his book deals with Muhammadan Rajputs of Batala Tahsil along with many others That sentence runs:—"The remaining tribes of all the Tahsils say that the *pagwand* rule has been always followed among them and should be maintained." This is, of course, not what they said (see above).

As the succession opened out in 1910, before the *riwaj-i-ams* of the various Tahsils had been compiled in 1911-12, I have no hesitation in holding that the burden of proof was on the plaintiffs to displace the presumption arising from the *riwaj-i-ams* of 1865 and 1892, and in this respect I disagree with the trial Judge. It may be that the statements contained in the *riwaj-i ams* of 1911-12 and instances arising after the succession opened out in 1910, may have some evidentiary value but, in my judgment, this value would be very low; for, after all we have to find what was the custom existing in 1910 and not in subsequent years. It seems to be recognised that customs in the Punjab may change, but, when it is remembered what a custom is, that change should be slow and imperceptible, and should be completed by the time that the changed custom is relied on. Otherwise, a *riwaj-i-am* would tend to become not a statement of existing customs, but a means of legislation; and surely, this would be the most uncertain and unstable mode of law making.

Further, it is clear from the way the *riwaj-i-ams* are worded that, in all three Tahsils of Batala, Shakargarh and Pathankot, the Muhammadan Rajputs were conscious that they were legislating and that they then agreed that they would give up an old custom and follow a new one, which they, for some reason, then preferred. Where custom is the rule of law, this cannot be permitted. As held by their Lordships of the Privy Council in *Anant Singh* v. *Durga Singh* (1), where it seemed probable that the entries recorded in a *riwaj-i am* connoted the views of individuals as the practice they would wish to see prevailing, rather than the ascertained facts of a well-established custom, weight must be attached to the circumstance that there was no evidence of an instance of the alleged custom. Again, it was held by the Oudh Judicial Commissioners in 60 Ind Cas. 147 *Muhammad Ali Khan* v. *Ghazanfar Ali Khan* (2), that, where a *wajib-ul arz* contained merely a record of the wishes and opinions of the parties, it could not be regarded as establishing any binding custom at variance with the personal law of the parties. In the case before us, it is not a question of custom *versus* personal law but a case of an alleged new custom *versus* an old established custom but that makes no difference in principle. The plaintiffs would get no more than they have at present if Muhammadan Law was followed as the numerous sisters would then share; and it is in evidence that, when plaintiff No. 1 demanded his share in accordance with his personal law, he was told that he could take it. He did not pursue this claim further as he later discovered that it was not to his advantage. For the reasons given the new *riwaj-i-am* of 1911-12 have little or no value as pieces of evidence and certainly do not suffice to change the burden of proof.

Further, even if the *riwaj-i-ams* of 1911-12 were not subject to the above objections, their value is well defined by Roe and Frizelle, JJ., in *Rahiman* v. *Bala*. They said that the parts of a *wajib ul arz* referring to custom were not provisions intended to be in force for a limited period only; they were statements that a certain custom existed. The statement might or might not be correct but, if it was correct, there would be a natural

(1) 6 Ind. Cas. 787; 32 A. 363; 14 C. W..N. 770; 12 C. L. J. 36; 7 A. L. J. 704; 13 O. C 163; 37 I A. 191; 12 Bom. L. R. 504; 8 M. L. T. 79; (1910) M. W. N. 327; 2 M. L. J. 604 (P. C.).

(2) 60 Ind. Cas. 147; 7 O. L. J. 474.

(3) 8 P. R. 1892.

presumption that the custom continued to exist and it would be for those alleging that a change had subsequently taken place to prove the allegation. Thus the production of a later Record of Rights containing entries opposed to the earlier ones would no doubt be some proof of such a change but there would then merely be a balance of evidence on either side and it could not be said that the second record destroyed or abrogated the earlier one. With the opinion of these learned Judges I am with all respect in full agreement. The subsequent *riwaj-i-am* can never by itself destroy the effect of the first. While there is always the difficulty in cases where it is alleged that an old custom has been abrogated by a new one that, when it is held that the old custom has gone, it becomes a very difficult question whether the parties should not then be held bound by their personal law, rather than by an alleged new custom which has arisen recently. It might be mentioned here that there was no dispute before us that *chundwand* was the original rule.

It was again said at page 221 of *Hassan* v. *Jahana* (4) by a Division Bench as follows:—

"Custom is said to be in a fluid condition in the Punjab, capable of adapting itself to the varying conditions, views and opinions of the community among which it prevails, but no custom can be recognised as of binding authority unless it is generally, if not universally, recognised, and this is especially true where an old established custom is alleged to be replaced by a new one. It is obvious that the attempts of the agnates among the *Phapras* to abrogate the old custom have been few and their success still less and that sonless owners among them are still going on making alienations under the old established rule. It cannot be said, therefore, that the old custom has been set aside or has fallen into disuse," (see also pages 88, 89 of *Natha Singh* v. *Harnam Singh* (5)).

It is true that another Division Bench at page 34 of *Ranjha* v. *Bulanda* (6), said that a late record was quite as valuable as the earlier *riwaj-i-am* if not more so and they did not see why it should be an inflexible presumption that the previous *riwaj-i-am* correctly recorded the custom. With great respect I think that the other authorities quoted contain the correct rule; but in any case this decision cannot influence the present case as admittedly the prior documents were properly and correctly recorded.

A very similar case to the present is *Hira* v. *Molar* (7) in which it was held that the change in the statement of custom merely showed that a previous custom was in the process of abandonment and not that it had been abandoned. This is the highest value which can be attached to such subsequent statements. It may be the case that it is not necessary to prove that a custom in the Punjab is ancient, as has once been held, though as to this I prefer to offer no opinion; but it is certainly necessary at least to establish that it is being invariably or very generally followed at the time in dispute and has been so followed for some time in the past; for, otherwise, we would have to find some other name than custom for such a variable process.

Nor can it now be contended in face of the judgment of their Lordships of the Privy Council in *Beg* v. *Allah Ditta* (8), that the burden of proof should be on defendant No. 1 as he succeeded against the general rule of custom in vogue in the Punjab. Prior to that judgmet, the rule followed (which was given in Rattigan's Digest of Customary Law and still finds a place there) was that, if a custom was more generally followed in the Punjab it was called the general custom and the burden was placed on any one alleging a contrary custom even though the *riwaj i-am* was in his favour. In effect this often resulted in spreading the custom of the majority as it was frequently held that the *riwaj-i-am* and the instances proved were not sufficient to rebut the presumption arising from the fact that the majority of people scattered throughout the Punjab followed another custom; and it appears obvious from a perusal of the Punjab Records that the *chundawand* custom was helped to become less prevalent by this means. At that time it was lost sight of that a small body of people might have as well established a custom, which they were entitled to follow, as the generality, and that it was the essence of custom that each tribe or community, however small, should be allowed its own peculiar customs. This process of legislation, however, was partially put an end to in 1917 by their

(4) 71 P. R. 1904.
(5) 31 P. R. 1894.
(6) 1 Ind. Cas. 395; 114 P. R. 1909; 11 P. W. R. 1909.
(7) 84 Ind. Cas. 1; 6 Lah. 52; 6 Lah. L. J. 442; A. I. R. 1925 Lah. 163.
(8) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L. J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

Lordships of the Privy Council who laid down in *Beg* v. *Allah Ditta* (8) that the entry in the *riwaj i am* in favour of the succession of a daughter's son in preference to collaterals was a *strong piece* of evidence in support of such custom which it lay upon the plaintiffs to rebut, even assuming that there was a *general custom* of collateral succession to the contrary. The Chief Court did not for some time give full effect to this far reaching decision in favour of minorities. It might here be observed that in the case of the *riwaj-i-am* before their Lordships of the Privy Council there were no instances quoted as would appear from the third paragraph of the report at page 172 of the Punjab Record. By the time *Labh Singh* v. *Mango* (9), was decided, however, *Beg* v. *Allah Ditta* (8) was being followed. In *Labh Singh* v. *Mango* (9), a Division Bench held, following *Beg* v. *Allah Ditta* (8), that it cannot be said to be an established rule that a statement in a *riwaj i-am* opposed to general custom and unsupported by instances possesses little evidentiary value and that an entry in a *riwaj-i-am* recording a special custom is *prima facie* proof of that custom and places the onus of rebuttal upon the party disputing the correctness of that entry. The same view was taken in *Labha Ram* v. *Raman* (10).

It was contended, however, that the Judges who decided *Bhag Singh* v. *Jai Singh* (11), did not go so far as had been done in the previous judgments which followed the Privy Council decision. It is true that in it *Beg* v. *Allah Diita* (8) and *Labh Singh* v. *Mango* (9) were followed to the extent that it was held that an entry in the *riwaj i-am* in favour of a so-called special custom like *chundawand* was an important piece of evidence in support of it and was sufficient to shift the onus to the party challenging it. Apparently, however, it then went on to lay down the burden of proof would be comparatively light in view of the general custom in the province being opposed to the *chundawand* custom. If this is the correct meaning of the judgment, I am with all respect unable to agree with it; for the words used by their Lordships in 1917 were that such an entry was a *strong piece* of evidence even though it was against the general custom and in *Labh Singh* v. *Mango* (9), it was held that it could not be said that such an entry was *of little evidentiary value*. Even in *Bhag Singh* v *Jai Singh*(11) it appears to have been said that such an entry was an *important piece* of evidence. In these circumstances how can it be said that the burden of proof would be light as it was against general custom when their Lordships of the Privy Council said that that such an entry was a *strong piece* of evidence though against the so-called general custom? There would thus appear to be a contradiction in terms. Such a decision in reality would mean a return to the old state of affairs before their Lordships' decision of 1917, and to go against what was laid down then.

In these circumstances it seems unnecessary to discuss the remarks in certain judgments of the Chief Court that *chundawand* is a dying system and a barbarous rule, and that it must always be established by the person setting it up as it is against general custom. It is no concern of mine to condemn it or to praise it; but merely to see whether it existed in 1910 as the custom amongst this tribe. As to its being a dying rule that may or may not be the case; but if it is, the process has been greatly helped by the fact that the burden of proof has in the past been frequently wrongly laid when this custom came before the Courts, and also because certain Settlement Officers and Judges seem to have held the view that it was a barbarous custom.

There has been some speculation as to the origin of the rule of *chundawand* but without any success. The rule is a tribal one in vogue in several districts; but it has sometimes happened that a large number of sons by one wife have been able to enforce the opposite *pagwand* rule against the one son of another wife. That does not militate against the custom; nor does it make it a family custom. It remains essentially a tribal custom In fact family customs are not common amongst persons who follow Customary Law in the Punjab, though, amongst persons following their personal law in whole or in part, family customs against their personal law are frequently pleaded. The parties in this case follow custom and what is meant is, as usual, their tribal custom. Though defendant No. 1 who started as a Barrister, has now reached a position of some importance in India,

(9) 100 Ind. Cas. 924; 8 Lah. 281; A. I. R. 1927 Lah. 241; 29 P. L. R. 586.

(10) 103 Ind. Cas. 280; 9 Lah. 1; A. I. R. 1927 Lah. 593.

(11) 116 Ind. Cas. 903; 10 L. 694; A. I. R. 1929 Lah. 318; 30 P. L. R. 750.

the family remains rooted in the customs of its tribe and place of origin.

It will now be possible to proceed to a discussion of the instances, it being first postulated that the burden is heavy on the plaintiff to establish the *pagwand* rule in view of the entries in the *riwaj-i am* of 1865 and 1892 which must be considered strong pieces of evidence in favour of the *chundawand* rule. The question has never apparently arisen in the family of the parties and there is no record or tradition that any of the ancestors of the deceased had families by different wives. It would be futile to inquire into what has happened in the families intermarrying with the parties as they only form part of the tribe and require no special discussion.

I shall first take the period prior to 1892 in Tahsil Batala as was done by the trial Judge. In his judgment at page 148 of the paper-book, eight instances of *chundawand* succession amongst Muhammadan Rajputs, many of them being amongst the Bhatti sub division are given during this period. We have gone carefully into these and all have been established. Two further instances of *chundawand* have also been proved in this Tahsil during this period in this tribe. These are instances 9 and 10 at the top of page 149 of the paper-book. No. 9 was wrongly rejected by the trial Judge. It had nothing to do with instance No. 4 on the preceding page. Similarly, No. 10 is a good instance of *chundawand*, the only son by one wife holding more than the two sons by the other wife to the extent of 31 *ghumaons* described as being additional to his ancestral (half) share (See page 464 of the paper-book). There were thus at least ten instances of *chundawand* in the period in question. In the same period there were only two instances of *pagwand*, the trial Judge wrongly including Sher Muhammad's instance here as well as in the subsequent period. The first of the *pagwand* instances was in 1878 and the second was a judicial instance of 1888, see Ex. P. 33 at p. 203. That case was tried by an Honorary Subordinate Judge. As already pointed out as being nearly universally done, the onus was wrongly put on the party who pleaded the *chundawand* rule, as it was against Rattigan's General rule. It was merely held that the proved instances did not establish the custom, and no reference was made to the *riwaj i am*. This wrong decision though acquiesced in, cannot be treated as a true instance for at that time the chance of an appeal succeeding was very slight for reasons already given [Compare *Durga Devi* v. *Ramzan* (12)]. In fact the Honorary Subordinate Judge states that *pagwand* was the rule generally accepted by the higher authorities. This is, therefore, an instance forced on one of the parties by the Courts and should be discounted. The instances in favour of *chundawand* were thus up to 1892 at least ten, while there was only one true instance in favour of *pagwand*.

I take next instances among Muhammadan Rajputs in Tahsil Batala from 1892 to 1911 when the last *riwaj-i ams* were recorded in (Mian Hussain Bakhsh having died in 1910). The trial Judge refused to accept as instance of *chundawand* cases where a childless step-mother succeeded to a half share along with two or more step-sons of deceased. These are in this district true instances of *chundawand* as is apparent from page 20 of Kennaway's Customary Law of the District where it is noted that all the tribes with a few exceptions stated that the sonless step mother was allowed a share in the presence of her step-sons, her share being in accordance with the *chundawand* rule where that rule was followed and equal to that of a son where the rule of succession was *pagwand*. This is natural and in view of the Customary Law of the district there was no necessity for the trial Judge to try to find other explanations. A step mother is generally an heir in this district, though with a limited estate, along with her step sons. Where, therefore, a step-mother succeeds to one-half along with two or more step sons, this is an instance of *chundawand*. When she does so along with one step son, it cannot be said whether it is an instance of *chundawand* or *pagwand* as each takes one-half under either rule. For this reason we have had to reject as inconclusive a fairly large number of instances of the latter kind though they were recorded as being in accordance with the *chundawand* rule. Similarly in this district where the whole blood excludes the half-blood, that is an instance of *chundawand* succession. This is laid down at page 34 of Kennaway's Customary Law, where it is added that no regard is paid to association but only to the *chundawand* and *pagwand* rules. See also para. 26 of Rattigan's Customary Law.

The first instance of *chundawand* quoted for the second period in Tahsil Batala amongst this tribe at page 150 of the paper

(12) 10 Ind. Cas. 330; 91 P. R. 1911; 127 P. L. R. 1911; 217 P. W. R. 1911.

book is admitted. The second instance is inconclusive as being the case of a step-mother and one step son. The third instance was dropped. The fourth instance at page 151 is a good instance where a step-mother took half against four step sons. The fifth and sixth instances are inconclusive for the same reason as the second. The seventh instance is a curious one. Umar died in 1909. One son Sirdar, by one wife, succeeded to one-half while his four step brothers succeeded to the other half according to the mutation at page 680. This mutation was contested. In the Revenue Record of 1921, however, Sirdar is recorded as owning one-third and his two surviving step-brothers two-thirds. The mutation which brought this about has not been produced. Sirdar was examined as a witness (pages 58, 59). He still claimed that the succession was *chundawand* but stated that there was a compromise when partition was applied for. That was about 1920, after the later *riwaj-i-ams* had been compiled. In these circumstances I would count this as a case in 1909 of *chundawand* succession. No. 8 was also wrongly rejected by the trial Judge. This was an instance of the whole blood succeeding to the exclusion of the half-blood in 1909 where long before the original succession had been *chundawand*. Obviously this is an instance of *chundawand* distribution being maintained.

No. 9 at page 152 is another good instance of *chundawand* succession, a step-mother taking a half as in the presence of her two step sons. Similarly, the tenth instance is a good instance of *chundawand*, the evidence being ample to establish it. There are thus at least six instances proved of *chundawand* succession among Muhammadan Rajputs in Batala Tahsil between 1892 and 1911.

Instances of *pagwand* in the above period in this Tahsil held proved by the trial Judge are given at pages 152—154. Instance No. 2 must be rejected as it relates to the year 1912. Instance No. 6 is, in my opinion, an instance of *chundawand* succession. A Subordinate Judge held that the plaintiff had failed to prove the rule of *pagwand* (though the burden was the other way) (page 241). The District Judge remanded the suit for re-trial and the parties then compromised it, the plaintiff getting eight out of the sixteen *bighas* extra which he claimed under the *chundawand* rule. This instance makes the *chundawand* instances up to seven in this period.

Instance No. 7 is a curious one. The land was mutated according to the *chundawand* rule (page 561), all the three sons admitting before the Revenue Officer that this was correct, though it must be noted that one was a minor. Apparently, however, there was a suit later, and a copy of the compromise in the suit has been put in, to the effect that the distribution should be *pagwand* (page 214). The final result was thus *pagwand* in spite of the earlier admission of *chundawand*. I think that this instance should not count either way.

Instances Nos 1, 3 and 4 are instances of *pagwand* in cases of one son against five sons, one son *versus* four sons, and one son *versus* three sons. The fifth instance was disputed before the Revenue Officer, the chief *lambardar* asserting the *chundawand* rule (page 236). *Pagwand* was, however, held to be the rule by the Naib Tahsildar who stated that *chundawand* was the rule in 1865 but that there was no mention of this in the papers for 1892. These last words were a misstatement as already shown. The matter was not taken further perhaps owing to the tendency already alluded to, or perhaps because it was a case of two sons *versus* three sons and the difference was thus not great. It can be counted as a *pagwand* instance.

Instance No. 8 is a case of *pagwand* where there were two sons by one wife and three by the other and all the land was under mortgage, while instance No. 9 is a good instance. Between 1892 and 1911, therefore, there were at the most six proved instances of *pagwand* in Batala Tahsil in this tribe as against seven proved instances of *chundawand*. Taking into account the two *riwaj-i ams* of 1865 and 1892 and the fact that the proved *chundawand* instances up to 1911 are 17 and the proved *pagwand* ones only seven, I have no hesitation in holding on this material that parties followed in 1910 their tribal custom of *chundawand*.

I have already shown that little, if any weight can be attached to the *riwaj-i-ams* of 1912 and instances after the succession opened out. The following *chundawand* instances in Batala Tahsil after 1911 have been clearly proved namely Nos. 1, 2, 3, 5 and 8 given at pages 154 and 155 of the paper book. No. 4 (see p. 756) is also another instance of *chundawand*, so that there are six proved after 1911.

The trial Judge found six *pagwand* instances proved in the tribe in Batala Tahsil during this period Instances Nos 3 and 6 must be rejected because in the first case there is no proof that the parties were *Rajputs* (p. 393) and in the second the par-

ties were not *Rajputs*, but *Gulshahi Awaans* (p. 392).

Instance No. 5 must also be rejected (see p 338). The deceased left five sons by one wife and one by another. There was a dispute which was settled by the village elders as follows The five sons by one wife got five shares The one son and his mother got two shares, while the mother of the deceased also got a share. The share of the mother of the one son would go on her death to her own son so that he in reality got an extra share. Usually, of course, the mother of the deceased would get nothing. All that this instance shows is the heavy pressure which a large number of sons by one wife can bring to bear on one son by another wife in order to break down the *chundawand* rule of succession. There are thus only three proved instances of *pagwand* succession after 1910 in the Tahsil as against six *chundawand* instances. If the three periods are added together there are 23 *chundawand* instances as against 10 *pagwand* instances.

The trial Judge has referred to certain decided cases (see p. 157) in disputes of this nature amongst other tribes and castes. Obviously they are of no value. His case No. 3 *Ida* v. *Rahim Bakhsh* (13) he cites as a case of Muhammadan *Rajputs* of Gurdaspur Tahsil. This is not correct. It was a case of Musalman *Jats* and is of no use in this inquiry. His instance No 6 was amongst *Salaria Rajputs* of Shakargarh Tahsil. It was decided by the District Judge in 1916 (p. 353). He held that it had not been proved that the *chundawand* custom had been *invariably* followed and that, therefore, it was not a legal custom. More than that could have been said as to the *pagwand* rule, which is also a customary rule, excluding the daughters who share with the sons according to Muhammadan Law. Here again is the old idea that *the general custom* so-called is the proper rule.

Case No. 7 has been discussed already.

Many instances of *chundawand* among Muhammadan *Rajputs* in Tahsils Pathankot and Shakargarh, where the *riwaj-i ams* were similar to Tahsil Batala, have also been proved. These three Tahsils are in the same Revenue District and adjoin each other. These instances are, therefore, not without value. I do not propose to detail them though we were taken through all of them by the learned Counsel for the appellant. There were in Tahsil Pathankot 25 *chundawand* instances among Muhammadan *Rajputs* proved by documentary evidence and ten in Tahsil Shakargarh. There were even two in Tahsil Gurdaspur where the *rawaj-i am* was in favour of the *pagwand* custom. Further, there are about fifteen instances in these Tahsils and also seven instances in Batala Tahsil not included in the instances already given for that Tahsil which are established by oral testimony.

On the record, therefore, there is no doubt that the custom of *chundaw and* succession has been proved to prevail amongs Muhammadan *Rajputs* of the Batala Tahsil in spite of an attempt to substitute the rule of *pagwand* succession and I would so hold.

This takes me to the second question, namely, whether, after the death of the parties in 1910, *Khan Bahadur Mian* Ghulam Farid, deceased, settled a dispute between the parties as regards succession to the effect that the division of the land would be according to the *chundawand* rule but Mian Fazl Hussain, who in this way got a one-half share should give up all claims to the moveables and also agree to bear half the expenses of the marriage of his step-brothers and step sisters. The trial Judge apparently found some difficulty in giving his decision on this question. He said:—

"The material thus bearing on the point is so discrepant and uncertain that it is not possible *affirmatively* to say whether Mian Ghulam Farid did decide their question of succession or whether on account of the threat held out by defendant No. 1 Afzal Hussain and Amjad Hussain kept quiet and the *chundawand* rule was acted upon in the mutations which were effected in the two village where the land was situated."

Again he said:

"My finding, therefore, is that the alleged settlement by Mian Ghulam Farid was not positively made out; but, assuming that he did settle the question of succession, I am of opinion that the same was not binding on the plaintiffs who were admittedly minors at the time".

He also found that there was no question of estoppel.

It seems to me that the statement of Mian Fazl Hussain on this point must be accepted in its entirety and the statements of his two step-brothers, who are the *pro forma* defendants, namely, Afzal Hussain and Amjad Hussain, must clearly be rejected. Although both these brothers must know that mutations are effected by Revenue Officers when a proprietor dies and though both have been enjoying the income of the

(13) 12 Ind. Cas. 857; 58 P. R. 1911; 45 P. L. R. 1912; 202 P. W. R. 1911.

land, which has been managed by a Mian Ali Ahmad, their relative, according to the shares accruing to them under the *chundawand* rule of succession, yet both have had the audacity to state in the witness-box that they did not know up to 1924 that the land had been entered in the revenue papers according to the *chundawand* rule of succession. This they did in spite of the fact that they had signed the register kept by Mian Ali Ahmad whenever they received their income from the land, those registers clearly showing on the pages where they had signed the shares which came to them as being according to the *chundawand* rule. Further, the mutation proceeding as regards the land in Batala is printed at page 694 of the paper-book. An order was passed by the Revenue Officer to issue interrogatories to inquire the rule of succession from the interested parties. In a later order it is noted that,

"In reply to the interrogatories issued the heirs admit and support the custom of *chundawand*"

This is strong evidence that both Afzal Hussain and Amjad Hussain were examined on interrogatories. In fact the person who did so, namely, the then Tahsildar of Lahore, Mian Altaf Hussain Khan, (see pages 71 and 72 of the paper-book) has stated that he examind both those persons on interrogatories in the Tahsil Court at Lahore after he had examined Mian Fazl Hussain at his house. He did not examine them at the time he examined Mian Fazl Hussain as they were not then present. He asked Mian Fazl Hussain to send them to the Tahsil and this was done.

The mutation as regards the land in the other village is printed at page 690. In this case Mian Fazl Hussain petitioned that the land should be mutated in accordance with the *chundawand* rule, and his petition was supported by a written communication from *Khan Bahadur Mian* Ghulam Farid Khan. Interrogatories issued in this case also but, as they did not return in time, they were dispensed with and mutation effected in accordance with the *chundawand* rule as stated in the petition of Mian Fazl Hussain and as supported by *Khan Bahadur Mian* Ghulam Farid Khan.

This *Khan Bahadur Mian* Ghulam Farid Khan was closely connected with the family of the parties. His sister was the mother of defendant No. 1 and one of his sons had married the real sister of defendant No. 1. On the other hand, the wife of Afzal Hussain, defendant No. 2, was his daughter while his son Mian Ahmad Said Khan was married to the eldest sister of the step-brothers of Mian Fazl Hussain. It cannot, therefore, be said that he was more interested in Mian Fazl Hussain than in his step-brothers. He was a man of good position who had been for many years an Extra Assistant Commissioner in the Punjab. There is no doubt that he was present and approved of the *chundawand* rule at the time of the death of the father of the parties. The question is whether it can be said that he at that time effected a family settlement with regard to this question. It might be noted that on the death of his own father Din Mohammad (page 333) the sons of three wives succeeded in accordance with the *chundawand* rule.

The evidence of Mian Fazl Hussain starts at page 127 of the paper-book. He said that there was a talk among the ladies as to how the property should be inherited and it was the contending ladies who referred the matter to Mian Ghulam Farid Khan who mentioned it to him. The witness said that he told Mian Ghulam Farid that he was prepared to abide by his decision. Thereupon Mian Ghulam Farid told him that he must agree to bear half the expenses of the marriage of his half-brothers and half-sisters and also to agree to the moveables being given over to his half-brothers and sisters to his own exclusion. Now it has been established that he did pay half the expenses for the marriages of his step-brother and sisters. It has also been proved that all the moveables, apart from money and mortgages, went to the step-brothers and sisters. He went on to say that defendants Nos 2 and 3, the elder full brothers of the plaintiffs, interested themselves on behalf of the plaintiffs and on their own behalf. Mian Ghulam Farid ultimately decided that the inheritance should be according to the *chundawand* rule subject to the above modification, Afzal Hussain and Amjad Hussain, defendants Nos. 2 and 3 being aware of this decision.

Later, however, in his statement Mian Fazl Hussain said that Mian Ghulam Farid Khan mentioned his decision to him a fortnight after his father's death when no one else was present. Barring the fact that Mian Afzal Hussain asked him about 15 or 20 days after his father's death as to what had been decided none of his

brothers even suggested that the inheritance should be divided according to the *pagwand* rule or gave him to understand that there was a dispute on that point. He could not say whether any male members went to Mian Ghulam Farid along with the ladies of the family because he himself was not present at that time.

This is, I have no doubt, a correct statement of what occurred, but can it be said that this was a settlement of a family dispute? According to Mian Fazl Hussain, the parties did not appear as such before Mian Ghulam Farid. There was not a solemn family conclave where the contesting parties put forward their views and their elders settled the matter, so as to save the family being involved in unnecessary litigation and expense Apparently, the major step-brothers did not even suggest that the inheritance should be divided according to the *pagwand* rule and the matter was only agitated by the ladies of the family who were not interested except indirectly. On the whole, therefore, I am inclined to hold that a family dispute was not referred to Mian Ghulam Farid for settlement but that the question was informally agitated by the ladies of the family and he informally told them that the old established custom of *chundawand* should prevail subject to the modification that Mian Fazl Hussain should help his half-brothers and sisters to the extent indicated This was known to the two major step-brothers and Mian Afzal Hussain must be held to have lied when he said in the witness-box that Mian Ghulam Farid did not approve of succession according to the *chundawand* rule, but, on the contrary, told him to contest the claim of Mian Fazl Hussain to follow that rule. Both the major brothers undoubtedly knew what had been informally discussed and decided and they also further knew that the land was mutated in accordance with the *chundawand* rule and that they were receiving their share of the income from the land in accordance with that rule. Since, however, the contesting parties did not come face to face, it cannot be held to be a family settlement in the proper sense, and it is for this reason alone that I would support the decision of the trial Judge on this point.

There is no ground for the insinuation that at that time Mian Fazl Hussain took advantage of the youth of his step-brothers in order to bring about a division in accordance with the *chundawand* rule. The *chundawand* rule was the tribal rule and the step-brothers who were majors then agreed to it or rather perhaps did not contest it The direction of Mian Ghulam Farid given to Mian Fazl Hussain has been fully carried out.

It is further true that Tafazzal Hussain, plaintiff No. 1, when he came of age, received his share of the income in accordance with the *chundawand* rule for two and a half years before he brought the present suit, knowing during that time that he was receiving his share according to that rule. He had, however, three years in which he could bring a suit after attaining majority and as he did so no question of estoppel arises against him. It was suggested by the appellant's Counsel that the suit was brought merely because defendant No. 1 had failed to help him with money. It appears to me unnecessary and unprofitable to go into this question.

This practically disposes of the appeal, as, on my finding there is no need to order an account Mian Ali Ahmad was managing the property in the lifetime of the father of the parties. He continued to do so after his death and, though for the first three years Mian Fazl Hussain took a larger part in directing him, the fact still remains that Mian Ali Ahmad was the agent of the two major step brothers as well as of the two plaintiffs who were then minors. There is a lease upon the record which is signed by Mian Fazl Hussain and the two major step-brothers. Nobody was competent to sign on behalf of the minors. After 1313 separate accounts were opened by Mian Ali Ahmad for each son and each son used to draw from Mian Ali Ahmad his share of the profits. That, however, does not make Mian Fazl Hussain liable to account to his brothers. It cannot be said that he managed the estate on their behalf.

I would accordingly accept the appeal and dismiss the suit with costs throughout to defendant No. 1.

Hilton, J.—I agree.

A. *Appeal accepted.*

LAHORE HIGH COURT.

Second Civil Appeal No. 464 of 1930.
January 30, 1931.
ADDISON J.

BHAJNA—DEFENDANT—APPELLANT
versus
Musammat BHEOLI—PLAINTIFF—RESPONDENT

Customary Law (Punjab)—Widow—Unchastity—Forfeiture of rights—Custom—Entry in riwaj-i-am, *value of*—Ahirs *of Rewari, Gurgaon District.*

The entry in the *riwaj-i-am* of the Gurgaon District provided that if a widow was unchaste or remarried she forfeited all right to her husband's estate:

Held, that the onus of rebutting the entry was upon the widow who disputed its correctness even though the entry was opposed to the general custom of the Punjab. *Beg* v. *Allah Ditta* (1), *Labh Singh* v. *Mango* (2), *Kahan Singh* v. *Gopal Singh* (3) and *Labha Ram* v. *Raman* (4), relied on. [p. 555, col. 2.]

Held, further on the evidence that the onus was not discharged. *Bhurian* v. *Puran* (5), not followed.

Second Appeal from a decree of the District Judge, Gurgaon at Hissar, dated the 17th December, 1929, reversing that of the Subordinate Judge, Fourth Class, Gurgaon, dated the 12th August, 1929

Mr. *Nanwa Mal*, for the Appellant.

Mr. *Devi Dayal*, for the Respondent.

Judgment—The parties are *Ahirs* of *Tahsil* Rewari, District Gurgaon. One Man Singh died without issue and without a widow. His mother *Musammat* Bheoli claimed to succeed to his estate and so did his minor cousin Bhajna. The Collector, relying on the *riwaj-i am*, mutated the land in favour of Bhajna. *Musammat* Bheoli then sued Bhajna for possession. The defendant pleaded that she had re-married one Nahar by *karewa*, that she was, in any case, unchaste and that, according to custom, she thus had forfeited her right to succeed to the estate of her deceased son, whether it was established that she had remarried by *karewa* or whether it was established that she was only unchaste. The trial Court, holding that she was unchaste, gave effect to the *riwaj i-am* and dismissed the suit. On appeal the District Judge, also holding that she was unchaste, decreed the suit and the defendant has preferred this second appeal having obtained a certificate under s. 41 (3) of the Punjab Courts Act.

The entry in the *riwaj-i-am* is quite clear and is not challenged. It is to the effect that if a woman is unchaste or remarries then she forfeits all rights to her husband's estate. The District Judge admitted that this entry placed the burden upon the plaintiff to rebut it but he stated that that burden was a light one as the rule expressed in the *riwaj-i am* was opposed to general custom and was adverse to the interests of females. Further he considered that the burden upon the plaintiff was discharged by three decisions of certain Subordinate Judges in Gurgaon District to the effect that unchastity in a widow did not cause forfeiture of her life-estate. He did this although he had to point out that the *riwaj-i-am* was not followed in those three cases (two of which were decided in 1922 and one in 1913) on the ground that there were no instances in support of the rule in the *riwaj-i am*.

The general rule for the Punjab is given in para. 31 of Rattigan's Digest of Customary Law, 11th edition. It is to the effect that unchastity of a widow sometimes causes a forfeiture of her life-interest but the *onus* is on those who assert the existence of such a custom. On the other hand, the *riwaj-i-am* is clear that in the Gurgaon District unchastity does cause a forfeiture of the life-estate. It was at one time held that a *riwaj i am* which was not supported by instances or which was opposed to general custom, should be considered unreliable but since the Privy Council judgment *Beg* v. *Allah Ditta* (1), this can no longer be held to be good law. Their Lordships were of opinion, that an entry in the *riwaj i-am* was a strong piece of evidence in support of an alleged custom which it lay upon the other side to rebut even assuming that the rule laid down in the entry was against the general custom in the Punjab. The Privy Council judgment was considered in *Labh Singh* v. *Mango* (2) where it was said that in view of the Judicial Committee's clear exposition of the law it could no longer be held to be the established rule that a statement in the *riwaj i-am* opposed to general custom and unsupported by instances was of no judicial value. Such an entry was *prima facie* proof of the custom and placed the *onus* of rebuttal upon the party disputing the correctness of that entry. The same view was taken in *Kahan Singh* v. *Gopal Singh* (3) and *Labha Ram* v. *Raman* (4). It

(1) 38 Ind. Cas. 354; 45 P. R. 1917; 12 P. W. R. 1917; 21 M. L. T. 310; 32 M. L. J. 615; 19 Bom. L. R. 388; 15 A. L J. 525; 21 C. W. N. 842; 44 C. 749; 26 C. L. J. 175; 44 I. A. 89 (P. C.).

(2) 100 Ind. Cas. 924; 8 Lah. 281; A. I. R. 1927 Lah. 241.

(3) 105 Ind. Cas. 204; 8 Lah. 527; A. I. R. 1927 Lah. 677; 28 P. L. R. 681.

(4) 103 Ind. Cas. 280; 9 Lah. 1; A. I. R 1927 Lah. 593.

follows that it was for the plaintiff in this case to rebut the entry in the *riwaj-i-am* which is against her.

It was held in *Bhurian* v. *Puran* (5) that amongst *Ahirs* of Delhi District no special custom had been proved whereby unchastity worked a forfeiture of the life-estate of a widow. I have been carefully through that judgment and nothing is said in it about any entry in the *wajib-ul-arz* or *riwaj-i-am*. This case, therefore, cannot affect that decision in the present case.

It remains to be decided whether the widow has rebutted the presumption arising from the entry in the *riwaj-i-am* of 1879. It is true that in three cases the Subordinate Courts have decided against this entry but they did so on the ground that the rule in the *riwaj-i-am* was not supported by instances. Having regard to the decisions quoted above, I must hold that these decisions were bad in law and cannot, therefore, be taken to be instances rebutting the entry in the *riwaj i am*. That being so, effect must be given to that entry.

For the reasons given I accept the appeal and, setting aside the order of the lower Appellate Court, dismiss the suit with costs throughout.

It was also contended before me that the finding of fact of the Courts below that the plaintiff had not re married by *karewa* should be set aside. There is no question that the widow is living with Nahar and has given birth to three children by him. The District Judge has said that only one witness from the village swore that he was present at the re-marriage and that this was strange. He also added that no *pandit* was there. Now, in *karewa* marriage no *pandit* can be there and this remark of the District Judge is unintelligible. A *karewa* marriage is not a religious ceremony. Further, three witnesses from the village have given evidence that they were present at the re-marriage, and not one. One of these witnesses was Nahar's own brother. I have no doubt myself from the evidence which has been misread by the District Judge, that there was a *karewa* marriage but this question is not important, seeing that I have held above that unchastity causes a forfeiture in the life-estate of the widow. This matter need not, therefore, be pursued further.

A. *Appeal accepted.*

(5) 105 P. R. 1885.

LAHORE HIGH COURT.

First Civil Appeal No. 135 of 1926.

December 8, 1931.

SHADI LAL, C. J. AND MONROE, J.

JAWAYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

MULRAJ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Mortgage—Stipulation for payment of compound interest on entire mortgage amount though possession of part was given—Enforceability—Power to grant relief—Usurious Loans Act (X of 1918), s. 3.

Where under the terms of a usufructuary mortgage the mortgagee was put in possession of about three-fourths of the mortgaged properties and the mortgagor agreed that till the date of giving possession of the remaining properties interest on the entire mortgage amount at a certain rate with compound interest would be paid to the mortgagee :

Held, that the clause for payment of simple and compound interest on the entire sum advanced was on the face of it unconscionable and that under s. 3 of the Usurious Loans Act the Court had ample jurisdiction to decline to enforce the contract as to interest and to grant only such relief as was just and equitable. *Balla Mal* v. *Ahad Shah* (1), distinguished. [p. 557, col. 2.]

First Appeal from a decree of the Senior Subordinate Judge, Sargodha, dated the 9th November, 1925.

Messrs. *Shuja-ud-din* and *Mohammad Monir*, for the Appellants.

Mr. *C. L. Ghulati*, for the Respondents.

Shadi Lal, C. J.—On the 1st June 1925, Bakhu, the ancestor of the defendants, granted a mortgage of immoveable property to the predecessors-in-interest of the plaintiffs by way of security for Rs. 280 which he borrowed from them. The property mortgaged comprised two plots of land, measuring 21 *bighas*, 2¼ *kanals* and 8 *bighas* ¾ *kanal* respectively; and, though the mortgage was with possession, it is common ground that the mortgagor delivered possession of only the first plot of land. As regards the second plot, the mortgage-deed contained the following stipulations:

The mortgagees "will be put into its possession afterwards and till the time of giving possession thereof, the interest will be paid at the rate of Rs. 2-2-4 per cent. per mensem. But when the possession of 8 *bighas*, ¾ *kanal* of land is delivered by me to the mortgagees, the interest will cease to be paid. In case the possession of 8 *bighas*, ¾ *kanal* is delivered, the entire money will carry no interest."

There was a clause in the deed providing for the payment of compound interest in

the event of the failure of the mortgagor to pay simple interest within one year.

It appears that the mortgage was intended to be a usufructuary one; but as the mortgagor did not deliver possession of the second plot of land, he promised to pay interest on the whole of the debt at the rate mentioned above. It is not explained why interest was agreed to be paid on the entire mortgage money when admittedly possession of the larger plot was delivered to the mortgagees and has remained with them all along. One would expect that interest would be allowed to the mortgagees only on a part of the mortgage money, in order to compensate them for the loss of the rents and profits of the smaller parcel of land.

It is, however, beyond dispute that the possession of 8 *bighas* ¾ *kanal* was never delivered to the mortgagees, and they resist the motgagor's claim for redemption by demanding a sum of money which exceeds enormously the amount advanced by them. The question for determination is what amount should be paid by the mortgagor in the redemption of the property. The learned Counsel for the mortgagees contends that the contract as entered into by the parties should be enforced by the Courts, and he places his reliance on certain judgments in support of his contention. The leading case on the subject is *Balla Mal* v. *Ahad Shah* (1), in which their Lordships of the Privy Council laid down the rule that,

"the mere fact that the principal sum now claimed exceeds enormously the amount originally advanced will be no ground for holding the transaction unconscionable. It must also appear that there was something unconscionable either in the original dealings or in the subsequent stages of the transaction."

As regards compound interest, their Lordships made the following observation :—

"There is nothing inherently wrong or oppressive in a lender's securing for himself compound interest after the borrower has for a considerable time neglected to pay the debt he owes or the interest accruing due upon it which he has contracted to pay. The borrower cannot acquire merit simply by breaking his contract. Bankers are, in fact, in this country in the habit, in the ordinary course of their business of capitalising the interest accruing on overdrawn current accounts every six months, as along as a debit balance against the customer remains due".

The propositions of law enunciated by their Lordships of the Privy Council do not admit of any dispute; but the clause providing for simple interest and compound interest on the entire sum advanced to the debtor in the event of the latter failing to deliver about one-fourth of the mortgaged property appears, on the face of it, an unconscionable stipulation. It is not disputed that s. 3 of the Usurious Loans Act, 1918, confers ample jurisdiction upon the Court to go behind the terms of a contract, when the Court has reason to believe that the interest is excessive, and that the transaction was as between the parties thereto, substantially unfair. Both these conditions are satisfied in the present case, and the Court is fully authorised to decline to enforce the contract entered into between the parties, and to grant such relief as may appear to be just and equitable.

The mortgagor did not, as pointed above, deliver possession of 8 *bighas*, ¾ *kanal* of land, but the mortgagees had no right to demand interest on the whole of the money advanced by them. They could claim interest only on a proportionate amount of the loan. There is no evidence to show that the quality of the smaller plot of land was different from that of the first plot, and it is, therefore, reasonable to assume that the two plots were of the same quality. The principal sum proportionate to the parcel of land, of which possession was not given to the mortgagees, roughly amounts to Rs. 75, and the mortgagees may be allowed simple interest on that sum at the rate of Re. 1 8·0 per cent. per mensem from the date of the mortgage-deed up to the date of redemption

For the aforesaid re sons I would accept the appeal and grant the plaintiffs a decree declaring that they are entitled to simple interest as stated above. I would leave the parties to bear their own costs in both the Courts.

Monroe, J.—I agree.

A. *Appeal accepted.*

(1) 48 Ind. Cas. 1; 124 P. R. 1918; 35 M. L. J. 614; 16 A. L. J. 905; 23 C. W. N. 233; 25 M. L. T. 55; 180 P. W. R. 1918; 29 C. L. J. 165; 1 U. P. L. R. (P. C.) 25; 21 Bom. L. R. 558 (P. C.).

LAHORE HIGH COURT.

Second Civil Appeal No. 2870 of 1927.

December 3, 1931.

Shadi Lal, C. J. and Hilton, J.

NARINJAN AND OTHERS—DEFENDANTS —APPELLANTS

versus

MUHAMMAD YUNUS—PLAINTIFF —RESPONDENT.

Specific performance—Readiness and willingness

of plaintiff to perform his part, necessity of—Making unfounded claims, effect of.

In a suit for specific performance the plaintiff has to allege and if the fact is traversed, to prove, a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part. [p. 559, col. 1.]

Where the plaintiff sued for specific performance alleging that a *khancha* was included in the property which the defendants had agreed to sell and claiming damages in case the *khancha* could not be included and it was found that the defendants had not promised to sell the *khancha*:

Held, as the plaintiff was not ready and willing to perform his part of a contract as it really was but insisted on having the *khancha* included in the sale, he had debarred himself from obtaining specific performance. *Bindeshri Prasad* v. *Jai Ram Gir* (1) and *Ardeshir H. Mama* v. *Flora Sassoon* (2), relied on. [p. 559, col. 2.]

Second appeal from the decree of the District Judge, Delhi, dated the 15th August, 1927, varying that of the Subordinate Judge, First Class Delhi, dated the 28th April, 1927.

Mr. *Kishan Dayal*, for the Appellants.

Messrs. *Noor-ud-din* and *Mohammad Amin*, for the Respondent.

Hilton, J.—Plaintiff sued the first and second defendants claiming specific performance of two agreements for the sale of certain house property by these defendants to the plaintiff. The plaintiff averred in his plaint that a *khancha* was included in the property which the defendants had agreed to sell. The defendants denied having undertaken to sell this *khancha*. The third defendant is the father of the first and second defendants and was impleaded as a person claiming to be the owner of the *khancha*. The relief for which the plaintiff asked in his plaint was that "in case the *khancha* cannot be included in the sale, the plaintiff claims for it Rs. 500 as damages from defendants Nos. 1 and 2, besides the sale deed of their house."

The trial Judge found as a fact that the first and second defendants had not promised to sell the *khancha* along with the house to the plaintiff and that the contract was to sell the house only for Rs. 3,500. The judgment then continued as follows :—

"The plaintiff has not proved that he was ever ready and willing to pay the balance of the price and get a sale-deed of the house only. In his letters of 2nd July 1926 and 22nd July 1926 the plaintiff clearly wanted the sale of the house as well as of the *khancha* and thereby himself repudiated the real contract. But inspite of all this it was essential for the plaintiff to show for the suit to succeed that he himself never repudiated the contract. At any rate the plaintiff has never from the date of the contract up to this date shown willingness to have the house alone for Rs. 3,500.

In the result the plaintiff obtained a decree for refund of Rs. 2,000, already paid under the agreement, and the parties were ordered to bear their own costs. The plaintiff appealed and the learned District Judge gave the following finding:

"My conclusions so far, then are that the plaintiff agreed to buy, and defendants Nos. 1 and 2 to sell the house in dispute, including the *kothri* but not including the *khancha*. It is conclusively proved that the plaintiff had money ready to pay the balance of the purchase-money. It is also not denied that time is not of the essence of the contract in the sale of immoveable property [and it is clear that the plaintiff did not unduly delay his suit.

In these circumstances I do not see why the contract as found by the lower Court and myself, should not be enforced. The mere fact that the plaintiff contended that the *khancha* was included in the contract does not take away his right to have the alleged contract enforced with respect to that part (practically the whole) which really was, as found, the whole of the contract. There is no question, as far as I can see of a breach of the contract on the part of the plaintiff".

The appeal was accepted. The plaintiff was given a decree for specific performance of the sale of the house (but not the *khancha*) for a sum of Rs. 3,500. The claim for damages with regard to the *khancha* was dismissed. The plaintiff was awarded three-fourths of his costs. The defendants have preferred this second appeal.

The sixth ground of appeal before the learned District Judge was that the trial Judge had erred in holding that the plaintiff was not prepared to pay the full price of the house leaving out the *khancha*. It is important to note that the District Judge in his judgment did not endorse the contention of this ground of appeal nor did he expressly dissent from the finding of the trial Judge that the plaintiff had never from the date of contract up to the date of hearing shown willingness to have the house alone for Rs. 3,500. This finding of the trial Judge is one which goes to the root of the case and I am of the opinion that it was justified by the evidence on the record including the correspondence that had passed between the parties and that it must be taken as representing the true facts of this particular matter.

For the defendant-appellants Mr. Kishan Dayal has relied upon s. 51 of the Indian Contract Act and has argued that it is the duty of the plaintiff, before he can obtain relief by way of specific performance, to allege and prove that he was willing and ready to perform his part of the contract as it really was and not as he thought it to be.

An authority very apposite to the facts of the present case is *Bindeshri Prasad* v. *Jai*

Ram Gir (1). In that case there was a contract for the sale of the proprietary right in certain lands and the intending purchaser had unjustifiably insisted on a right to compel the vendor to give an absolute warranty of the title, and when suing for specific performance of the contract he required a guarntee of this character from the vendor, until it appeared that the judgment of the Appellate Court was about to be given against him on the ground that he was not entitled to the guarantee which he claimed. In the course of the judgment their Lordships of the Privy Council remarked as follows:—

"He distinctly claimed to have the contract performed by having this warranty of title; and when he says that he was ready to have the contract completely performed as far as he himself was concerned it must be taken that he was ready to have it performed in that way."

In the present case it must, also, in my judgment, be taken that the plaintiff was ready and willing to have the contract performed only in the way upon which he himself was insisting, namely, that the *khancha* should be included in the property of which he required the conveyance.

In *Ardeshir H. Mama* v. *Flora Sassoon* (2) their Lordships of the Privy Council were dealing with a case that was somewhat different in its facts from the present case but while remarking (at page 622 *) that:

"although there is no express statement so far as the Specific Relief Act is concerned that [the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England. It seems invariably to have been recognised, and, on principle, their Lordships think rightly that the Indian and English requirements in this matter are the same."

They also laid down a rule (at page 619*) that:

"in a suit for specific performance the injured party had to allege, and if the fact was traversed he was required to prove, *a continuous readiness and willingness, from the date of the contract to the time of the hearing*, to perform the contract on his part."

That rule prescribes a course of conduct which the plaintiff has certainly not followed in the present case, regard being had to the finding of the trial Judge (from which the District Judge did not dissent, as pointed out above) namely, that the plaintiff had never from the date of the contract up to the date of hearing shown willingness to have the house alone for Rs. 3,500 and regard being also had to the nature of the prayer which the plaintiff made in his plaint that "in case the *khancha* could not be included in the sale he should be awarded Rs. 500 damages in addition to the sale-deed of the defendants' house".

On the above view of the case I would hold that the plaintiff was not willing and ready to perform his part of the contract as it really was and that he is thereby debarred from obtaining the relief of specific performance of the contract as it really was. I would accept the appeal and, setting aside the judgment and decree of the learned District Judge dated the 15th of August, 1927, would restore the judgment and decree of the Subordinate Judge, First Class, dated the 28th of April 1927. I would grant the defendant-appellants their costs in this Court and in the lower Appellate Court but would leave the parties to bear their own costs in the trial Court as was ordered by the Subordinate Judge, First Class.

Shadi Lal, C. J.—I concur.

A. *Appeal accepted.*

(1) 9 A. 705; 14 I. A. 173; 5 Sar. 61; 11 Ind. Jur. 433 (P. C.).

(2) 111 Ind. Cas. 413; 52 B. 597; A. I. R. 1928 P. C. 208; 32 C. W. N 953; 30 Bom. L. R. 1242; 28 L. W. 257; I. L. T. 40 B. 125; 55 M. L. J. 523; (1928) M. W. N. 893; 48 C. L. J. 451; 55 I. A. 360; 26 A. L. J. 1220 (P. C.).

* Pages of 52 B.—[*Ed.*].

LAHORE HIGH COURT.

Miscellaneous Second Civil Appeal No. 698 of 1931.

December 9, 1931.

TEK CHAND, J.

Musammat GAINDO—DEFENDANT—APPELLANT

versus

RADHA MOHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23, O. XLIII, r. 1—Suit not disposed of on preliminary issue—Remand by Appellate Court, legality of—Appeal from order of remand, competency of—Remand under inherent power—Power to order refund of court-fee.

No order of remand can be made under O. XLI, r. 23, Civil Procedure Code, unless the trial Court has disposed of the whole suit upon a preliminary point; and if an order of remand is not one passed under O. XLI, r. 23, Civil Procedure Code, it is not appealable. [p. 560, col. 2.]

A Court remanding a case under s. 151, Civil Procedure Code, is competent to order a refund of court-fee paid on the memorandum of appeal. [*ibid.*]

Miscellaneous Second Appeal from an order of the District Judge, Delhi, dated the 2nd March, 1931, reversing that of the Subordinate Judge, First Class, Delhi, dated the 28th July, 1930.

Messrs. *Shamair Chand* and *Qabul Chand*, for the Appellant.

Mr. *Kishan Dayal*, for the Respondents.

Judgment.—The plaintiffs respondents instituted a suit against the defendant-appellant for recovery of arrears of rent and for ejectment from certain plots of land.

The defendant pleaded (1) that the relationship of landlord and tenant had ceased to exist between the parties, (2) that, in any case, before the plaintiffs could eject the defendant they were bound to pay a sum of Rs. 10,000 as compensation for improvements as fixed in a certain prior litigation between the parties and (3), that enhanced rent was not payable by the defendant to the plaintiffs.

The trial Court heard the evidence on all the points and found, firstly, that the relationship of landlord and tenant still subsisted between the parties. Secondly, that the amount of compensation, payable by the plaintiffs to the defendant before the latter could be ejected, had been fixed at Rs. 10,000 in the previous litigation between the parties and that this point was *res judicata*. On the third question it held that the plaintiffs were not entitled to rent at enhanced rate. In the result it passed a decree for ejectment on payment of Rs. 10,000 as compensation in addition to Rs. 48-7-9 as arrears of rent.

On appeal by the defendant, the learned District Judge upheld the finding that the relationship of landlord and tenant had ceased to exist, but he disagreed with the trial Court on the second point and held that the decision in the previous suit fixing the amount of compensation at Rs. 10,000 did not operate as *res judicata*. He did not go into the third point relating to enhanced rate of rent, but accepted the appeal, and setting aside the decree of the trial Court he remanded the case to it for a "fresh decision on the merits." The provision of the law under which the remand was made was not mentioned in the order.

Against this order a miscellaneous appeal under O. XLIII, r. 1 (*u*) has been preferred by the defendant in this Court. A preliminary objection is raised on behalf of the respondents that the appeal is not competent as the order of the learned District Judge was not passed under O. XLI, r. 23, Civil Procedure Code, but had been passed under s. 151, Civil Procedure Code.

I have heard lengthy arguments on the point and have no doubt that the order of remand could not have been made under O. XLI, r. 23, Civil Procedure Code. It is obvious that the decree of the trial Court did not proceed on a preliminary point. The learned trial Judge had decided all the issues which arose for decision in the case. On appeal the learned District Judge upheld the finding on the first question, namely, that the relationship of landlord and tenant was subsisting between the parties at the time of the suit, but he disagreed with the trial Court on the second question and held that the finding in the previous litigation as to the amount of compensation was not *res judicata* and remanded the case to assess the present value of the improvements. Now, it is settled law that no order of remand can be made under O. XLI, r. 23, Civil Procedure Code, unless the trial Court had disposed of the whole suit upon a preliminary point. That rule authorises a remand only where the entire suit, and not only a portion of it, has been disposed of by the Court below on a preliminary point. Mr. Shamair Chand for the appellant does not controvert this proposition but he urges that in this case though no order of remand under O XLI, r. 23, Civil Procedure Code, could be legally passed, the District Judge must be taken to have acted under that rule in so far as he has ordered the refund of the court-fee on appeal. But a Court remanding a case under s. 151, Civil Procedure Code, is equally competent to order a refund of court-fee paid on the memorandum of appeal. I hold, therefore, that the order of remand was not passed under O. XLI, r. 23, Civil Procedure Code, and is not appealable to this Court.

Mr. Shamair Chand as a last resort asked me to treat the memorandum of appeal as a petition for revision. But no adequate ground for interference on the revision side has been disclosed. The appellant has got another remedy open to her inasmuch as she can agitate the points, now decided against her, in an appeal to this Court against the final decree if one is eventually passed against her.

For the foregoing reasons I uphold the preliminary objection and dismiss the appeal, but leave the parties to bear their own costs in this Court.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 837 of 1928.
June 22, 1931.

SULAIMAN, ACTG. C. J. AND YOUNG, J.

BALKISHAN DAS AND OTHERS—DEFENDANTS—APPELLANTS
versus
BACHAN PANDEY—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 77—Vendor and purchaser—Refusal to register document—Infructuous suit under s. 77—Fresh suit for specific performance and possession—Maintainability—S. 77, whether exclusive remedy—Agreement to transfer immoveable property—Right to specific performance.

In the case of an agreement for transfer of immoveable property a suit under s. 77, Registration Act, is not the exclusive relief open to the purchaser and the mere failure of a suit under s. 77 or its infructuous termination cannot operate as a bar to a suit for the specific performance of the contract by executing a new and a fresh document and for recovery of actual possession. [p. 562, col. 1.]

The original cause of action to enforce specific performance is independent and separate from the cause of action arising from the refusal of the purchaser to register the document. *Amar Chand* v. *Nathu* (2), *Uma Jha* v. *Chetu Mandar* (4), *Nasir-ud-Din Midda* v. *Sidhoo Mia* (3), *Kanhaiya Lal* v. *Sirdar Singh* (5) and *Ram Ghulam* v. *Menda* (6), relied on, *Satyanarayana* v. *China Venkatarao* (1), not followed. [*ibid.*]

The relief of specific performance is discretionary but the ordinary presumption is that a contract for transfer of immoveable property cannot be compensated for by damages. [*ibid.*]

Second Appeal from a decision of the Additional Subordinate Judge, Benares, dated the 14th of April, 1928.

Dr. *K. N. Malaviya*, for the Appellants.

Messrs. *A. Sanyal*, *K. Verma* and *Gaidhar Prasad*, for the Respondent.

Judgment.—This is a defendants' appeal arising out of a suit for specific performance. Under a registered agreement dated the 18th May, 1924, the defendant accepted earnest money and undertook to sell certain immoveable property to the plaintiff. A sale deed was executed and was presented for registration by the vendee but the defendant did not turn up on the day when it was to be registered. An application was afterwards made to the Sub-Registrar for the registration of the sale deed, but that was refused as the defendant did not again appear. An appeal to the District Registrar was also dismissed because the defendant did not appear to admit the document and the document was proved. The plaintiff then brought a suit under s. 77 of the Indian Registration Act for the compulsory registration of that particular document. The case was fought out and the finding was in favour of the plaintiff. The decree however was in the form directing the defendant to get the sale deed registered within thirty days. If the correct form had been adopted the learned Munsif should have allowed the plaintiff to take it to the Registration Office for registration. The defendant, however, appealed to the District Judge, but after the period of thirty days expired he withdrew his appeal on the ground that the decree had become a nullity as the sale deed was not produced for registration within thirty days. As a matter of fact he himself had made default as the Munsif's decree had directed him to get it registered. The plaintiff had made an application to the Munsif within the thirty days for the return of the document in order that he might present it for registration. This application was dismissed as the decree of the Munsif did not direct him to get the document registered. An infructuous appeal was filed to the District Registrar but it also failed. In the result the plaintiff did not obtain the relief which he might have got under s. 77 of the Registration Act. He then instituted the present suit for the specific performance of the original contract. Various defences were raised but all the issues were found against the defendant and the suit was decreed by both the Courts below.

It is contended before us that the only remedy which the plaintiff had was the one allowed to him under s. 77 of the Indian Registration Act, and that that suit having failed, his remedy was exhausted and he no longer had any further cause of action against the defendant. In support of this contention reliance is placed on certain Madras cases among which *Satyanarayana* v. *China Venkatarao* (1) may be mentioned. This case dissents from the view taken in this High Court in the case of *Amar Chand* v. *Nathu* (2). The view of this High Court has been followed by the Calcutta High Court as well as by the Patna High Court. 44 Ind. Cas. 361 *Nasir-ud-Din Midda* v. *Sidhoo Mia* (3) and *Uma Jha* v. *Chetu Mandar* (4).

It seems to us that the original contract substantially was for the sale of the immoveable property by the defendant to the plaintiff and not for the mere signing of a particular document or of its presentation

(1) 100 Ind. Cas. 385; 49 M. 302; 23 L. W. 277; A. I. R. 1926 Mad. 530; 50 M. L. J. 674.
(2) 7 Ind. Cas. 408; 7 A. L. J. 887.
(3) 44 Ind. Cas. 361; 27 C. L. J. 538.
(4) 95 Ind. Cas. 187; A. I. R. 1926 Pat. 69; (1926) Pat. 11; 7 P. L. T. 730.

for registration. It cannot be said that the defendant has fulfilled his contract completely by merely signing the sale deed without getting it registered. The property admittedly is still in his possession and has not legally passed to the plaintiff. It is, therefore, impossible to hold that the contract entered into by the defendant has been fully carried out.

Section 77 of the Indian Registration Act permits a suit for a decree directing the document to be registered. That obviously refers to a relief for the registration of that particular document which had been executed and the registration of which was refused. Under that section no other relief can be claimed. This has been clearly held by this Court in *Kanhaiya Lal* v. *Sirdar Singh* (5) and *Ram Ghulam* v. *Menda* (6). It is, therefore, obvious that the mere failure of a suit under s. 77 or its infructuous termination cannot operate as *res judicata* in a suit brought for the specific performance of the original contract and for recovery of possession of the immoveable property. This suit is based on the original cause of action which was independent and separate from the cause of action arising from the refusal of the purchaser to register it. It is also quite clear that the remedy which the plaintiff claims in the present suit is for the specific performance of the contract by executing a new and fresh document and for recovery of actual possession. Such reliefs could not have been claimed in the previous suit. We are unable to hold that s. 77 provides the only exclusive relief to the plaintiff, who has paid consideration and earnest-money to the defendant who has promised the transfer to him of the immoveable property. There is absolutely no reason why he should not be able to enforce the contract specifically and obtain actual possession.

The only point that remains for consideration is whether there has been any thing in the conduct of the plaintiff which would disqualify him from obtaining the equitable relief of specific performance. No doubt such a relief is discretionary, but the ordinary presumption is that a contract for the transfer of immoveable property can not be compensated for by damages. The finding of the lower Appellate Court makes it quite clear that it was the defendant himself who was to blame throughout. On two occasions he did not appear before the Sub-Registrar and he did not turn up before the District Registrar. He also frivolously resisted the plaintiff's suit under s. 77 and then although the decree was against him he did not obey that decree. The plaintiff has been knocked about from Court to Court but it cannot be said that he was in any way negligent. The Munsif had passed a decree in his favour and against the defendant, and although the form of it was not proper the plaintiff submitted to it hoping that defendant would be bound by it. In view of all the circumstances we agree with the view taken by the Court below.

We accordingly uphold the decree of the Court below and dismiss the appeal with costs.

A. *Appeal dismissed.*

(5) 29 A. 284; 4 A. L. J. 171; A. W. N. (1907) 46.

(6) 60 Ind. Cas. 869; 19 A. L. J. 224.

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1417 of 1929.

July 2, 1931.

MUKERJI AND ALLEN, JJ.

RAM KISHAN AND ANOTHER—DEFENDANTS —APPELLANTS

versus

(RADHEY LAL) GOPI NATH AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, rr. 3, 11—Guardian—Neglect to protect minor's interests—Removal—Duty of Court—Right to retire—'Interest adverse to minor', meaning of.

A guardian appointed by the Court has no absolute right to remove himself from the litigation and force the hands of the Court at his own sweet will. *Narender Singh* v. *Chatrapal Singh* (1), referred to. [p. 564, col. 1.]

But if the interests of a minor are in the hands of a person who has neglected to protect those interests it is the duty of the Court to remove him from the guardianship, if he had already been appointed, or to decline to appoint him guardian, if there was no formal order for his appointment. [p. 564, col. 2; p. 565, col. 1.]

"Claiming an interest adverse to that of the minor" does not mean that the minor and guardian were fighting or were actually on inimical terms. The expression is an expression of law, and it means that the interest of the minor cannot be safe in the hands of the guardian. [p. 564, col. 2.]

Second Appeal from the decision of the Additional Subordinate Judge, Muttra, dated the 1st July, 1929.

Messrs. *N. P. Asthana* and *B. N. Sahai*, for the Appellant.

Dr. *M. L. Agarwala*, Dr. *K. N. Katju* and Mr. *S. C Das*, for the Respondents.

Judgment.—This is an appeal by the minor defendants Nos. 4 and 5.

The facts briefly are these. A suit for sale was brought by one Lala Bithal Das against the mortgagors, and two persons, Baidy Ram and Munni, as subsequent transferees. When Baidy Ram died, his sons Ram Kishen and Lachman, the present appellants, were brought on the record. The plaintiff applied that Chunna Ram, the paternal uncle of the minors, Ram Kishen and Lachman, should be appointed their guardian for the suit.

A notice was issued to Chunna Ram to state to the Court whether he was willing to accept the appointment or not, and he was to appear on the 15th August, 1927. The notice was served on Chunna Ram on the 5th August, 1927, but he did not appear on the 15th August, 1927. On the latter date, the Court directed that the case should proceed *ex parte* against the minors, Ram Kishen and Lachman. There is no formal order appointing Chunna Ram as the guardian for the suit of the minor defendants.

On the 15th August, 1927, it was reported to the Court that the original plaintiff, Bithal Das, had died leaving a will, and it would require some time to bring his legal representatives on the record The learned Judge granted time, and the case was adjourned for three months.

On the 8th November, 1927, an application was made to the Court to substitute the names of two persons as the legal representatives of the deceased plaintiff, Bithal Das. On this application being made, an order was passed to the effect that two notices should issue to the defendants one was a notice asking the defendants to say if they objected to the bringing on the record of the two persons as the legal representative of the plaintiff, and the other notice was to the effect that the 23rd January, 1928, had been fixed for the hearing of the case.

On the 23rd January, 1928, Chunna Ram appeared before the Court of first instance and made an application (No. 65-C) asking the Court to make him a party. He said that the mortgage, by virtue of which Baidy Ram had been made a defendant, was the joint family property of himself and Baidy Ram, that he had an interest in the bond and that on that ground he should be made a party. This application was rejected on that very day, on the ground that the application had been made too late.

Thereupon, Chunna Ram made an application to the Court saying that so far no guardian had been appointed for the minors, that he did not want to act as the guardian of the minors and some other person should be appointed. The learned Munsif rejected this application on the ground that the notice of appointment of guardian had been served on the applicant on the 5th August, 1927, and if a second notice had been issued to Chunna Ram, it was issued by mistake of the office.

Thereupon a third application was made by Chunna Ram on behalf of his minor nephews, and this time it was for adjournment. He said that he had been appointed a guardian against his will, that he had no previous information of the case, that he applied for summoning a record (on 18th January, 1928) in the impression that he was a party to the suit and that in the interest of the minors an adjournment should be granted. The learned Munsif rejected this application and proceeded to hear the case.

The case was heard, and a few days later judgment was pronounced. It was found that the minor defendants, Ram Kishen and Lachman, had failed to prove that they held any priority over the mortgage in suit We may mention here that this was the only point taken on behalf of the minors that really affected the case. Their case was that the mortgage in favour of their father, although of a date subsequent to the date of the mortgage in suit, had been executed to pay off a decree (No. 131 of 1916) passed on a mortgage of 1905, and that, therefore, they had priority over the plaintiff's mortgage.

Chunna Ram filed an appeal before the learned District Judge, and it was heard by the Additional Subordinate Judge of Muttra The learned Subordinate Judge dismissed the appeal. He was of opinion that the allegations of Chunna Ram that his interests were adverse to those of the minors was without force, that the repeated applications and the allegations made in them by Chunna Ram were made and done with the sole object of obtaining an adjournment and that the Munsif was right in refusing to allow an adjournment. The learned Subordinate Judge agreed with the contention of the minors before him that there could be no appointment of a guardian against his will, but he observed: "But the question is, if he fails to object to his appointment within 15 days of the service of notice on him, and the Court passes orders behind his back, is he competent to return at his own sweet will and force the Court to stop proceedings at any time he chooses to do so". These observations are very pertinent, but they would be good only

if they tallied with the circumstances of the case.

As we take it, it is the duty of the Court to protect the interests of a minor. A guardian is appointed for that purpose, and for that purpose alone. If the Court finds that the guardian is not acting properly, it would be the duty of the Court to remove him and to see that the interest of the minor is protected. When a person who has been properly appointed guardian of a minor, has taken proper steps to safeguard the interests of the minor, and then, for some reason or other, wants to force the hands of the Court by preferring a resignation, it would be the duty of the Court to see whether the resignation should be accepted or not. If the minor concerned is not likely to be prejudiced thereby, the Court may decline to remove the guardian. Such a case arose in *Narendar Singh* v. *Chatrapal Singh* (1). It was laid down in that case that a guardian appointed by the Court for the protection of a minor's interest has no absolute right to remove himself from the litigation and force the hands of the Court at his own sweet will. The learned Judges who decided the case took considerable pains to discover whether the minor's interest was suffering or not. They came to the conclusion that the minor's interest did not suffer, and that the only object of the application on the part of the guardian asking for her retirement was to delay the trial of the suit.

That being the principle, we have to see whether, in this particular case before us, the Court should have accepted the application of Chunna Ram either to let him retire from the office of guardian, or to grant him time to prosecute the interest of the minors.

We are not laying any particular stress on the fact that there is no order for the appointment of Chunna Ram as the guardian of the minors. We assume that a formal order will not be important, if the minors' interests have been duly protected. But we find in this case that the written statement disclosed a case which, on the face of it, has some force. At least, it is a case which was well worth being put before the Court. When the applications of Chunna Ram were rejected, he filed a written statement and he filed certain documents, but these could not be proved because he did not summon any witnesses for the minors' case. The documents produced required formal evidence in order to be proved. In the circumstances, the learned Munsif could have easily seen that the interest of the minors had not been protected. The man who had been appointed guardian had filed a written statement but had taken no steps to summon witnesses. We may note that there was no hearing at all before the 23rd January, 1928, the date of the hearing, when Chunna Ram appeared and declined to act. He said that his interest was adverse to that of the minors. It has been argued that if he was a member of a joint Hindu family with the minors, it would be to his interest to prosecute the defence on behalf of the minors. The question whether Baidy Ram was joint or not with Chunna Ram has not been gone into, and we need not express any opinion on the point. But it is clear that when Chunna Ram claimed a half share in the property which stood in the name of the minors' father, on the face of it, at any rate, he was claiming an interest which was adverse to that of the minors. "Claiming an interest adverse to that of the minors" does not mean that the minors and Chunna Ram were fighting or were actually on inimical terms. The expression is an expression of law, and it means that the interest of the minors cannot be safe in the hands of Chunna Ram. There was the assertion on the part of Chunna Ram that his interest was adverse to that of the minors. The trial Judge ought to have accepted this statement as correct in the interests of the minors, even as a matter of precaution and extra care for the benefit of the minors. Then Chunna Ram definitely declared that he was not going to act for the minors. It was not a case like the one already quoted by us, in which the guardian had taken every step to protect the interest of the minors. So far Chunna Ram had done nothing whatsoever to protect the interest of the minors. As we have said, he did not file a written statement, till the eleventh hour and he had not summoned witnesses. It has been argued that he was taking all the interest that was possible for him to take in the minors, but was neglectful of his duty and that he had neglected to summon witnesses, and that was why he was asking for time. If that was so, the interests of the minors were in the hands of a man who had admittedly neglected to protect those interests. In the circumstances, it was the duty of the Court below to remove Chunna Ram from the guardianship, if he had already been appointed, or to decline to appoint him

(1) 94 Ind. Cas. 340; A. I. R. 1926 All. 437.

guardian, if there was no formal order for his appointment. We are clearly of opinion that the interests of the minors have suffered in the present litigation at the hands of Chunna Ram. We are, therefore, of opinion that the appeal should be allowed.

It has been argued on behalf of the plaintiffs-respondents that if the Court be inclined to allow the appeal, the costs which have been thrown away should be paid by Chunna Ram personally, because, after all, he alone is responsible—at least mainly responsible—for all that has happened. We think there is force in this contention. Chunna Ram was twice served with a notice, and it was his obvious duty, if he was not going to act as the guardian of his minor nephews, to come before the Court and say so.

The Counsel for respondent No. 6, Munni, has argued that he should have his costs, because there is no contest between him, on the one hand, and the appellants on the other, and he was unnecessarily brought before this Court.

It was argued on behalf of the appellants that the appeal had arisen out of a mortgage suit, and it was necessary that all the parties to the suit should be before this Court. If that was so, the plaintiffs made the respondent No. 6, Munni, a party in their own interest, and, therefore, they are bound to pay his costs.

In the result, we allow the appeal, set aside the decrees of the Courts below and remand the suit to the Court of first instance for trial according to law. The learned trial Judge will now appoint a fresh guardian for the appellants and pass a proper order for the appointment. The costs here and hitherto as between the plaintiffs, on the one hand, and the minor defendants Nos. 4 and 5 (Ram Kishan and Lachman), on the other, will abide the result. The costs will include Counsel's fees in this Court on the higher scale. As Chunna Ram has been mainly responsible for the throwing away of so much costs, the plaintiffs will be entitled to recover their costs, excepting the Court-fee paid by them, from Chunna Ram, including costs in the Courts below and in this Court. If the plaintiffs recover their costs which have been thrown away, from Chunna Ram, they will not be entitled to recover the same from Lachman and Ram Kishen again, in case the plaintiffs succeed after trial.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Civil Revision No. 486 of 1930.
July 16, 1931.
SEN, J.

SECRETARY OF STATE FOR INDIA—PLAINTIFF—APPLICANT
versus
FIRM GIRDHARI LAL-SHAMBHUNATH—DEFENDANT—OPPOSITE PARTY.

Escheat—Basis of the right—Escheat and succession, distinction between—Succession Act (XXXIX of 1925), ss. 214, 381, application of, to Crown—Recovery of debt by Secretary of State due to person dying heirless—Succession Certificate, necessity of.

Where there is a vacant inheritance the property lapses to the Crown by the rule of escheat but the escheat to the Crown is not due to any rule of succession; it is a prerogative of the Crown. Upon the death of a person without leaving heirs his estate devolves upon the Crown under its general prerogative and not by reason of any rule of succession. Therefore, the provisions of ss. 214 and 381, Succession Act, are not applicable to the Crown where the property vests in the Crown by reason of escheat and it is not necessary for the Secretary of State to obtain a succession certificate for the realisation of the debt due to the person dying heirless. *Collector of Masulipatam* v. *Cavaly Venkata Narainpah* (1), *Cavaly Venkata Narainpah* v. *Collector of Masulipatam* (2) and *Sonet Koer* v. *Himmat Bahadur* (3), referred to. [p. 566, cols.1 & 2.]

Civil Revision against a decree of the Subordinate Judge, Agra, dated the 28th of June, 1930.

Mr. *Sankar Saran*, for the Applicant.

Messrs. *N. P. Asthana* and *Baij Nath Sahai*, for the Opposite Party.

Judgment.—This is an application for civil revision by the Secretary of State for India in Council who figures as plaintiff in the action. The suit was to recover interest on five *hundis* of various dates which were drawn by the firm Girdhari Lal-Shambhu Nath on the firm Ram Narain-Chunni Lal. The *hundis* were payable 61 days after the date of execution.

The firm of Ram Narain-Chunni Lal was owned by Chunni Lal. He died in April, 1925, before the *hundis* had matured. He is said to have died without leaving any issue.

Upon his death, three rival claimants appeared on the scene; one claimed to be the collaterel heir of Chunni, the second claimed under a will and the third in the right of escheat. A triangular dual is going on between these three and I am informed that litigations are pending in appeal before this Court.

On the 14th of July, 1925, Rai Bahadur Seth Soorajbhan, Government Treasurer of Agra, sent a notice on behalf of the Collector of Agra to the defendant calling upon

him to pay up the principal and interest due on the *hundis*. The defendant did not make the desired payment.

On the 21st of April, 1927, the defendant appears to have to a certain extent changed his mind, for, on that date, the defendant deposited the principal amount due on the *hundis* in the Imperial Bank of Agra to the credit of the Collector of Agra.

The Collector served a notice upon the defendant asking him to pay the interest due on the *hundis* from the date of their maturity up to the 21st of April, 1927, when the principal sum was paid. The defendant did not respond to this notice; hence the suit.

The suit was instituted on the 5th of March, 1929.

Various points were raised in defence but the one which was seriously pressed was that, in view of the provisions of ss. 214 and 381 of the Indian Succession Act (XXXIX of 1925) the plaintiff was not entitled to claim interest without obtaining a succession certificate. It may be noticed that this plea had not been taken in the written statement as originally filed. At a later stage, the defendant applied for the amendment of his written statement by the inclusion of this plea. His written statement was allowed to be amended.

On the 20th of December, 1929, the Court passed an order directing the plaintiff to obtain a succession certificate. Thereupon the plaintiff applied for and obtained the required certificate on the 2nd of June, 1930. This certificate was duly filed in Court. The Court, however, dismissed the plaintiff's suit on the following ground :—

"The present plaintiff obtained succession certificate on the 2nd of June, 1930, after the filing of the present suit. Evidently up to 2nd of June, 1930, there was none who could give a valid discharge and so the defendant cannot be held liable for interest for the period in question."

Where there is a vacant inheritance, the property lapses to the Crown by the rule of escheat. The escheat to the Crown is not due to any rule of succession. The right of escheat is a prerogative of the Crown and the said prerogative is recognized universally in every system of civilized jurisprudence. I would emphasise the fact that upon the death of a person without leaving any heirs his estate devolves upon the Crown under its general prerogative and not by reason of any rule of succession. Escheat is the vanishing point in the law of inheritance. Where succession ends, escheat begins The law on the subject has been discussed in a number of cases and reference may be usefully made to the *Collector of Muslipatam* v. *Cavaly Vencata Narainpah* (1), *Cavaly Vencata Narainpah* v. *Collector of Muslipatam* (2) and *Sonet Koer* v. *Himmat Bahadur* (3).

Section 214 of the Indian Succession Act provides that:

"no Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased person or to any part thereof..... except on the production by the person so claiming of .. (III) a succession certificate granted under Part X and having the debt specified therein."

Where the property descends to the Crown by escheat it could not be said that the Crown was claiming the property by right of *succession* within the meaning of s. 214 of the Indian Succession Act. Section 381 of the Indian Succession Act provides that:

"the succession certificate granted by the District Judge with respect to the debts and securities specified therein will be conclusive against the person owing such debts or liable on such securities and, shall afford full indemnity to all such persons as regards all payments made, or dealings had, in good faith in respect of such debts or securities to or with the person to whom the certificate was granted."

No authorities have been cited in support of the proposition that the provisions of ss. 214 and 381 of the Indian Succession Act are applicable to the Crown where the property vests in the Crown by reason of a vacant inheritance. This case, therefore, is one of first impression Upon general principles, I am of opinion, that the Indian Succession Act is not applicable to the Crown, when it takes the property upon escheat. The ground, therefore, upon which the judgment proceeds cannot be supported.

An important plea was raised by the defendant in para. 9 of written statement which runs as follows :—"Neither were the *hundis* presented to the contesting defendant on the due date nor did there appear any person entitled to take the money." The question, therefore, which still remains for determination is whether the plaintiff could claim interest on the *hundis* without presenting the *hundis* after their maturity.

I allow the application, set aside the decree of the Court below and remand the case to that Court for disposal of the case with reference to the issue indicated above. Costs here and heretofore shall abide the event.

B L. *Application allowed.*
Case remanded.

(1) 8 M. I. A. 500; 2 W. R. P. C. 59; 1 Sar. 752; 1 Suther 417.

(2) 11 M. I. A. 619; 10 W. R. 47; 2 Suther 103; 2 Sar. 338.

(3) 1 C. 391 at p. 401.

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 26 of 1929.
June 16, 1931.
BOYS AND SMITH, JJ.
Lala BAL KISHAN AND ANOTHER—
PLAINTIFFS—APPELLANTS
versus
Musammat BUNDIA AND OTHERS—
DEFENDANTS—RESPONDENTS.

Mortgage—Release — Mortgagor mortgaging two houses—Suit for sale on basis of mortgage—Exemption of one house by statement, whether release—Mortgagee's right to claim entire money from one house—Transfer of Property Act (IV of 1882), s. 82.

One *C* after mortgaging two houses, house No. 1 and house No. 2, in favour of the plaintiff sold house No. 1 to defendant No. 2. Later on the mortgagee sued for sale of both houses on the foot of the mortgage. After written statements had been filed the mortgagee's Counsel made a statement admitting that the house No. 2 did not belong to the mortgagor in the mortgage in suit and that it belonged to one *K* predecessor-in-interest of defendant No. 3 who had mortgaged it to defendant No. 4 and that it might be excluded from claim. In consequence of this statement Counsel for defendant No 4 remitted costs:

Held, that the action of the mortgagee did not amount to a release and he could ask that his entire claim under the mortgage be satisfied out of house No. 1. [p. 587, col. 2.]

Held, further, that the owner of house No. 1 could file a suit for contribution directed against house No. 2 under s. 82, Transfer of Property Act. [p. 568, cols.1 2.]

Second Appeal from a decision of the Additional Subordinate Judge, Banda, dated the 10th December, 1928.

Mr. *M. N. Kaul* (with him Dr. *K N. Katju*) for the Appellants.

Mr. *P. L Banerji* (for whom Mr. *Ambika Prasad Dube*, and Mr. *Ram Nama Prasad*), for the Respondents.

Judgment—This is a plaintiffs' appeal arising out of a suit on a mortgage.

On 17th January, 1917, Chhotey Lal the deceased husband of *Musammat* Bundia, defendant No. 1 executed a simple mortgage in favour of Keshab Das, the predecessor-in-title of the plaintiffs, of three items of property, the house No. 1, house No. 2 and some *zemindari*. Defendant No. 5 was impleaded simply as a donee of part of the *zemindari*, and defendant No. 6 as having attached one of the houses in execution of a decree.

On the 5th September, 1921, the mortgagor sold house No. 1 to Pandit Bala Parsad, defendant No. 2.

There is an allegation in the suit, the truth of which has not yet been decided, that on the 17th January, 1927, one Khunnun, claiming to be the owner of the house No. 2 mortgaged it to one Hazari Lal, who is now defendant No. 4, Khunnun being represented by his son Jagannath. The plaintiffs directed their suit at the outset against both the houses Nos. 1 and 2 but after the written statements had been filed they proceeded through their Counsel on the 15th February, 1928, to state that they admitted that house No. 2 did not belong to Chhotey Lal, the mortgagor in the mortgage in suit, but that it belonged to Khunnun, and they agreed, therefore, that the said house might be excluded from the claim against all the defendants.

When the plaintiffs' Vakil had made the statement the Vakil for Hazari Lal, defendant No. 4 stated on behalf of his client that as the claim had been withdrawn in respect of house No 2, defendant No. 4 was also prepared on his side to remit his costs. The trial Court held that house No. 1 was only ra'eably liable and not liable for the whole amount of the mortgage. The judgment declared that the amount for which house No. 1 was liable was Rs. 250 whereas in the decree the amount was stated to be Rs. 300. The plaintiffs appealed, and defendant No. 2 filed a cross-objection. The plaintiffs' appeal was dismissed, and on the cross-objection the error in the decree was corrected by substituting Rs. 250 for Rs. 300. Except for this modification the decree of the trial Court stood. The plaintiffs have come up here in second appeal, asking us to hold that the house No. 1 should have been made liable for the whole amount due under the mortgage, Rs. 1,278 8 3. We have heard not only Counsel for the plaintiff-appellants and for Pandit Bala Prasad defendant No. 2 but also Counsel on behalf of Hazari Lal, the mortgagee in the mortgage alleged to have been executed by Jagannath, the son of Khunnun We have had much argument addressed to us as to the consequences of the mortgagees action in declaring that he was prepared to exclude the house No. 2 from his suit. We have had cases quoted to us and it has been argued on the basis of this case or that case that the plaintiffs' action amounted to or did not amount to a release. In our view there is no particular magic in the word 'release' The circumstances of each case must be regarded in order to determine which of the parties in suit may be bound by particular action taken We may illustrate this by noting that the lower Appellate Court has relied mainly on the decision in *Jugal Kishore* v. *Kedarnath* (1) which it has described as being on all fours with the present case. In our view that case is plainly distinguishable. When the mortgagor sold

(1) 16 Ind. Cas. 401; 34 A. 606; 10 A. L. J. 300.

the property which the mortgagee subsequently exempted from his suit he left Rs. 500 with the vendee, which was to be paid to the mortgagee, which was paid to the mortgagee and which the mortgagee eventually accepted in full payment of the liability of that portion of the property. In the present case the mortgagee did not receive any money in consideration of their exempting house No. 2 and least of all did they receive any money from the mortgagor. The mortgagor, so far as the evidence goes, was in no way privy to the transaction between the mortgagees and the defendants Nos. 3 and 4 more particularly defendant No. 4. In our view the case may be decided by reference to two very normal principles. It was open to the mortgagees to proceed by their suit against both the items of property, house No. 1 and house No. 2 and having obtained a decree in reference to them both it was open to them to proceed to recover the whole of their mortgage money if they could, by sale of either, and subsequently by sale of the other if the sale of the first did not satisfy their decree. On the other hand, it was open to them to include in their suit only one of the items of the property, if they so chose, but in this case if that item proved insufficient to cover all that was due under the mortgage they would be unable, of course, to proceed by another suit against the other two properties. But in either of these cases there was nothing whatever to prevent them from asking for the whole of their mortgage money from the one property. It has been contended that defendant No 2 the present owner of house No. 1 would be gravely injured if his property was made liable for the whole of the amount of the mortgage, because as it was suggested on his behalf he would not be able to file a suit for contribution directed against the other property, house No. 2. While, however, this assertion was made both on behalf of defendant No. 2 and by Counsel for defendant No. 4 no authority was shown to us to suggest why a suit for contribution should not lie. We were repeatedly referred to what the mortgagees had said and done, but nothing that the mortgagees said or did possibly binds the owner of house No. 1 unless he or his predecessor-in-title was in some way privy to the statements or actions of the mortgagees. This is not suggested. Reading the terms of s 82 of the Transfer of Property Act, it is certainly not apparent why a suit for contribution should not lie. There is nothing in it to the effect that a suit will not lie unless the property has been included in the original decree. It will of course be for the defendant No. 2 if he files such a suit to establish that Chhotey Lal and not Khunnun was the real owner of the property. That is a matter that has not yet been gone into owing to the fact that the mortgagees exempted house No. 2.

The result is that we allow the appeal and setting aside the decrees of both the lower Courts decree the suit of the plaintiffs in full as regards house No. 1. The plaintiffs will get their full costs from defendant No. 2 throughout. The defendants including defendant No. 4 will pay their own costs. The decree will be prepared under O. XXXIV, r. 4, six months being allowed to the defendant No. 2 counting from 16th June, 1931, for payment.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Civil Revision No. 394 of 1930.

May 14, 1931.

SULAIMAN, ACTG. C. J., AND KING, J.

RISAL SINGH—PLIANTIFF—APPLICANT

versus

FAQIRA SINGH AND ANOTHER—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Order setting aside award—Revision—'Case decided'.

An order setting aside an arbitration award is not a case decided within the meaning of s. 115, Civil Procedure Code, and, therefore no revision lies from such an order.

Civil Revision against a decree of the Munsif, Haveli Saharanpur, dated the 14th May, 1930.

Dr. *K. N. Malavaiya*, for the Applicant.

Mr. *G. S. Pathak*, for the Opposite Parties.

Sulaiman, Acting C. J.—This is a plaintiff's application in revision from an order of the Munsif of Saharanpur setting aside on arbitration award. A preliminary objection to the hearing of this application is taken and it is urged that no case has been decided and, therefore, no revision lies under s. 115, Civil Procedure Code. The learned Advocate for the respondent relies on the case of *Rudra Prasad* v. *Mathura Prasad* (1) decided by a Bench of which I was a member. It was pointed out in that case that there had been a recent decision in the case of *Shah Muhammad Fakhr-ud-din* v. *Rahimullah* (2),

(1) 89 Ind. Cas. 173; 47 A. 916; 23 A. L. J. 656; A. I. R. 1925 All. 566; L. R. 6 A. 459 Civ.

(2) 85 Ind Cas. 502; 47 A. 121; L. R. 6 A. 22 Civ; A. I. R. 1925 All. 458.

in which exactly the same point had been decided against the applicant. Following that decision we held that no revision lay.

In the case of *Shah Muhammad Fakhar-ud din* v. *Rahimullah* (2), another Bench had held that no application in revision would lie from an order setting aside an award. The Bench considered that they were following the pronouncement of the Full Bench in *Budhu Lal* v. *Mewa Ram* (3). But in this Full Bench case the opinion of Ryves, J. which turned the scale was simply this, that "no revision lies from a finding on an issue relating to the question of jurisdiction". There is however an earlier case of *Chattar Singh* v. *Lekhraj Singh* (4), in which also it was held that no revision lay from an order setting aside an award. On the other hand, in *Bhola Nath* v. *Raghunath Das Mithan Lal* (5), it was held that an application in revision would lie from an order superseding a reference to arbitration before the award was delivered. That case also was decided by a Bench of which I was a member. The case of *Chatar Bujh* v. *Raghubeer Dayal* (6), which was exactly on all fours with the case before us was cited and followed by us. We held that the termination of the proceeding relating to the supersession of the arbitration amounted to a case decided within the meaning of s. 115 Civil Procedure Code.

The learned Advocate for the respondents has urged before us that the two last mentioned cases can be distinguished on this ground that an application for the supersession of the arbitration proceedings before the award is delivered is not expressly provided for anywhere in the Code and the proceeding started by such an application may be treated as a separate proceeding. A case within the suit, resulting in the supersession of the arbitration, may amount to " a case decided" with in the meaning of s. 115, Civil Procedure Code. On the other hand, the order setting aside the award is an order contemplated by Sch. II, Civil Procedure Code, and is a part of the proceeding in the suit itself.

I must admit that the distinction sought to be drawn is very thin and that to some extent there is unfortunately a want of harmony. Bhola Nath's case can be distinguished only on the ground that if the Court allows a new proceeding to be started, which the law does not contemplate and which is outside the scope of the suit, resulting in the interruption of its normal course, and passes an order not warranted by law, the proceeding is deemed to be a 'case' in itself.

As the facts of the case before us are identical with the facts of the first three cases quoted above, it must be decided in accordance with the view expressed in those cases. I would therefore dismiss this revision.

King, J.—I concur. The order setting aside the arbitration award disposed of a proceeding during the pendency of the suit and, in my opinion, the decision of the question whether the award was valid or invalid did not amount to the decision of a "case" within the meaning of s. 115 of the Code of Civil Procedure. The rulings in *Chattar Singh* v. *Lekhraj Singh* (4), *Shah Muhammad Fakhar-ud din* v *Rahimullah* (2) and *Rudra Prasad* v. *Mathura Prasad* (1) are exactly in point and I think that they, should be followed.

By the Court.—The application is dismissed with costs.

N. K. & A *Application dismissed.*

(3) 63 Ind. Cas. 15; 43 A. 564; 19 A. L. J. 558.
(4) 5 A. 293.
(5) 122 Ind. Cas. 685; A. I. R. 1929 All. 743.
(6) 23 Ind. Cas. 758; 36 A. 354; 12 A. L. J. 529.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1032 of 1930.
November 7, 1930.
BOYS AND NIAMAT ULLAH, JJ.
FIRM RIKHAI LAL-BINDESHRI PRASAD—PLAINTIFF—APPELLANT
versus
BANARSI SINGH *alias* BANSI SINGH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—Finding of 'default', whether finding of fact—Post Office Act (VI of 1898), s. 6—'Default', meaning of.

A finding of negligence or a finding that there was or was not default is not necessarily in all cases a finding of fact, if the finding has not been approached from the proper legal standpoint. [p. 570, col. 1.]

The word 'default' is used in s. 6, Post Office Act, in the sense of failure in duty, care, etc., as the cause of some untoward event. [p. 570, col. 2.]

Where an insured cover containing promissory notes was lost and in a suit against the Post Master the only fact proved against him was that in the list of insured articles sent to the sorter in the ordinary course of his duties he did not mention the missing article and the District Judge found that the defendant was not guilty of default:

Held, the finding of the District Judge was one of fact. [*ibid.*]

Second Appeal from the decision of the Additional Subordinate Judge, Azamgarh, dated the 28th April, 1930.

Mr. *U. S. Bajpai*, for the Appellant.

Judgment.—This, though an appeal under O. XLI, r. 11, we have heard at considerable length, because while we are of opinion that we are in this case invited to consider a finding of fact, we are also of opinion that a finding of negligence or a finding that there was or was not default is not necessarily in all cases a finding of fact, if the finding has not been approached from the proper legal standpoint.

The plaintiff has proved that on the 17th February, 1925 he sent a registered and insured cover to a consignee in Calcutta, which cover is said to have contained a currency note of the value of one thousand rupees.

In the ordinary course the plaintiff's doubts might have been expected to be aroused within a few weeks at the utmost if he did not receive either from the Post Office or his consignee on intimation that the insured letter had been duly delivered. The plaintiff has asked the Court to believe that his suspicions were not so aroused until a year later, when he received a copy of his accounts with his consignee and found that he had not been credited with one thousand rupees. This question of the plaintiff's statement as to when he acquired knowledge of the loss of the thousand rupees is only of importance in a case of this description in second appeal in weighing the question of the burden of proof. Had he taken any proper steps at all to satisfy himself, he would have been able to make a claim for his money from the Post Office at any time within three months.

Even in June, 1926, when he learnt of the alleged loss of the money, he did not bring a suit, but contented himself with, at some date during the next two years—we have no more precise information—bringing a criminal case against the Post Master at the Despatching Office. As a result of that trial, the Post Master, the present defendant-respondent, was acquitted.

Now, when the period of limitation was on the point of expiry or, as the District Judge says, on the last day of limitation, the plaintiff brought the present suit. Again, most of these facts are only of importance in considering the question of the burden of proof.

To succeed in this suit, the plaintiff had to prove that the Post Master had been guilty of causing the loss of the insured letter "fraudulently or by his wilful act or default (Act No. VI of 1898 s. 6)". The only fact proved against the defendant is that, when he sent the list of insured articles to the sorter in the ordinary course of his duties, he mentioned in that list only two articles, whereas he should have mentioned three, the third being apparently the missing letter which has led to this suit.

The learned District Judge has weighed the evidence carefully and has found that the plaintiff has failed to prove that the loss was "caused by" the default of the defendant. It is to be noticed that the Legislature has, presumably deliberately, avoided using the word 'negligence' and the word 'default' is manifestly or somewhat stronger import. We should be inclined to hold that in s. 6 of the Post Office Act it bears the 4th meaning given to it in 'Murary' or the 'Oxford' dictionary :— "Failure in duty, care, etc., as the cause of some untoward event". The use of the word 'cause' both in this definition and s. 6 of Act VI of 1898 (The Post Office Act) is noticeable.

The learned Judge of the lower Appellate Court has found in fact that there are causes to which the loss might have been attributed other than the default of the defendant. In his view, while an omission on the part of the defendant has been proved, that omission might only be one link in the chain of circumstances and might not have been the cause of the loss. For instance, he suggests that it might have been lost or stolen before ever the list was written. It is not necessary for us to speculate but so far as the evidence goes, there are manifestly circumstances which might have led to the loss of this insured letter without the loss being attributable directly to the omission in the list. Just as a finding of negligence is a finding of fact, so ordinarily speaking is a finding as to whether a default was or was not the cause of a loss. This, of course, does not mean that a finding as to default can never be attacked as a finding on a point of law. But if the question has been approached from the proper legal standpoint, then we are of opinion that it is a finding of fact. In the present case, we see no reason to believe that the Judge has not approached the case entirely in the right way. We hold his finding, therefore, in the present case to be a finding of fact;

and, we may add, we see no reason to disagree with him. The appeal is dismissed under O. XLI, r. 11, Civil Procedure Code.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

Criminal Reference No. 247 of 1931.
August 11, 1931.
SULAIMAN, J.
EMPEROR——PROSECUTOR
versus
JIWA RAM—ACCUSED—OPPONENT.

Criminal trial—Procedure—Offence covered by special as well as general law—Law applicable.

It is not a general rule of law that if an act is an offence under a special law providing penalties for such an act, the application of the general law would be repelled. It is possible that an act may be an offence both under special law as well as under general law both laws being applicable simultaneously. In such a case the offender may be prosecuted under either law though it would be more appropriate to prosecute the offender and to convict him under the special Act if the offence falls strictly within the purview of a section of the special Act and does not go beyond it. [p. 571, col. 2.]

The Assistant Government-Advocate, for the Crown.

Mr. *S. B. L Gaur*, for the Accused.

Judgment.—This is a Criminal Reference by the Sessions Judge of Aligarh recommending that the conviction of the accused under s. 279, Indian Penal Code, be altered into one under s. 16 of the Motor Vehicles Act, and the fine be reduced from Rs. 200 to Rs. 100

The applicant was driving his motor lorry in a wrong direction, keeping to the right side of the road. From the opposite direction Lieutenant Colonel Pengelley was coming in his car, and he very properly kept to the left side of the road. He blew his horn when at a distance of 40 yards, but the accused Jewa Ram, did not turn back to the left side of the road, but moved on, compelling the complainant to leave the road and move on to its left side. Even then he did not escape safely but his car was hit at right angles and was dashed against a tree and was smashed. The complainant received a few bruises also. The Magistrate found that although the accused applied his brakes he could not, in spite of his efforts, avoid the accident. This implied that he was going at a fast speed and through a dusty atmosphere when the visibility was not good. He distinctly found that Jewa Ram's negligence and failure to observe the rule of the road were responsible for the collision.

As the case was tried summarily there was no appeal; but the accused filed a revision before the Sessions Judge. The learned Sessions Judge did not, of course, overrule these findings, but considered that the conviction under s. 279, Indian Penal Code, was illegal. He relied on the case of *In re Oudh Bar Association, Lucknow, Emperor* v. *Mohan Lal Saksensa* (1) and concluded that where there is a special law making a particular an offence and providing penalties, the general law is inapplicable. He has accordingly referred this case to the High Court because he considers that the conviction under the general law is illegal.

It is not necessary for me to express any opinion on the decision in the Oudh case because in that case the question considered was whether a person could be convicted of abetment under s. 117 Indian Penal Code, when the offence also fell under s. 9 of the Salt Act of 1882. I may, however, remark that that case has not been followed by a Bench of this Court in *Joti Prasad Gupta* and *Baijnath* v. *Emperor* (2) decided on 23rd February, 1931 and has also been doubted by the Bombay High Court in *Emperor* v. *Ganesh Vaman Joshi* (3).

I am only concerned with the observation made by the learned Judges of the Oudh Chief Court on which reliance has been placed by the learned Sessions Judge. With great respect, I am unable to hold that it can be laid down as a general rule of law that where there is a special law making a particular act an offence and providing penalties for such an offence, the general law must be held to be inapplicable. It is possible that the same act may be an offence under two different Acts, and both may be applicable simultaneously and the offender may be prosecuted and convicted under either Act. It may, however, be conceded that where the offence falls strictly within the provisions of a section of a special Act and does not go beyond it, it would be more appropriate to prosecute the offender and convict him under that special Act, rather

(1) 128 Ind. Cas 221; A. I. R. 1930 Oudh 497; (1930) Cr. Cas. 1161; 32 Cr. L. J. 104; 7 O. W. N. 895; Ind. Rul. (1931) Oudh 29.

(2) 136 Ind. Cas. 91; (1931) A. L. J. 986; A. I. R. 1932 All. 18; 53 A. 642; 33 Cr. L. J. 236.

(3) 130 Ind. Cas. 25; A. I. R. 1931 Bom. 140; 32 Cr. L. J. 478; 33 Bom. L. R. 56; Ind. Rul. (1931) Bom. 233; 55 B. 353; (1931) Cr. Cas. 188.

than fall back upon a more general law which prescribes a heavier penalty. In such a case it may be assumed that the Legislature in prescribing the smaller penalty has considered recourse to the special law as the proper course

The fault of the accused in the present case did not lie merely in not observing the rule of the road by driving the lorry on the right side of it. If he had done nothing worse than that, I would have felt inclined to alter his conviction as recommended by the Sessions Judge. But on the finding of the Magistrate he was negligent in continuing to drive on the wrong side of the road in spite of due warning and in going fast. The case undoubtedly fell within the scope of s. 279, Indian Penal Code.

Section 16 of the Motor Vehicles Act has not any necessary ingredient of rashness or negligence in it. Rule 27 of the Motor Act Rules merely lays down the rule of the road, and a breach of it need not necessarily involve rashness or negligence. When the ingredient of negligence entered into the offence, the conviction under s. 279, Indian Penal Code, was not only proper but more appropriate.

I accordingly decline to interfere. Let the papers be returned.

R. L *Reference rejected.*

ALLAHABAD HIGH COURT.

Criminal Revision No. 267 of 1931.
July 13, 1931.
KING, J.
LACHMI NARAIN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 244, 256—Warrant cases—Accused, whether entitled to cross-examine prosecution witnesses before charge.

In the trial of a warrant case the accused has no absolute right of cross-examination of the prosecution witnesses before the framing of the charge, but Magistrates would generally be exercising a proper discretion if they permit some cross-examination at least, at that stage. *Ashirbad Muchi* v. *Maju Muchini* (1), *Queen Empress* v. *Sagal Samba Sajo* (2) and *Ramyad Singh* v. *Empress* (3), referred to. [p. 574, col. 2.]

When a Magistrate has "to take all such evidence as may be produced in support of the prosecution" he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no express provision is made for cross-examination. But when express provision for cross-examination is made, as in s. 256 or s. 208 (2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination [p. 573, col. 2.]

Mr. *Nanak Chand*, for the Applicant.

The Assistant Government Advocate, for the Crown.

Judgment—This is an application in revision against an order passed by the Sessions Judge of Bareilly confirming the order of a Magistrate of the First Class refusing to allow the applicant to cross-examine the prosecution witnesses before the charge had been framed.

The complaint was instituted on the 26th of January, 1931, alleging that the accused had committed offences under ss. 420 and 467 Indian Penal Code When the complainant had been examined on the 1st of April, 1931, an oral request was made to the Magistrate to permit his cross-examination at once. The Magistrate rejected this request. When the next witness had been examined the defence put in a written request that the Magistrate should permit the witness to be cross-examined before the framing of the charge. This request was rejected by the Magistrate in a written order. The Magistrate took the view that s 256 of the Code of Criminal Procedure did not indicate that prosecution witnesses are to be cross-examined twice, and he could not find any justification in the Code or in the Evidence Act for the proposition that the accused has a right to cross examine prosecution witnesses both before and after the framing of the charge. After the prosecution witnesses had been examined the Magistrate framed a charge under s. 420 Indian Penal Code

The accused applied to the Sessions Judge of Bareilly asking that the Magistrate's order refusing to allow cross-examination of prosecution witnesses before the framing of the charge, be set aside. The learned Sessions Judge discussed the point and recorded his opinion that the Magistrate was probably incorrect in his procedure, and that the accused was entitled to cross-examine a witness immediately after he had been examined and before the framing of the charge. Nevertheless, in view of the facts that all the prosecution witnesses had been examined-in chief and the charge had been framed and some of the witnesses had already been cross-examined after the charge had been framed he rejected the application.

The question for determination is whether an accused person is entitled to cross-examine a prosecution witness, in the trial of a warrant case, before the charge has been framed

Section 138 of the Evidence Act merely

lays down the order of the examination of witnesses, namely that they should be first examined-in chief, and then (if the adverse party so desires) cross examined, and then (if the party calling them so desires) re-examined. This does not indicate a right of cross-examination immediately after the exmination-in-chief when express provision has been made for exercising the right of cross-examination at a later stage. It is perfectly clear that under s. 256, Criminal Procedure Code the accused has the right of cross-examining a prosecution witness after the charge has been framed. So s 138 of the Evidence Act does not seem to be of much assistance. It merely lays down that cross-examination shall be allowed at some stage after the examination-in-chief and s. 256 may well be construed as indicating the proper stage for cross-examination in the trial of warrant-cases. Section 138 certainly does not indicate that the adverse party shall be entitled to cross-examine a witness more than once.

Section 252 of the Code is the section under which prosecution witnesses are examined in warrant-cases. This lays down that the Magistrate,

"shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution."

It has been argued that the word "evidence" in this phrase must include not merely the examination-in-chief of a witness, but also his cross-examination and re-examination if any. In support of this contention reference has been made to s. 244. This section lays down the procedure in the trial of summons cases, and enacts that the Magistrate,

"shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution — — —".

The phraseology in ss. 244 (1) and 252 (1) is identical. It is argued that under s. 244 when the Magistrate proceeds to "take all such evidence as may be produced in support of the prosecution", he must certainly allow the witnesses to be cross-examined as well as examined-in-chief and that, therefore, the word "evidence" in this phrase must include not only the examination-in-chief but also the cross-examination and re-examination if any. Section 244 does not contain any express provision for cross-examination. Cross-examination must certainly be allowed at some stage, and as no express provision is made for exercising this right in the trial of summons cases, we must hold that the right is exercisable under s. 244.

It is argued that as the phrase cited gives a right of cross-examination under s. 244, therefore, the same phrase must be held to give a right of cross-examination under s. 252. There is some force in this argument, but it is far from conclusive. One cannot lose sight of the fact that no express provision for exercising the right of cross-examination has been made in the trial of summons cases, whereas in the trial of warrant cases such express provision is to be found in s. 256.

It must moreover be noted that when the same phrase occurs in s. 208 (1) which lays down the procedure in taking evidence in inquiries into cases triable by the Court of Session we find it expressly stated in sub-s. (2) that "the accused shall be at liberty to cross-examine the witnesses for the prosecution." Sub-s. (1) enacts that the Magistrate shall

"proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution....."

Once again we find the same phrase. If that phrase is construed as conferring a right of cross-examination wherever that phrase may occur, then it must be conceded that sub-s. (2) is wholly redundant. But it must be presumed that the Legislature does not enact wholly redundant provisions. The inference is that the phrase in question cannot be construed as necessarily conferring or including the right of cross-examination. I conclude that when a Magistrate has "to take all such evidence as may be produced in support of the prosecution", he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no express provision is made for cross examination. But when express provision for cross examination is made, as in s. 256 or 208 (2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination.

The language of s. 256 supports the same conclusion. That section requires the accused to state "whether he wishes to cross examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken". If the Legislature had intended to confer an absolute right of cross-examination before the framing of the charge, then we should expect it to lay down explicitly that the accused should be required to state whether he wishes further to cross-examine any of the prosecution witnesses. The omission of the word

"further" seems to indicate that the cross-examination is to be deferred, as a matter of right, until after the framing of the charge.

If must also be remembered that under s. 254 the Magistrate can frame a charge as soon as a *prima facie* case is established against the accused. It is not necessary to record the whole of the prosecution evidence before framing a charge. Hence, although there may be 12 prosecution witnesses, it is frequently possible and even desirable to frame a charge after only one or two witnesses have been examined. In such a case it is clear that all the "remaining witnesses" can only be cross-examined once under s 256. I doubt whether the Legislature intended that witnesses examined before the charge should be cross-examined twice, as a matter of right while those examined after the charge should only be cross-examined once. Section 257 gives a right of second cross-examination if the Magistrate thinks it necessary in the interests of justice. The interests of the accused, therefore, are fully protected even if no cross-examination is permitted as a matter of right before the framing of the charge.

Sections 286 (2) and 289 (1) have also been referred to as showing that the examination of witnesses must include cross-examination and re examination. This is no doubt the correct interpretation of the expression "examination of the witnesses" in s. 289 (1) and of the expression "examine his witnesses" in s. 286 (2), but that is not of much assistance in construing the language of s. 252 which is different. Moreover, there is no express provision for the cross-examination of prosecution witnesses in trials before High Courts and Courts of Session.

The only ruling relied upon by the learned Advocate for the applicant is the case of *Ashirbad Muchi* v. *Maju Muchini* (1). The judgment was very briefly expressed, but the learned Judges observed that the Magistrate should at once give the accused an opportunity to cross examine the prosecution witnesses, if they should so desire, even though the charge may not be framed.

This ruling does not purport to lay down the proposition that the accused has an absolute right of cross-examination before the charge is framed in the trial of a warrant case. I think the ruling goes no further than laying down that a Magistrate would be well advised to permit cross-examination before the framing of the charge and does not support the contention that he is bound to permit cross-examination at that stage.

Reference may also be made to the case of *Queen Empress* v. *Sagal Samba Sajao* (2) in which the learned Judges remarked that s. 256 does not prohibit cross-examination before the charge has been framed. I quite agree. In *Ramyad Singh* v. *Empress* (3), a single Judge of the Patna High Court observed: "The accused have got the right to cross-examine the prosecution witnesses once before the charge is framed, and secondly, after the charge is framed under s. 256". This observation certainly supports the applicant's contention, but it is a mere *obiter dictum* and no reasons are given. There is, therefore, no clear judicial authority, so far as I am aware, for holding that the accused is entitled as a matter of right to cross-examine prosecution witnesses in the trial of a warrant case before the framing of a charge, and I am unable to interpret the relevant sections of the Code of Criminal Procedure and the Evidence Act as giving the accused such a right.

As a matter of practice or discretion I think that Magistrates would be well advised to permit some cross-examination before framing a charge, otherwise, as pointed out by the learned Sessions Judge, s. 253 would practically become a dead letter. It is unlikely that a Magistrate could discharge an accused person on the strength of the evidence of prosecution witnesses whose credit has not been impeached by cross-examination. Ordinarily the examination-in-chief of prosecution witnesses does make out a *prima facie* case against the accused, and it is only after the witnesses have been shown by cross-examination to be untrustworthy that the Court would be justified in discharing the accused.

In my opinion, although the accused has no absolute right of cross-examination before the framing of the charge, I think that Magistrates would generally be exercising a proper discretion if they did permit some cross-examination at least at that stage.

It has been contended that no *prima facie* case has been made out against the accused, but I agree with the learned Sessions Judge that on the facts alleged

(1) 8 C. W. N. 838.

(2) 21 C. 642 at p. 663.

(3) 58 Ind. Cas. 686; 5 P.L. J. 94; (1920) Pat. 59; 1 P. L. T. 112; 21 C. L. J. 814.

a criminal offence would be established against the accused.

As the Magistrate has not committed any irregularity, in my opinion, in refusing to permit cross-examination before the charge, and at the most might be held to have failed to exercise a proper discretion, I see no grounds for interference at this stage. On the materials before me I cannot express any opinion whether the Magistrate should, in the exercise of his discretion, have permitted cross-examination in this case before framing the charge.

The application is rejected.

N. K. & A. *Application rejected.*

ALLAHABAD HIGH COURT.

Miscellaneous Case No. 46 of 1930.

May 16, 1930.

MUKERJI AND BENNET, JJ.

In the matter of Seth KASHI NATH BAGLA OF ALIGARH.

Income-Tax Act (XI of 1922), ss. 34, 66—Income escaping assessment—Re-assessment—Jurisdiction of Income-tax Officer—Whole assessment cannot be revised.

The words "assess or reassess such income, profits or gains", in s. 34, Income-Tax Act, must be taken to refer to the income, profits or gains chargeable to income-tax which have escaped assessment referred to in the prior part of the section. Accordingly in a proceeding under s. 34 the Income-tax Officer and after him the Assistant Commissioner are only dealing with the extra income which has not been assessed to income-tax. No jurisdiction is given to either of these officers by s. 34 to make a new assessment for the purposes of taxing the whole of that assessment under the Income-Tax Act. *Palanippa Chettiar* v. *Commissioner of Income Tax* (1), followed.

Section 34 does not confer on the authorities a power to grant relief to the assessee on the ground that the previous assessment under s. 23 (4) was too high.

The question of the exercise of his discretion by the Commissioner is a matter solely for the Commissioner and not a matter for the High Court to consider in a reference.

Reference submitted by the Commissioner of Income Tax U. P. as per his letter No;—C. No. 60829 I. T. dated the 13th January, 1930.

Mr. *M. N. Kaul* (with him Dr. *K. N. Katju*), for the Applicant.

Mr. *U. S. Bajpai*, for the Crown.

Judgment.—This is a reference by the Commissioner of Income-tax on the application of an assessee who is a minor of unsound mind under the guardianship of his mother. On the 2nd February, 1927, the Income-tax Officer made an assessment under s. 23 (4) of the Indian Income Tax Act, acting under that section because no return of income had been filed. The assessment was on an income estimated at Rs. 1,17,600 and the minor was assessed to income-tax and super-tax, the assessment being based on the income estimated for 1925-26. On 11th March, 1928, the Income Tax Officer came to the conclusion that some income had escaped assessment and accordingly he issued a notice to the minor under ss. 22 (2) and 34 for the same year's income. Accounts were filed and the Income-tax Officer assessed the income as Rs. 1, 31, 875. Against that assessment of extra income an appeal was made to the Assistant Commissioner and the Assistant Commissioner held that the actual income was less than the Rs 1,17,600 which had been originally assessed on the 2nd of February, 1927. It is admitted that he did not proceed to find what in his opinion the total income was, but he treated the matter before him as confined to the appeal against an assessment on additional income and he accordingly allowed the appeal.

The assessee has now asked that an opinion should be given as to whether the Assistant Commissioner was precluded from granting relief to the assessee against the original assessment under s. 23 (4). This is the main point in the case. Now s. 34 under which the second notice was issued states as follows:—

"If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year, or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-s. (2) of s. 22, and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section."

We consider that the words in a later part of the passage quoted, "Assess or re-assess such income, profits or gains" must be taken to refer to the income profits or gains chargeable to income-tax which have escaped assessment referred to in the prior part of the section. Accordingly in a proceeding under s. 34 the Income-tax Officer and after him the Assistant Commissioner are only dealing with the extra income which has not been assessed to income-tax. No jurisdiction is given to either of these officers by s. 34 to make

new assessment for the purpose of taxing the whole of that assessment under the Income-Tax Act. Accordingly our answer to the first question "do the provisions of s. 34 limit the action of the Income-Tax Authorities to the assessment of income which has previously escaped assessment or which has been assessed at too low a rate" is in the affirmative. We hold that the Assistant Commissioner of Income-Tax was precluded from granting any further relief to the assessee than allowing his appeal against the assessment of extra income-tax. We may note that this opinion is in accordance with an opinion of a Full Bench of the Madras High Court in O P. No. 168 of 1928 decided on 14th October, 1929, *Palaniappa Chettiar* v. *Commissioner of Income Tax* (1) in the petition of P. L. M. P. L. Palaniapa Chettiar, Puduvayal, Ramnad District.

The second question is whether s. 34 confers on the authorities "a power of revision of a previous assessment and if the revision results in showing that the assessment under s. 23 (4) was too much can relief be granted to the assessee." As already stated we consider that this question must be answered in the negative.

A further question was put forward by the assessee as to whether the Commissioner could exercise his discretion in his favour under s. 33 of the Act. The question of the exercise of his discretion by the Commissioner is a matter solely for the Commissioner and not a matter for this Court to consider in a reference.

No further question arises on this reference. Accordingly we direct that the reference be returned with these answers.

As the applicant has not succeeded in his application, we direct that he should pay his own costs and the costs of the Government including the fees of the Government Advocate assessed at Rs. 100.

A.

(1) 122 Ind. Cas 339; A. I. R. 1930 Mad 126; 31 L. W. 91; Ind Rul. (1930) Mad 307; 58 M. L. J. 23 (F. B.)

ALLAHABAD HIGH COURT.

Execution Second Appeal No. 647 of 1930.
April 24, 1931.

PULLAN AND NIAMAT ULLAH, JJ.

PANCHAITI AKHARA BARA UDASI NANAK SAHI KYDGANJ DECREE-HOLDER —APPLICANT

versus

NASIR-UD-DIN AND ANOTHER—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Agra Tenancy Act (III of 1926), s. 197 (b)—*Grove of ex-proprietary tenant, whether can be sold in execution.*

Under the Agra Tenancy Act, 1926, a grove planted by an expropietary tenant on his tenancy land can be sold in execution of a decree unless the tenant shows that it is for some reason exempt from the provisions of s. 197 of the Act.

Execution Second Appeal from the decision of the Subordinate Judge, Allahabad, dated the 21st December, 1929.

Messrs. *Harbans Sahai* and *Sri Narain Sahai*, for the Applicant

Mr. *Zafar Mehdi*, for the Respondents.

Judgment—The only question to decide in this appeal is whether a grove belonging to th judgment debtors can or cannot be sold in execution of a decree. The judgment-debtors are ex-proprietary tenants and the grove is situated on their ex-proprietary tenancy. Under the Agra Tenancy Act of 1926 the interest of a grove-holder can be transferred in execution of a decree of a Civil or Revenue Court, and "a grove-holder" is defined in s. 196 of the Act. The various classes of grove-holders mentioned in that section include one who has planted a grove on land held by him as a tenant, and it was for the judgment-debtors to show that this grove planted by them on their tenancy land is a grove which for some reason is exempt from the provisions of s. 197 of the Act. The Courts below appear to have overlooked the new Act and decided the case on the basis of a decision of this Court reported in Revenue Cases for 1927, page 123 *Hafizan* v. *Chhoko Lal*. We find that that case refers to the Agra Tenancy Act, No. II of 1901, and is no authority for the rights of a grove-holder under the new Act. In our opinion, this grove can be sold in execution of a decree. We, therefore, allow this appeal with costs, set aside the decrees of the Courts below and dismiss the objection with costs.

Appeal allowed.

PATNA HIGH COURT.

First Civil Appeals Nos. 141 and 142 of 1928

May 2[illegible], 1[illegible]3.

WORT AND FAZL ALI, JJ.

Sreemati PURNIMA DEBYA AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

NAND LAL OJHA AND OTHERS— DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Evidence of separation—Circumstances—Cessor of commensality etc., value of—Presumption of completeness of partition—Evidence Act (I of 1872), ss. 11, 40, 42, 43—Judgments not inter partes, *relevancy of—Civil Procedure Code (Act V of 1908), s. 11—Decree on award*—Res judicata—*Competency of Court*—Pardanashins—*Applicability of rule.*

If a decree passed by a Court cannot operate as *res judicata* owing to incompetency of that Court to try the subsequent suit, the fact that the decree was based upon an award cannot render the matters decided in that decree or the award itself *res judicata. Bhajahari Saha Banikya* v. *Behary Lal Basu* (1) and *Krishna Panda* v. *Balram Pande* (2), distinguished. [p. 581, col. 2.]

The Evidence Act itself does not draw a distinction between a judgment which is not *inter partes* and a judgment which is *inter partes*, except where the judgment is clearly *res judicata*. [p. 582, col. 2; p. 583, col. 1.]

A judgment other than a judgment referred to in ss. 40 to 42 may be admissible to prove that a right was asserted or denied under s. 13 of the Evidence Act or to explain or introduce facts in issue or to explain the history of the case. But unless a judgment is relevant under ss. 40 to 42 of the Evidence Act, it is not evidence at all so far as regards the matter which it decides. [p. 583, col. 1.]

Case-law discussed.

Under the Hindu Law though a declaration of intention to separate must be made in definite and unambiguous terms it does not follow that where there is no evidence of an express declaration of intention, separation cannot be proved. The question is really one of intention and all that the law requires is that the intention should be clearly and unequivocally expressed whether it be by explicit declaration or by conduct. [p. 588, col. 1.]

In the absence of an explicit declaration, the evidence of conduct as well as of the surrounding circumstances is material for the purpose of judging whether the member intended to separate or not. [p. 588, col. 2.]

Though certain circumstances when taken individually do not furnish conclusive evidence of separation, yet they may point to a different conclusion when taken collectively or with reference to the particular facts of any individual case. [p. 588, col. 1.]

Though cessor of commensality may not be conclusive yet it may properly be considered in determining the question whether there was a partition of the joint family or not [p 588, col. 2.]

When a partial partition is proved or admitted to have taken place, the presumption is that there has been an entire partition both with reference to rights and properties. [p 589, col. 1.]

The rule giving protection to *pardanashins* is not strictly applicable to cases where the *pardanashin* is not a contracting party and the case is one of fraud not undue influence. [p. 591, col. 2.]

First Appeal against a decision of the Subordinate Judge, Manbhum, dated the 30th November, 1927.

Mr *A. K. Roy* (with him Messrs. *R. S. Chatterji* and *S. S. Prashad Singh*), for the Appellants.

Messrs *A. B Mukherjee* and *B. B. Mukherjee*, for the Respondents.

Fazl Ali, J.—These appeals arise out of two suits which were tried together by the Subordinate Judge of Manbhum and which were instituted under circumstances which will presently appear

One Bechan Ojha had two sons, Baijnath Ojha and Biswanath Ojha. Baijnath Ojha died leaving behind a widow *Musammat* Rashooni and a son Ramlal Ojha and Biswanath died leaving a son Nandlal. It is common ground that Nandlal and Ramlal remained joint till the year 1295 B. S. or 1888. It is further fully established that the two cousins not only separated in mess in the year 8-8 but also divided their moveables as well as *nij jote* lands which they began to cultivate separately. The only properties which were not divided were those in *Mauzas* Pilai and Sirkabad. Between 1895 and 1900 a fresh property which is referred to in Sch. IV of the plaint filed in Suit No. 3 and which may be called the Jerka property was acquired in Ramlal's name by three separate deeds, one of which was virtually a *kebala* or a sale-deed and the other two leases. In *Baisak*, 1314, or April, 1907, Ramlal died leaving behind him two widows Umamayi and Purnima and a daughter by Umamayi named Amodbala and it is hardly necessary to say that under the Hindu Law, if Ramlal died in state of jointness with Nandlal, the latter became entitled to the entire property by the rule of survivorship; but on the other hand, if he had separated from Nandlal before his death, his two widows were entitled to succeed to his property. In September, 1908, Umamayi settled Ramlal's share in Manirambad lands in village Sirkabad with one Kartik Mahto who executed a registered *kabuliyat* in her favour and the boundaries given in the documents show that the lands of Nandlal in this *chak* were quite separate from those of Ramlal. In November, 1903, Umamayi and her co-widow Purnima describing themselves as the heirs of Ramlal Ojha brought a suit against Mangal Baumij and Amar Singh Sardar for the possession of certain lands in village Jerka and the suit was

this suit, was no other person than the proprietor of Jerka from whom Ramlal had acquired the Jerka property. In February 1909, Umamayi and Purnima brought a Small Cause Court suit against Nandlal Ojha for the recovery of a certain sum of money on the allegation that he had realised not only his share but their share of the rent also from certain tenants in village Tilai. The suit was contested by Nandlal on various grounds, one of which was that he was entitled to the entire property left by Ramlal as survivor. The matter was referred to the arbitration of three Pleaders of Purulia and by their award they upheld the claim of the widow and overruled the plea that Ramlal was joint with Nandlal and the latter was entitled to the property by way of survivorship. This award being accepted by the Court a decree was passed accordingly. In execution of the decree Umamayi proceeded to attach Nandlal's share in village Tilai but Nandlal paid the decretal amount and a petition of satisfaction was filed. From 1909 onwards up to her death which took place in the year 1916 Umamayi continued to possess and deal with the properties as if she and her co-widow were the heir of Ramlal and no step appears to have been taken by Nandlal either to question her rights or to get an adjudication as to his claim of survivorship. In August, 1909, Amar Singh Sardar who had granted the previous leases to her husband gave to her and not to Nandlal a fresh *patta* in respect of certain lands in village Jerka which she had purchased from one Kuna Laya and thereby recognised her as a tenant in respect of those lands. In 1913 she and her co-widow Purnima applied for and obtained a succession certificate from the District Judge of Manbhum-Sambalpur. In June, 1914, she granted a lease to Kartik Mahto in respect of Manirambad lands for a further period of five years. In 1915 Amar Singh Sardar, the proprietor of Jerka, sued her and obtained a decree against her for arrears of cess in respect of village Jerka. The documentary evidence filed by Nandlal also supports the case that Umamayi was in undisturbed possession of at least Tilai and Jerka so long as she was alive and in fact he attempts to explain her possession by setting up a story that she was allowed to remain in possession in lieu of maintenance. It is impossible, however, to accept this explanation in view of the fact that Umamayi had been asserting throughout that she was holding the property as an heir of Ramlal and also because no such case as is now set up by Nandlal was set up either in his plaint in Suit No. 3 nor in his written statement in Suit No. 50. It is true that Nandlal did contend, though unsuccessfully, before the Settlement Court in the year 1921 that Umamayi was in possession of Jerka in lieu of maintenance; but what was contended before us was that she was in possession of not only Jerka but also of Tilai in the aforesaid capacity. Again, if Umamayi was allowed by Nandlal to be in possession in lieu of maintenance, there seems to be no good reason for his not showing similar indulgence to Purnima, who was equally entitled to maintenance. On the other hand, what we find is that soon after Umamayi's death Nandlal attempted once more to secure for himself the entire property.

It appears that when Umamayi died Purnima was still quite young, for even according to the estimate of her age given by Nagendra Nath Chakravarty, a witness for Nandlal, she must have been about 14 or 15 years of age at the time, while according to the other witnesses she was still younger (*vide* P. W. No. 3). The settlement operations were also to commence shortly in the District and in fact they actually commenced about the year 1920. Thus we find that in January, 1918, Nandlal obtained two *kabuliyats* in his favour in respect of certain lands in Sirkabad (Exs. 11 and 20). Again on the 31st January, 1918, he got an *ekrarnama* from one Dharup Singh Sardar by which the latter was given the right to fish in a tank appertaining to Jerka for a period of four months. We also find that in the same year he obtained certain rent receipts in respect of village Jerka, Exs. 14 (*c*), (*d*), (*e*) and (*f*), though it is to be noted that he has not filed any receipts in respect of this village of a date prior to the year 1325 or 1918 and the other receipts which he has filed relate to the year 1332. There were also two rent suits brought against him in respect of land in village Sirkabad and both the suits were allowed to be decreed *ex parte* though curiously enough the period for which the two suits were brought to some extent overlapped each other. Meanwhile about the year 1920 settlement operations began and once more it was asserted by Nandlal that Ramlal had died in a state of jointness with him and so he was entitled to the entire property of the family by survivorship. Thus a dispute arose before the Settlement Officers in charge of *Khanapuri* and attesta-

tion work as to whether the name of Nandlal or that of Purnima and Amodebala Debya, the daughter of Ramlal, should be entered in respect of village Jerka and Ramlal's share in village Tilai and Sirkabad. Nandlal wholly failed with regard to Tilai and Jerka and ultimately *khewats* were prepared in the name of Purnima in respect of these villages [D (1), D (2), Z, 31]. With regard to Sirkabad, however, Nandlal was partially successful and on the 30th July, 1921, he preferred an objection under s. 83, cl. (1), and s. 111, cl. (1), of the Chota Nagpur Tenancy Act praying that

"after striking off the name of Sreemati Purnimamai Debya the *khatian* may be amended by preparing the 6-annas *khewats* in the name of Nandlal Ojha."

This objection was decided in his favour on the 5th September, 1921, on the ground that one Sashi Bhusan Ojha, who was the agent and brother of Purnima had admitted the objector's claims and stated before the Settlement Officer that his sister Purnima had got no share and that according to *Mitakshara* she was not entitled to any share. Relying upon this admission the Settlement Officer cancelled Purnima's *khewat* and recorded an order that the *khewat* should be prepared in the name of Nandlal. In connection with this entry it was pointed out in this Court on behalf of Purnima that Ex. 24 which purports to be a general power of attorney given by Purnima to Sashi Bhusan Ojha (who is not her brother but only a cousin) is not a registered document and that curiously enough the alleged signature of Purnima on this document purports to have been written by Sashi Bhusan Ojha himself. On the other hand it has been urged that Sashi Bhusan Ojha should have been examined on behalf of Purnima to deny that he had appeared before the Settlement Officer and made the admission which is attributed to him. However that may be, it is clear that the admission in question was not made by Purnima directly but is said to have been made by her through another person and it has not been proved that this other person, whoever he may be, had really been authorised by Purnima to make any admission on her behalf. Besides, it appears that Nandlal had by this time succeeded in winning over Purnima to his side with the result that Purnima began to live in Nandlal's house and Amodebala, the daughter of Ramlal (whose husband Kali Kinker Misser had died while the survey operation was going on), was left alone to carry on the struggle with Nandlal. In this fight Nandlal was decidedly in a position of some advantage, because he could successfully urge, and on certain occasions did urge, that during the lifetime of Purnima, Amodebala had no interest in the properties of Ramlal even on the assumption that Nandlal and Ramlal had separated. It appears, however, that Amodebala also had some influence over the tenants because we find that on 28th September, 1922, Nandlal was forced to bring a rent suit against certain tenants of Sirkabad—Alai Mahta and others for the recovery of Rs. 48 on the allegation that though the defendants had delivered to him his share of the paddy, they had removed the entire straw. The suit was contested by the first defendant who pleaded that he held the land under Umamayi and afterwards under her daughter Amodebala and he also contended that the suit could not proceed in the absence of Amodebala and Purnima. Both Amodebala and Purnima were accordingly made parties to the suit but the suit was contested mainly by Alai Mahta and Amodebala. The suit was finally dismissed on the ground that the *kabuliyat* of 1918 which had been executed in Nandlal's favour shortly after the death of Umamayi was a collusive document Nandlal appealed from this decision to the Deputy Commissioner of Manbhum, but his appeal also was dismissed on the 15th February, 1923. Meanwhile Nandlal brought a suit (Suit No. 48 of 1923) against Purnima for a declaration that Tilai and Jerka properties belonged to him, that the defendant had not right to the said properties and that the Record of Rights had been incorrectly prepared. This suit was instituted on the 13th March, 1923, and was decreed on the 31st May, 1923. As the circumstances under which the decree was obtained have to be investigated in this appeal, it is sufficient to say that the decree purports to have been passed on the admission of Purnima as contained in her deposition which was recorded by a Commsisioner Babu Pashupati Mukherji In the same year Nandlal Ojha once more instituted a rent suit against Alai Mahta for the recovery of produce rent for the years 1328 and 1329 in respect of the land held by him in Sirkabad Alai Mahta again challenged the title of Nandlal and pleaded having made a *bona fide* payment of rent to Amodebala, and the latter was, therefore, impleaded as a *pro forma* defendant. This suit also was dismissed with costs and the decision of the trial Court was upheld on appeal by the

Judicial Commissioner of Manbhum, the judgment of the Appellate Court being delivered on the 16th January, 1925. On 6th January, 1926, Nandal instituted Suit No. 3 of 1926 (out of which Appeal No. 142 arises) upon the allegation that Ramlal Ojha had died in a state of jointness with him; that neither his two widows nor Amodebala could, therefore, inherit his property and that defendants Nos. 2, 3 and 4 (against whom the two rent suits had been unsuccessfully brought by Nandlal) were liable to pay rent to him and not to any other person. The reliefs that he prayed for in his plaint were as follows:

"(a) That it may be declared that the plaintiff has got *panchak brahmottar* right, mentioned in the plaint to the land specified in Sch. III and that defendant No. 1 has no right whatever thereto.

(b) That after declaring the plaintiffs' right to get *bhag* paddy from defendant No. 2 in respect of land in the possession of Alai Mahata within the land, covered by Sch. III, a decree for *khas* possession thereof may be passed in favour of the plaintiff

(c) That if defendant No. 1 has realised *bhag* paddy for the years 1330, 1331 and 1332 B S. from defendant No. 2 in decree for Rs. 201 (two hundred one) on account of the price of the said paddy may be passed against her.

(d) And that costs in Court and interest may also be awarded."

Written statements were filed in this suit by all the defendants, defendants Nos. 3 and 4 admitting the claims of the plaintiff and the other defendants contesting it. The main ground on which the suit was contested by Purnima and Amodebala was that Ramlal had separated during his lifetime from Nandlal and that, therefore, Nandlal was not entitled to any property by way of survivorship. It was further contended that the matter was *res judicata* in view of the decision in the Small Cause Suit No. 215 of 1908 and there was also a plea of limitation raised. Alai Mahta, defendant No. 2, alleged that the *kabuliyat* of 1918 was collusive, inoperative and invalid and had been obtained by Nandlal in order to create evidence on his behalf and that the decision in the previous suit as to the collusive nature of the *kabuliyat* was binding on the plaintiff. It was also alleged by him that he and his brothers formerly held their land under Ramlal Ojha and subsequently under Umamayi and then under defendant No. 1 Amodebala. In May, 1929, Purnima brought Suit No. 50 of 1926 (which is the subject-matter of Appeal No. 142) for setting aside the decree obtained in Suit No. 48 of 1923 on the ground of fraud. Her main allegations have been set forth in paras. 8, 9 and 10 of the plaint and were in substance these: (1) that she had no knowledge of the suit; (2) that she had not appointed Babu Brajendra Nath Mazumdar (the Pleader who acted for her in the suit) as her Pleader; (3) that she never authorised him to ask for Commission or to take the other steps which were taken in the suit; (4) that the deposition recorded by the Commissioner did not represent her statement, nor had she made a voluntary statement before him; and that in fact she had been made to say "yes" or "no" to every question put to her; (5) that the defendant instead of disclosing the real facts before the Court had suppressed them and had obtained the decree by practising fraud upon the Court.

The defence of Nandlal on the other hand was that he had not practised any fraud upon the Court and that the decree obtained by him was binding upon Purnima. Upon these allegations a number of issues were framed in both suits and by consent of the parties the two suits were tried together.

Two main questions arose at the trial—(1) whether Ramlal had separated in estate from Nandlal during his life time; and (2) whether the decree in Suit No. 48 of 1923 was vitiated by fraud. It need not be stated that the first issue was considered to be the most material issue so far as Suit No. 3 of 1926 was concerned, while the second was the chief issue in Suit No. 50. The learned Subordinate Judge held that Nandlal was entitled to the declaration prayed for by him in his plaint as he was of opinion that Ramlal had died in a state of jointness with him. With regard to Jerka property, however, he found that it was the self-acquired property of Ramlal and, therefore, Nandlal had no valid claim to it. In Suit No. 50, he held that the decree obtained by Nandlal was vitiated by fraud; but in view of his finding that Nandlal was entitled to all the properties excepting Jerka, he vacated the decree only with regard to Jerka.

From this decision two appeals have been preferred one by Amodebala and Purnima and another by Purnima alone. In Appeal No. 141, which arises out of Suit No. 50, the grievance of the appellant is that when the decree was found to have been vitiated by fraud, it should have been vacated in its entirety, whereas the main question raised in Appeal No. 142, which arises out of Suit No. 3, is that it should have been held that Ramlal had been separate from Nandlal and that the suit of Nandlal should have been dismissed on certain legal grounds. The cross-objection of Nandlal in

Appeal No. 141 relates to the finding that the decree in Suit No. 48 had been procured by fraud, whereas the cross-objection in the other appeal relates to the finding as to Jerka being the self-acquired property of Ramlal.

Both the appeals and cross-objections have been argued at great length in this Court and the arguments were mainly directed to the two important questions in the case to which I have already referred.

I shall first take up the question as to whether Ramlal died in a state of jointness or separation with Nandlal because that was the first question argued before us although logically the second question, namely, whether the decree in Suit No. 48 was obtained by fraud, should have been dealt with first.

The learned Advocate for the appellant in discussing this question has referred us to a large number of documents but before dealing with them in detail, I would like to dispose of two preliminary points raised in course of the argument. It was said in the first place that the decree in the Small Cause Court suit of 1908 in which the identical question had been raised by the parties and decided by the arbitrators operates as *res judicata* It is conceded that the Small Cause Court which tried the previous suit was not competent to try the present suit and, therefore, one of the conditions laid down by s. 11 of the Civil Procedure Code is not satisfied. It was, however, urged that what we have to look is whether the arbitrators who gave the award were or were not competent to try the present suit and as there is no limit to the jurisdiction of the arbitrators, the award given by them would operate as a *res judicata*. In support of his argument the learned Advocate for the appellant relied upon *Bhajahari Saha Banikya* v. *Behari Lal Basu* (1) and *Krishna Prasad* v. *Balram Pande* (2). Neither of these cases, however, appears to me to help the appellant. In *Bhajahari's* case (1) Mookerjee, J. simply pointed out that certain rights may be created under an award even though it has not been enforced either by an application under s. 525 of the Civil Procedure Code or by a regular suit. Similarly in the case decided by the Madras High Court although both parties having objected to the award, it had never been carried into effect, it was held in a subsequent suit for partition that such an award was equivalent to a final judgment and was binding on the parties in the absence of positive evidence that both parties had agreed that the former state of things should be restored. It is not disputed here that the award was final so far as the claim in the Small Cause Court suit is concerned; but it does not follow that the award by itself will have any greater value than the decree of the Court which is based upon the award. If, therefore, a decree passed on contest in the Small Cause Court suit could not operate as *res judicata*, I do not see how a decree based upon an award in the same suit or the award itself, if it is possible to treat it as something apart from the decree, can operate to make any matters decided thereby *res judicata*.

The next point urged was that the decisions in the Small Cause Court suit as well as in certain other proceedings which followed it including the proceedings before the Settlement Officers, even though they might not operate as *res judicata*, should be treated as evidence in the case and some stress was laid on the fact that the learned Subordinate Judge had in the face of so many decisions, come to a finding that the two cousins were joint at the time of Ramlal's death. Here again, I am afraid the learned Advocate for the appellant is attempting to place his case too high. The question as to whether a certain judgment pronounced in another case is or is not relevant is to be governed by ss. 40 to 42 of the Evidence Act. It is conceded that these judgments would not come under ss. 40 to 42 and s. 43 clearly provides that such judgments as are not relevant under these sections are irrelevant unless the existence of such judgment is a fact in issue or is relevant under some other provisions of this Act. The question as to whether there are any other provisions in the Act which would make such judgments relevant has been debated in a series of cases in this country. In *Gujju Lal* v. *Fatteh Lal* (3) it was held by the Full Bench of the Calcutta High Court, Mitter, J., dissenting, that a former judgment which is not a judgment *in rem*, nor one relating to matters of public nature, is not admissible in evidence in a subsequent suit either as *res judicata* or as proof of the particular point which is decided, unless between the same parties or those claiming under them. A question arose in this case whether such a judg-

(1) 33 C. 881; 4 C. L. J. 162.
(2) 19 M. 290.
(3) 6 C. 171; 6 C. L. R. 439; 3 Shome L. R. 132 (F. B.)

ment was admissible under s. 13 of the Evidence Act and Garth, C. J., expressed an opinion that the former judgment was not a transaction and that the right claimed in the particular suit was not a right within the meaning of s. 13. On the other hand in *Collector of Gorakhpur* v. *Palakdhari Singh* (4) a Full Bench of the Allahabad High Court came to a different conclusion and held (Brodhurst, J. dissenting) that such judgments were in many cases admissible under s. 13. The view that was put forward in this case was that the majority of the learned Judges of the Calcutta High Court had put too narrow a construction on the word "right" as used in s. 13 and that the terms 'right' includes not only incorporeal rights, but a right of ownership. It was further held that though the judgment itself was not a transaction, the suit or the litigation in which it was pronounced might be treated as a transaction or an instance in which a right may have been asserted, acknowledged or denied. The point has been considered so exhaustively in these two judgments that I do not think it is necessary for me to deal with it at any great length. It appears, however, that although in many cases the Judges have expressed the view that the decree if not conclusive evidence is not evidence at all.—[*See Mahendra Lal Khan* v. *Rosomoyi Dasi* (5), *Surendra Nath Pal Chowdhry* v. *Brojo Nath Pal Chowdhry* (6), *Krishnasami Ayyangar* v. *Rajagopala Ayyangar* (7), *Ramasami* v. *Appavu* (8) and *Subramanyan* v. *Paramaswaran* (9).] There are on the other hand, a large number of cases where the Courts have shown their inclination towards the view propounded by Mitter, J. in *Gujju Singh* v. *Fatteh Lall* (3). In *Abinash Chandra Chatterjee* v. *Paresh Nath Ghose* (10) Ghose, J. observed—

"I am disposed to hold that the Judicial Committee in *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (11) and *Bitto Kuar* v. *Kesho Prashad Missir* (12), rather adopted the views expressed by Mitter, J. in *Gujju Singh* v. *Fateh Lall* (3), wherein the learned Judge held that a judgment though not *inter partes* may be received in evidence under s. 11 or s. 13 of the Evidence Act."

(4) 12 A. 1 (F. B.).
(5) 12 C 207.
(6) 13 C. 352 (F B.).
(7) 18 M. 73; 4 M. L. J. 212.
(8) 12 M. 9; 13 Ind. Jur. 16.
(9) 11 M 116.
(10) 9 C. W. N. 402 at p. 411.
(11) 22 C. 533; 22 I. A 60; [5 M.] L. J. 7; 6 Sar. 530 (P. C.).
(12) 19 A. 277; 24 I. A. 10; 7 Sar. 131; 1 C. W. N. 265 (P. C.).

See also *Tepu Khan* v. *Rajani Mohan Das* (13), *Lakshman Govind* v. *Amrit Gopal* (14), *Sri Ganesh Dharnidhar Dev* v. *Shri Dhundiraj Ganesh Dev* (15), *Mahamad Amin* v. *Hasan* (16), *Thama* v. *Kondan* (17) (here the judgment was held to be admissible to prove the result of an admission). It appears that in certain special circumstances the Judicial Committee also has not questioned the admissibility of such judgments. In *Run Bahadur Singh* v. *Lucho Koer* (18), Sir R P. Collier observed—

"Although the judgment in the rent suit is not conclusive still their Lordships cannot help attaching some weight to the decision of the Munsif and the Subordinate Judge both natives, who heard the same case as that now before us, and a good deal of the same evidence. It may be added that the judgment in the certificate suit in which the plaintiff set up the same case was the same; it was the same, also, and the case and evidence much the same, in proceeding before a Magistrate requiring the plaintiff to enter into recognizance to keep the peace. All the native Judges who have heard the case—and it has been heard by them four times—have concurred in their judgment upon it."

Similarly in *Bitto Kuer* v. *Kesho Prasad Missir* (12) it was held that a prior judgment was admissible though not conclusive evidence in the case. In one case [*Midnapur Zamindary Company, Limited* v. *Naresh Narayan Roy* (19)] it was observed that a previous decision was entitled to some weight as the facts of the case were nearer to the ken of the Court which decided it. See also *Ram Ranjan Chakerbati* v. *Ram Narain Singh* (11), *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (20).

In some cases again a distinction has been made between a judgment which is *inter partes* and one which is not so, a distinction which has not been lost sight of even in *Gujju Singh* v. *Fatteh Lal* (3) (and sometimes it has also been emphasised that although a judgment given in a different case will not be generally admissible under the English Law, it should not be supposed that Indian Evidence Act is a mere servile copy of the English Law. Apart, however, from the case law on the subject, it appears to me that the Evidence Act itself does not draw a distinction between a judgment which is not *inter partes* and a judgment

(13) 25 C. 522; 2 C. W. N. 591 (F. B.).
(14) 24 B. 591 at p. 599; 2 Bom. L. R. 386
(15) 5 Bom. L. R. 230.
(16) 31 B. 143; 9 Bom. L. R. 65.
(17) 15 M. 378.
(18) 11 C. 301; 12 I. A. 23; 4 Sar. 602; 9 Ind. Jur. 202 (P. C.).
(19) 64 Ind. Cas. 231; 48 I. A. 49 at p. 55; 48 C. 460; 14 L. W. 265; 30 M. L. T. 279; A. I. R. 1922 P. C. 241 (P. C.).
(20) 29 C. 187; 29 I. A. 24; 12 M. L. J. 83; 4 Bom. L. L. R. 167; 6 C. W. N. 386; 8 Sar 224 (P. C.).

which is *inter partes* except where the judgment is clearly *res judicata*. The logical view, therefore, seems to me to be that unless a judgment is relevant under ss. 40 to 42 of the Evidence Act, it is not evidence at all so far as regards the matter which it decides. It is true that s. 43 provides that a judgment other than that mentioned in ss. 40 to 42 though otherwise inadmissible may be admissible if it is relevant under some other provisions of this Act. Also in view of the numerous decisions of the various High Courts in this country as well as the decision of the Privy Council in *Dinomi Chowdhrani* v. *Brojo Mohini Chowdhrani* (20). It is now, in my opinion, too late to say that a litigation or a suit is not a transaction and that the word "right" as used in s. 13 must be interpreted in the somewhat narrow sense in which it was construed in *Gujju Singh* v. *Fatteh Lall* (3). Taking this view as I do, I am inclined to think that a judgment other than a judgment referred to in ss. 40 to 42 may be admissible to prove that a right was asserted or denied under s. 13 of the Evidence Act or to explain or introduce facts in issues or to explain the history of the case In some cases it has also been held that it may be used to prove an admission made by the ancestor of one of the parties (though the decisions on this point are not unanimous) or to show how certain property was dealt with in the past. I must confess, however, that I have not been able to discover any provision in the Evidence Act which would warrant the view that the actual decision or the findings arrived at in a previous judgment can be used as evidence to decide the points which are in issue in a particular case. Such a decision may by virtue of specific provisions operate as *res judicata* or be relevant as a pronouncement on matters of public nature, but otherwise it is not better than a mere opinion expressed on the issues involved in a particular case and the Evidence Act is clear that "opinion" will be relevant in those cases only which are specifically referred to in the Act and in no others. I am of opinion, therefore, that although, as observed by Sargent, C. J. in *Ranchhoddas Krishnadas* v. *Bapu Narhar* (21) one might have wished that the door had been opened somewhat wider for this class of evidence yet under the law as it stands the actual decision or the findings arrived at in a judgment pronounced in a different case are inadmissible except in cases referred to under ss. 40 to 42 of the Evidence Act and except perhaps in the special type of cases which have been referred to by the Judicial Committee. This being my view, although I would not go so far as to hold that the judgments which are on the record of the present case were inadmissible, I would proceed to decide this case not upon the findings which have been arrived at in favour of the appellant in those judgments, but upon the other evidence adduced in the case.

Now, the most important evidence in this case is an old document, Ex. M of *Baisak*, 1295, corresponding to April, 1888. It purports to be a receipt given by Nandlal Ojha to Ramlal Ojha and runs thus:—

"This receipt is executed to the following effect. That your father late Biswanath Ojha and my father late Shrinath Ojha were two brothers, of whom you are the son of the eldest and I am the son of the youngest. I lost my mother while I was a child. Your mother has brought up both the brothers. We both the brothers having proposed to separate from each other in mess, we appointed Raghumani Adhikari, *Mukhtear* of Purulia Court, and Fachu Malla of Raghunathdih, Parganas Kansaipur and Muchiram Mahata of Keraya and Goor Dutta of Ghatbera and sixteen annas tenants of the village, as *panchayat*; and we having agreed to the partition and division made by them, we receive in our respective shares movables and immovables articles. etc, as per schedule herein below. Hence, after having received all (?) the things detailed in the schedule, I execute this receipt in your favour for the purpose of a memorandum."

Then follows a Schedule in which a list of properties allotted to the two cousins is given and then appear the signatures of certain persons. We have examined this document carefully and in my opinion there can be no question as to its genuineness. It has been proved to be in the hand-writing of one Raghumani *mukhtar* who even Nandlal admits used to act as his *mukhtar* in the old days and who has been long dead. It appears to have been filed in the suit of 1908 and the admission made in the plaint of Nandlal that he separated in mess and began to cultivate some lands separately in the year 1295 also goes to support its genuineness. The question, however, is whether this document proves that there was an effective severance of joint estate in the year 1295. The learned Advocate for the respondent tries to show that there was only a separation in mess then and the only reason for the separation was that Nandlal was asked to cook food even after Ramlal had married a wife. It is urged by him that a mere

(21) 10 B. 439.

separation in mess which was induced by an ordinary quarrel like this could not be regarded as sufficient to cause a disruption of the joint family. Stress is also laid upon the words "we both the brothers having proposed to separate from each other in mess" and it is argued that this clearly indicates that the intention was to separate in mess only. The learned Advocate for the appellant on the other hand contends that the document should be read as a whole and that the Bengali expression which has been translated as meaning "separation in mess" does not really carry that meaning but means in ordinary parlance an effective partition. As this view is not accepted on behalf of the respondent I shall proceed on the assumption that the document has been correctly translated, though I agree with the learned Counsel for the appellant that it will be most unsafe to isolate any particular passage in the document from its context for the purpose of discovering what the intention of the parties was when this document was written. We must also bear in mind that this document does not claim or purport to be a complete and self-contained formal agreement entered into between parties but merely evidences to some extent what actually happened and should, therefore, be considered along with the evidence as to the surrounding circumstances and other matters. We have, therefore, to examine not only the language of this document but also the Schedule which is an integral part of it and also consider the extent and kind of properties partitioned and those left undivided. As to the recital in the document itself, it is true that it is said in one place that the cousins had proposed to separate in mess, yet in the very next sentence it is made clear that they had also agreed to the partition and division made by the *panches*. It is significant that the writer had not only used the words *partition* and *division* here, but also referred to "their respective *shares in movable and immovable articles as given in the schedule.*" It is needless to emphasise that a mere agreement to hold separate properties for the sake of convenience is quite different from getting one's share in the joint property by means of a division or partition; and that the latter was the case is fully confirmed by a careful perusal of the schedule attached to this document. It is fully established by evidence that the parties divided on this occasion all their movables and *nij-jote* lands and on this point there has been no serious controversy. It is also apparent from the schedule that in many cases and where it was possible the division was made in equal or half shares. What is most significant is that each party got an equal number of ploughs and bullocks as well as buffaloes and cows. As to the extent of this division though the learned Advocate for the respondent has tried to belittle it, it is enough to point out that although Nandlal was not yet married and had to support no other member of the family excepting himself, yet he was given half the number of cattle possessed by the family, namely, eight buffaloes, eight bullocks and 13 cows. This matter has an important bearing upon the contention of the respondent that Ramlal got more land on this occasion than he himself, a contention which seems to have been favoured by the learned Subordinate Judge. It appears to me that the actual evidence in the case does not necessarily lead to that conclusion. The learned Subordinate Judge has laid some stress on an admission made by Lochan Mahto D. W. No 2 that Ramlal cultivated with 12 ploughs and Nandlal with 5 or 6 ploughs. This statement, however, must be taken along with the statement made by the witness that this was because Nandlal was alone and that there were several members in Ramlal's family and it is clear that merely because Nandlal chose to *cultivate* a lesser area of land, it does not follow that the two cousins *had received* unequal quantities at the partition. I have already stated that they had received an equal number of bullocks and ploughs by the partition and it was open to them either to cultivate the entire lands themselves or to cultivate only a part of the land and make some arrangement regarding the rest One cannot in this connection altogether ignore that Nandlal himself stated that he began to plough with 5 ploughs and Ramlal with eight ploughs and that his witness P. W. (Jaichand Rajwar) made the following statement—

"Nandlal and Ramlal cultivated separately and they took food separately For 16 to 20 years they are in separate cultivation. *I am seeing them cultivating them in equal shares.*"

Then says—

"Nandlal had cultivation of 4 or 5 ploughs and Ramlal of 8 or 10."

The *nij note* lands which Ramlal and Nandlal possessed separately since 1295 *Fasli* have been recorded separately in survey papers and if Nandlal seriously

contended that he had got an unequal share in these lands it was easy enough for him to prove this. In my opinion, it is difficult to hold on the evidence as it stands that Ramlal got more land than Nandlal by the partition of 1295 or whatever we may choose to call it.

Turning now to the properties which were left undivided we find that they were only those lands in village Tilai and Sirkabad for which the family was entitled to receive rent from tenants. There appears to be no special significance in the fact that these lands were left undivided because all that had to be done was to realise rent from the tenants and it is not uncommon to find even members of different families holding such properties in common. Another fact which is to be borne in mind is that according to evidence the income of Tilai was only about Rs. 150 and although we have no evidence as to the income of Sirkabad, yet under the original *sanad* of 1864 by which it was granted, a *moguli* rent of Rs. 4 only was payable in respect of this property and the *kabuliyats* relied on by Nandlal show an income of Rs. 300 a year whereas the *khewat* Ex. 6 records only an area of 35·23 acres. On the other hand, each share of the lands actually divided yielded according to the evidence on the records annually 300 to 600 or 700 maunds of paddy. It is again in evidence that both Ramlal and Nandlal used to live in separate houses and used to pay their *chaukidari* taxes separately (*vide* Ex. Q series). Even as regards the property which was left undivided, the *thokas* of village Tilai (Exs. N to N·7) some of which have been proved to be in the hand-writing of Ramlal who died in the year 1907 show that he was realising only his half share in this *mauza*. The learned Subordinate Judge has without assigning any reason whatsoever dismissed these documents on the ground that he is not satisfied with their genuineness, but I regret I cannot agree with him in this finding. These documents were produced in Court as long ago as in 1908 and were used in various litigations against Nandlal. I have already stated that some of them have been proved to be in the handwriting of Ramlal and as this evidence stands unrebutted their genuineness is established beyond doubt for they could not have been manufactured after the death of Ramlal. In my opinion the *thokas* written by Ramlal are admissible under s. 32 (2) of the Evidence Act and it is clearly noted in one of these papers that they related only to a half share in the *mauza*. There is also internal evidence to support this statement, because we find that the rent realized from Sarban Mahatra was exactly half of what had been fixed by the *patta* Ex. 9 (*a*) executed jointly by Nandlal and Ramlal in his favour during the life-time of Ramlal. It is also to be noted that after 1895 the Jerka property was acquired in the name of Ramlal alone and even the learned Subordinate Judge had to hold on the evidence before him that this was the self-acquired property of Ramlal. I have already stated that this property was acquired during the life-time a Ramlal by three documents and Nandlal states that he was present on all the occasions on which the consideration was paid to the former proprietor of Jerka. It is curious, however, that although in every other document, which related to the property which was admittedly common, both Ramlal and Nandlal joined, the Jerka properties were allowed to be acquired only in the name of Ramlal It is true that such a transaction is possible even in a joint family; and where the family is joint, the mere fact that a certain property has been acquired in the name of one of the members only, does not necessarily make it the sole property of that particular member. In this particular case, however, it has been proved by D. W. No. 1, and his statement is supported by Ex. D·1, that about the year 1304 *Fasli* of 1897 there was a criminal case between Ramlal and Nandlal in which the complaint was that one of these persons had encroached upon the land of the other. It is, therefore, a matter to be considered as to whether in such circumstances Nandlal who was older than Ramlal would allow the acquisition to be made in the name of Ramlal only. Again what we find is that in 1909 the very proprietor of Jerka who had executed the three previous documents in favour of Ramlal executed a fourth document in favour of Umamayi, the widow of Ramlal, and not Nandlal. I do not suggest that any of these matters taken by itself is conclusive; but one will have to take into consideration the cumulative effect of all these transactions. The criminal case to which I have referred has not only an important bearing on the question as to whether the Jerka property was acquired by Ramlal for himself alone or for himself and Nandlal but also on the general question as to whether Ramlal and Nandlal

were joint at the time when this case was instituted. It is needless to say that it is not usual to find one member of a joint family bringing a case of trespass against another in respect of property which is still in law joint but which is held in separate possession only for the convenience of enjoyment by individual members of the joint family.

A joint Hindu family again has certain peculiar features of its own, but the evidence in this case, so far as it goes, discloses that those features are singularly wanting in this case. Generally one would expect a *karta* or a manager in the family and some sort of a joint fund or family chest or till as it is sometimes called which is drawn upon on such occasions as the marriage of a daughter or a member of the joint family or the *sradh* of a deceased member. In this particular case Nandlal was admittedly the older member and it is stated in para. 1 of his written statement in Suit No. 50 of 1925 that

"When the defendant and Ramlal Ojha were members of one family and joint in mess they all lived under the care of Rashmoin Ojhain, mother of Ramlal. The property described in Sch. III of the plaint was acquired at that time out of the income of the joint property and the defendant formerly as *karta* of the joint family and thereafter alone is in possession thereof."

Here there is a clear suggestion that Nandlal was the *karta* of the family after the death of Rashmoin and was the sole owner of Jerka after the death of Ramlal. The case about Nandlal being a *karta* seems to have been abandoned at the trial and in evidence an attempt was made to suggest that Ramlal being the more intelligent of the two cousins was entrusted with the collection of the joint property though it is not expressly stated as to who was the *karta*. However that be, there is nothing in the whole of the evidence before us to show that Nandlal took any part in marrying the daughter of Ramlal or that Ramlal took any part in Nandlal's domestic affairs. On the other hand, in his own plaint Nandlal accuses Ramlal Ojha of having married his daughter in *saprabara sagotra* and adds that for that reason he (Ramlal) gave up connection with the said daughter and

"for fear of being outcasted, he never brought her *in his own house*."

Again in his evidence he referred to his own concubine and the daughter begotten by her and adds that

"Ramlal was alive when Nagendra was married... ..... Ramlal did not participate in the marriage."

It is true that merely because a member of the family did not participate in the marrige of a natural daughter, it does not follow that he was not a member of the joint famly; but this passage as well as the passage in the plaint to which I have referred would give some indication of the relations between the two cousins as well as the condition of the so-called joint family.

I have already given a brief history of the family and shown that beyond the abortive attempt of Nandlal to put forward a hostile claim in the Small Cause Court suit of 1909 he did nothing so long as Umamayi was alive to seriously question or contest the right of the widows of Ramlal to succeed to those properties which they claimed to have inherited from him. I have referred to the succession certificate taken by Umamayi as well as the *pattas* executed in her favour. Besides these, *thokas* of Tilai and Jerka have been filed to show that collections were made on behalf of the widows during the life-time of Umamayi. I have also referred to the unsatisfactory explanation of Nandlal that Umamayi was in possession of Tilai and Jerka in lieu of maintenance. If, therefore, it is possible to draw any inference from the conduct of the parties as to the true import of an incident which took place as long ago as in 1295 *Fasli*, and regarding which much direct evidence cannot be now easily available, I think that inference must be in favour of the case of the appellants that there was a complete disruption of the joint estate in that year. I think that it will be legitimate to say that the parties themselves could understand better than any one else whether there was a real separation in 1295 *fasli* or not and if they acted for some considerable time in such a way as to show that the fact of separation was not seriously challenged, that fact cannot be wholly excluded from consideration, even though it may not be conclusive and may have to be considered along with such explanation as may be furnished by the acquiescing party for the attitude adopted by him.

The documentary evidence adduced on behalf of Nandlal is, to say the least, entirely inconclusive and by no means inconsistent with the case of the appellant. Exhibits 9, 9 (*a*) and 9 (*b*, are three *kabuliyats* executed by Ramlal and Nandlal jointly in respect of certain lands in Tilai in 1893 and are easily explained by the fact that Tilai is one of the villages which had not been divided in 1295 *Fasli*. Exhibits 5 and 5 (*a*) are two *ex parte* rent decrees obtained by Ambica Charan Manjhi, the superior

landlord of Sirkabad against Nandlal after the death of Umamayi and it is to be noted that while on the one hand the periods for which the two suits were brought overlap each other, on the other hand that very proprietor obtained a decree against Amodebala in 1921 and subsequently gave a receipt to her for the amount decreed in that suit (Exs B-1 and S 4). Exhibits 11 and 12 were two *kabuliyats* executed in favour of Nandlal in respect of Sirkabad properties shortly after the death of Umamayi; but some of the very tenants who executed the *kabuliyats* turned against Nandlal and the *bona fides* of these *kabuliyats* were seriously brought into question in the two rent suits of 1921 and 1923 which compelled Nandlal to bring the present suit Between 1918 and 1920, that is to say, after Umamayi's death and just before the survey operation, Nandlal got two *ekrarnamas* and one *kabuliyat* (Exs. 22, 23, and 21) relating to the properties in Jerka executed in his favour. By one of these one Dharup Sardar was allowed to fish in a tank for a period of four months and by the other two certain plots were let out to one Baidnath Rai for the purpose of rearing lac. These documents are no less suspicious than the *kabuliyats* relating to Sirkabad and were not given effect to by the Survey authorities. The most important documents filed by Nandlal are the *thokas* Exs. 16 series, certain counterfoils of rent receipts, chalans and rent receipts (Exs. 17, 8 and 12 series). The *thokas* are for a period extending from 1919 to 1926 and apart from the fact that the statements made in these documents cannot be used by Nandlal in his own favour, as there are clear indications that he was creating evidence for the purpose of advancing his claim before the Survey authorities, the statements made in the *thokas* in support of his claim are entitled to very little value. Besides, these documents do not necessarily prove that Nandlal was in exclusive possession of the properties. The same remarks apply to the counterfoils of rent receipts Exs. 17 series and the rent receipts Exs. 12 series as printed in the paper-book are of very little use because we do not know to which particular year they relate. The learned Advocate for the respondent gave us certain notes about the receipts of Jerka and Sirkabad and we are told that so far as the receipts of Jerka are concerned they are for the years 1325 and 1332 only whereas those of Sirkabad relate to the years 1312, 1315, 1316, 1318 and 1332. It is clear that the few stray receipts of Jerka which have been filed far from supporting Nandlal's case confirm the suspicion that he was creating evidence, while the receipts of Sirkabad also do not show that he was in exclusive possession of the properties throughout. Exhibit 8 series are the chalans of Tilai and although they go further than any other evidence produced by Nandlal, yet they can be explained by the fact that this *mauza* being admittedly common property, Nandlal was as much entitled to pay rent as any one else. On the other hand, some of the receipts which were granted in the life-time of Ramlal show that Nandlal while depositing the rent described Ramlal as his co-sharer [*vide* 8x (1) and 8x (2)] an expression which is certainly not a very happy one and is not generally used to describe a person who is still a member of the joint family.

It was urged by the learned Advocate for the appellant that Nandlal has a better case with regard to Sirkabad property; but I am unable to accept this contention. There are no documents before us of the period when Ramlal was alive and, as I have already said, soon after Ramlal's death Umamayi settled some of the Sirkabad lands by *kabuliyats*, Exs. R and R (1): I have already referred to the two *ex parte* decrees obtained by Ambica Charan Manjhi against Nandlal after Umamayi's death as well as the decree obtained by the same person against Amodebala in 1924. I have also commented on the *thokas* filed by Nandlal for the years 1919 to 1926. It is moreover to be remembered that the two rent suits of 1921 and 1923 related to certain lands in Sirkabad and in both of them the tenants successfully pleaded payment to Amodebala instead of Nandlal. The sheet anchor of Nandlal's case is the entry in the Record of Rights. But that entry is wholly in conflict with the Record of Rights prepared in respect of villages Tilai and Jerka and was based solely on an admission said to have been made by a person who has not been proved to have been authorised by Purnima and whose authority was based on an unregistered document the execution of which is denied by her. Besides if, as I am inclined to hold, the evidence adduced in this case is sufficient to prove that Ramlal and Nandlal had separated during the life-time of Ramlal and that Nandlal was never in exclusive possession of Sirkabad, it is also sufficient to rebut the survey entry in respect of

Sirkabad. I may mention here that while some of the witnesses examined by the appellants definitely prove the possession of Umamayi and Amodebala with regard to Sirkabad property, not a single witness has been examined on behalf of Nandlal who belongs to Sirkabad and it is only some of the Tilai witnesses who have also casually made statements regarding Sirkabad. The evidence in the case, in my opinion, does not show by any means that Nandlal was either joint with Ramlal or was ever in exclusive possession of the properties in Tilai, Jerka and Sirkabad or any of them in its entirety after the death of Ramlal.

Once the facts are fully ascertained there cannot be much difficulty in my opinion in applying the law. The learned Subordinate Judge has reviewed a series of authorities in his judgment and a number of cases have also been cited in the course of the elaborate arguments advanced in this Court. It appears to me, however, that the learned Sudordinate Judge was too much obsessed with the case law on the subject and that he has not correctly appreciated the facts of the case. There is no doubt that the summary of the law given in his judgment cannot be found fault with, but the case law cannot provide us with a ready made formula and each case has to be judged on its own facts. It may well be that certain circumstances when taken individually do not furnish conclusive evidence of separation, yet they may point to a different conclusion when taken collectively or with reference to the particular facts of any individual case. It is to be remembered that separation in status is not quite the same thing as "partition" as used in common parlance. It is possible for the members of a joint family to sever themselves in estate without there being a formal partition or an actual division of the properties by metes and bounds. In law a severance of the joint estate is effected as soon as an intention to this effect has been clearly and unequivocally expressed. It is also to be remembered that although it has been emphasised in many cases that a *declaration* of the intention to separate must be made in definite and unambiguous terms, it does not follow that where there is no evidence of an express declaration of intention, separation cannot be proved. The question is really one of intention and all that the law requires is that the intention should be clearly and unequivocally expressed whether it be by explicit declaration or by conduct—[*See Makund Dharman Bhoir* v. *Balkrishna Paimanji* (22).] Thus in the absence of an explicit declaration, the evidence of conduct as well as of the surrounding circumstances is material for the purpose of judging whether the members intended to separate or not. In this connection the Courts have always pointed out that mere cesser of commensality or separate enjoyment of distinct portions of the properties or separate definement of shares in revenue or survey paper or mere proof of separate transactions entered into by the co-parceners with stangers will not be conclusive to prove separation in estate. It does not, however, necessarily follow that even though all these elements may be present in a case and no matter what special significance any of these various circumstances may have having regard to the facts of a particular case, they can under no circumstances be sufficient to prove separation. Even as to the cesser of commensality the Privy Council has pointed out that though it may not be conclusive, yet it may properly be considered in determining the question whether there was a partition of the joint family or not—[*See Anandi* v. *Khedu Lal* (23) and *Ganesh Dutt* v. *Jewach Thakurain* (24)]. Similarly any one or more of the other circumstances referred to above may have a special significance or bearing on the intention of the parties and, therefore, decisive in a particular case having regard to its peculiar circumstances though the same circumstances or set of circumstances may not be quite conclusive in another case. In the present case my view is that the separation of 1295 must have caused a serious breach in the union and it was by no means such a trivial or ordinary incident as to have left the joint family wholly unaffected. What is significant is that the parties did not take for themselves only so much of the properties as would have been sufficient for their maintenance but they divided everything which could be conveniently divided and received their "share" of such properties by what they called

(22) 105 Ind. Cas. 703; 54 I. A. 413 at p. 420; A. I. R. 1927 P. C. 224; 4 O. W. N. 845; (1927) M. W. N. 732; 53 M. L. J. 468; 29 Bom. L. R. 1496; 46 C. L. J. 413; 39 M L. T. 521; 32 C. W. N. 203; 27 L. W. 196 (P. C.).

(23) 14 Moo. I. A. 412; 18 W. R. P. C. 69; 2 Suther 591; 3 Sar. 50.

(24) 31 C. 262; 14 M. L. J. 8; 31 I. A. 10; 8 C. W. N. 146; 6 Sar. 575; 6 Bom. L. R. 1 (P. C.).

"partition and division" brought about through the intervention of certain *punches*. In *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (25) it was held that when a partial partition is proved or admitted to have taken place, the presumption is that there has been an entire partition both with reference to rights and properties and this view was re-affirmed in 26 Ind. Cas. 514 *Sundarama* v. *Kamakotiah* (26) and in 31 Ind. Cas. 674 *Subha Hiddi* v. *Alagammal* (27). I have already discussed the matter at some length before and all I need say here is that even apart from this presumption the conclusion which I have arrived at on a consideration of the oral as well as the documentary evidence adduced in the case is that Ramlal and Nandlal separated in estate in the year 1295 and that Nandlal was not, therefore, entitled to succeed to any of the properties in dispute. The learned Subordinate Judge relying on an isolated passage in the evidence of Defence Witness No. 2 has held that so long as Rashmoni Debi lived she managed the properties and her orders were carried out; but when I refer to this passage in the evidence of this witness I do not find anything in it to show that the witness was referring to the common property of Nandlal and Ramlal and not to the separate property of Ramlal, having already said in the examination-in-chief that the two cousins had separated.

I shall now pass on to consider the next important point in the case, that is to say, whether the decree in Suit No. 48 of 1923 was obtained by fraud. The circumstances under which this suit was brought were no doubt peculiar. It is not disputed that at the time when the suit was brought Purnima was living with Nandlal and that there was no quarrel or friction whatsoever between her and the latter. It appears strange, therefore, that it should have been considered necessary to bring a suit against her in the absence of any dispute. This matter by itself would not perhaps have had much significance if it had stood alone; but there are many other suspicious features in the case. One of these is that the Pleader by whom Purnima is said to have been represented was one who had certainly acted for Nandlal on previous occasions and who curiously enough appeared as a Pleader for him both in Suits Nos. 3 and 50 of 1926. The story as to how he obtained the *vakalatnama* from Purnima is an extraordinary one. According to Nandlal this Pleader was approached by Shashi Bhushan, a cousin of the lady in the first instance, but he did not accept the *vakalatnama* This story appears to have been finally abandoned and has not been supported by any other evidence. The story has been definitely put forward is that one Rajwar went to the Pleader with a *vakalatnama* but as a matter of precaution, the latter deputed his clerk one Ajodhya Nath Ghosh to go and obtain the thumb impression of Purnima on the document. Ajodhya Nath accordingly went to Purnima's house and took the thumb impression and so the *vakalatnama* was accepted. Ajodhya Nath says in his evidence that Nagen (P. W. No. 2), a son-in-law of Nandlal, is his friend and he calls Nandlal his father in-law as he calls Nagen his brother. On this point Ajodhya Nath is supported both by Nagen and Nandlal who says that Ajudhya Nath is like a son to him. It is admitted that Purnima is a *pardanshin* lady and Ajodhya Nath himself states in his cross examination that Purnima did not talk to him and yet his case is that he went to Purnima, talked to her and obtained her thumb impression. The most astonishing part of the case is that although Purnima's father was alive and it is said that Purnima's cousin Sashi Bhushan held a general power-of attorney for her, neither of them took any part in the appointment of the Pleader. The Pleader having thus been appointed, appeared and applied to the Court on 12th April, 1923, for her examination on commission and stated—we do not know on what authority—that her evidence so given would take the place of the written statement. Purnima definitely states that she never authorised this step and her evidence stands almst wholly unrebutted. On that very day the Court ordered the plaintiff to deposit Rs. 15 as the cost of the commission but curiously enough it was Brajendra Babu, the Pleader for the defendant who deposited this money and no explanation has been given why the defendant should have deposited this sum although the plaintiff had been called upon to do so. It is suggested by the appellant that as Brajendra Babu was in fact acting for Nandlal though ostensibly he appeared for Purnima, he was anxious to conceal that he was handling any money which had been really supplied by Nandlal and so he made this blunder in depositing the sum of Rs. 15 on behalf of Purnima when the money should have been deposited on behalf of the plaint-

(25) 1 Ind. Cas. 408; 32 M. 191; 15 M. L. T. 49; 19 M. L. J. 94.
(26) 26 Ind. Cas. 514.
(27) 31 Ind. Cas. 674; 18 M. L. T. 346.

iff. This is mere speculation, but it is certainly curious that having deposited the money, the Pleader allowed the very amount to be charged in the decree as part of the cost awarded against his client, although it is said that the money had been deposited on behalf of the defendant (see Ex. 3). The learned Advocate for the appellant has laid some stress on the fact that it was rather unusual for the Pleader to say that no written statement was necessary and to apply for evidence on commission at once. There is nothing to show that evidence by commission was absolutely necessary because in the present suit Purnima herself appeared in Court to give her evidence. As to her examination by the commission there is no doubt that this took place when Purnima was living under the roof of Nandlal and, as the learned Subordinate Judge has pointed out, the statement of Purnima that she merely said "yes" or "no" to certain leading questions put to her receives support from the statement of the plaintiff's own witness Nagendra Nath Chakravarty. The commissioner also is not in a position to deny that leading questions were put to her and she merely answered "yes" or "no" to them. Besides, as the learned Subordinate Judge has pointed out neither Purnima's father nor her cousin was present at the time of the examination because it appears that she was identified before the commissioner by men who were complete strangers to the family and in fact apart from Purnima's evidence, we do not know how she was situated behind the *pardah* and to what extent she understood the question put to her. All this lends support to her testimony that the statement recorded by the commissioner did not truly represent her statements. It is true that the commissioner says that the statement was read over to her but as she was *pardahnashin* lady and did not appear before the commissioner, it is contended that it cannot be said with certainty how much of the evidence she actually heard when it was read out or whether it was actually read out within her hearing. There is again evidence to the effect that the summons in the case was not served upon her personally but that a copy of it was merely stuck up at the house of Nandlal where she lived. Nandlal says in his evidence that he was present at the time of the service of he summons but he also says that he did not inform Purnima of the suit he had brought against her. In this connection I cannot refrain from observing that the Pleader Brajendra Babu would have been a most material witness in the case because there are so many things which could be explained by him alone, but curiously enough he accepted the brief for Nandlal in both these suits even though Purnima had clearly stated in her plaint that he had no authority to appear for her in the previous suit and the decree in that suit had been obtained by fraud.

Now the main question in this case is whether Purnima has established a case of fraud. It is said that although there may be suspicious features about the case, yet that is not enough so long as definite particulars of fraud are not set forth and they are not established beyond doubt. As to the particulars of fraud I have already said that the case of Purnima in substance was that the decree had been obtained by keeping her in ignorance of the suit, by representing to the Court that Babu Brajendra Nath was her Pleader although as a matter of fact he was not, by taking various steps in the suit on her behalf although she had never authorised those steps to be taken and by using before the Court a deposition which did not contain her full and free statement. All these allegations are fully supported by her in her evidence and the question is whether her evidence should be taken to be sufficient in this case. The learned Subordinate Judge before whom she gave her evidence has apparently believed her and in my opinion he has rightly done so. The circumstances of the case to which I have referred fully lend support to her statements and there seems to be no reason why they should be rejected. It is true that her statments are to be taken with caution and in one or two instances for example where she says that her thumb impression had been obtained not on the record of deposition but on a blank piece of paper it may not be safe to accept her statement; but the statements in other respects, specialy where they are fully supported by the probabilities and the circumstances of the case, seem to have been accepted by the learned Subordinate Judge and I see no reason to differ from his conclusions. I cannot disbelieve her evidence that Brajendra Babu was never appointed by her: that she never authorised him to say to the Court that no written statement was necessary or that she was to be examined on commission. This fact by itself would be a serious fraud upon the Court, because if it is believed it means that

the decree was obtained by setting up a person as a Pleader for the party where as a matter of fact he had no authority to act as such. I am also of opinion that her statement as to her being wholly ignorant of the suit and as to the manner in which the deposition had been recorded cannot also be easily discarded. These facts in my opinion are quite sufficient for the purpose of upholding the decree of the lower Court independently of the agrument advanced on behalf of the appellant on the score of her being a *pardahnashin* lady and not having had any free and independent advice at any stage of the suit. In my opinion this question could directly arise only if there was a contract or an agreement entered into by the lady which was sought to be impugned or if the decree passed in this case had been a compromise decree. The learned Advocate for the appellant, however, refers to the evidence of Nandlal in which he speaks of the decree as if it was one based on a compromise. He says

"After the compromise Purnima went to her father's house"

and then again—

"He (Brajendra Babu) appeared for me in my case with Urma and Debi — ..... — I cannot say whether it was before or after the compromise in Suit No. 48."

The learned Advocate for the appellant thus refers us to the case of *Nistarini Dassi* v. *Nundolal Bose* (28) where Mr. Justice Stanley after referring to the fact that the plaintiff there was a *pardahnashin* lady living with the defendant Nundolal Bose who had exercised considerable influence over her and that while she was living under his care, he had induced her to put her name to documents which were not explained to her, referred to the following passage of Phear, J., in *Kanailal Jawhari* v. *Kamini Debi* (29) :—

"I may remark that I have more than once felt myself obliged to hold that a Hindu *pardahnashin* is entitled to receive in this Court that protection which the Court of Chancery in England always extends to the weak, ignorant and infirm, and to those who, for any other reason, are specially likely to be imposed upon by the exertion of undue influence over them. The undue influence is presumed to have been exerted unless the contrary be shown. It is, therefore, in all dealings with those persons who are so situated, always incumbent on the person who is interested in upholding the transactions to show that its terms are fair and equitable. The most usual mode of discharging this onus is to show that the lady had good and independent advice in the matter, and acted therein altogether at arm's length from the other contracting party".

As I have however already indicated, although the youth of the lady and her being a *pardahnashin* Hindu widow and her living with Nandlal at the time the decree was obtained may be circumstances tending to show that she could be easily imposed upon, I do not think that the principle laid down in the decision relied on by the learned Advocate exactly applies to this case because this is not a case in which Purnima was strictly speaking a contracting party and a case of undue influence is not quite the same as a case of fraud. In my opinion, however, the case of fraud has been fully established and her suit has been rightly decreed.

The only thing which I cannot understand is why the learned Subordinate Judge having found that the decree had been obtained by fraud should have partially decreed the suit only with regard to Jerka property. In my opinion Appeal No. 141 should be allowed with costs and Suit No. 50 of 1926 should be decreed. As to Suit No. 3 as I have held that Ramlal had separated from Nandlal during his life-time, the plaintiff has failed to establish his title upon which his suit is based and, therefore, his suit must necessarily fail.

It may be mentioned that it was urged on behalf of the respondent that Suit No. 3 was purely one under s. 177 of the Chota Nagpur Tenancy Act and the question as to whether Ramlal and Nandlal were joint or separate need not be gone into. On the other hand it was urged on behalf of the respondent that if the plaintiff's suit was one under s. 177 it was barred by limitation because it was brought more than one year after the decision of the Rent Suit No. 1400 of 1921-22. In my opinion, however, on the plaint as framed it cannot be held either that the question of title cannot be gone into or that the suit is wholly barred by limitation.

The result is that Suit No. 3 of 1926 must be dismissed and Appeals Nos. 141 and 142 must be allowed with costs throughout.

(28) 26 C. 891.
(29) (1867) 1 B. L. R. O. C. 31 Notes.

The cross-objections in both the cases will be dismissed.

Wort, J.—I agree.

A. *Appeals allowed.*
Cross-objections dismissed.

PATNA HIGH COURT.

Criminal Revision Application No. 39 of 1932.

February 17, 1932.

ROWLAND, J.

RAGHUNATH THAKUR AND OTHERS —ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE-PARTY.

Penal Code (Act XLV of 1860), s. 430—Essentials of the offence—Intention to save one's own land—Effect of.

Where the accused cut a *bandh* belonging to the complainant and containing water which the complainant required for the irrigation of his fields and let out some of the water :

Held, that the act of the accused would amount to an offence under s. 430, Penal Code, even though there was evidence to show that if the dam had not been cut, the crops of the accused would have been destroyed. *Ramkrishna Chetti* v. *Palaniyandi Kudambar* (2), followed, *Nafar Chandra Bhattacharjee* v. *Helaluddin Mondal* (1), not followed.

To fall within s. 430, Penal Code, the act need not be an act of wanton waste.

Application against an order of the Sessions Judge, Bhagalpur, dated the 13th January, 1932, upholding that of the Deputy Magistrate, Bhagalpur, dated the 2nd December, 1931.

Mr. *G. N. Mukherjee*, for the Petitioners.

Mr. *Shiveshwar Dayal*, Government Pleader, for the Crown.

Judgment.—The petitioners have been convicted by a Second Class Magistrate of offences under ss 430, 325 and 323, Indian Penal Code, and an appeal from the conviction has been dismissed by the Sessions Judge. They have moved this Court in revision, and the application has been ordered to be heard as regards the correctness of the conviction under s. 430, Indian Penal Code. The substantial grounds taken in the partition with reference to s. 430 are grounds Nos. 1 and 2, which ran as follows:—

"1. For that the conviction of the petitioners under s. 439, Indian Penal Code, is bad in law inasmuch as there was no malicious object on the part of the petitioners.

2. For that the evidence of the complainant being that if the *bandh* had not been cut the whole paddy crop of the petitioners of about 1 to 1½ *bighas* would have been destroyed the conviction under s. 430, Indian Penal Code, is not sustainable."

The learned Advocate for the petitioners has referred to three cases which it is said support the principle that where a dam erected by the complainant was cut by the accused not to take a supply of water but to save their own crops this would not amount to an offence under s. 430 of the Penal Code. The earliest of these cases *Nafar Chandra Bhattacharjee* v. *Helal-uddin Mondal* (1) was decided *ex parte* by a Judge of the Calcutta High Court sitting singly; and each of the other cases relied on is the decision of a single Judge No doubt these decisions and the opinion of these learned Judges are entitled to the greatest respect. But whatever may have been the views expressed by individual Judges, there is an authoritative ruling on the essentials of the section in the Full Bench decision of the Madras High Court in *Ramkrishna Chetti* v. *Palaniyandi Kudambar* (2) where the Judges observe :—

"It is not part of the definition of the offence that the act of the accused should be in common language a mere wanton act of waste. Under s. 430 of the Penal Code the physical requisites of the act are the doing of an act which causes or to the doer's knowledge is likely to cause a diminution of supply He also fulfils the mental requisites when he does this with intent to cause wrongful loss, and the intention is properly held to be such when he takes it without any sort of right, and it matters not that he claims to set up such a right if the facts are so clear that the claim is manifestly only an additional wrong. It is for judicial tact to distinguish where the case is sufficiently doubtful to prevent the inference of a wrong intent."

In the case before me there is no doubt that the *bandh* in question was the property of the complainant, that it held water which he required for the irrigation of his fields, that the accused by cutting the *bandh* let out some of the water and it would violate the most elementary principles of mathematics to hold that the supply of water was not thereby diminished.

The result is that the Rule is discharged.

A. *Rule discharged.*

(1) 8 C. W. N. 370.
(2) 1 M. 262 (F. B.)

CALCUTTA HIGH COURT.

Civil Appeal No. 216 of 1930.

May 13, 1931.

RANKIN, C. J. AND PEARSON, J.

MOHITOSH DUTTA—APPELLANT

versus

RAI SATISH CHANDRA CHAUDHURI AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), ss. 20, 56 (1)—Civil Procedure Code (Act V of 1908), s. 47—Receiver, whether representative of debtor—Objection by Receiver to execution against debtor's property, whether falls within s. 47—Second appeal, maintainability of—Ad interim Receiver, powers of.

The question whether a Receiver in insolvency is or is not a representative of the debtor for the purposes of s. 47, Civil Procedure Code, depends upon the purpose and nature of the application made by the Receiver. For some purposes he would be entitled as representing the judgment-debtor to litigate matters under s. 47 of the Code; but where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belongs to the Receiver the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the Receiver for the benefit of the creditors, then, for that purpose, the Receiver is not a representative of the judgment-debtor, but a third party making a claim, and no second appeal lies from an order made on such an application. *Kashi Prasad* v. *Miller* (1) and *C. E. Grey, Official Assignee* v. *Hazari Lal* (2), and other cases referred to. [p. 594, col. 1.]

An *interim* Receiver cannot represent the debtor and make an application under s. 47, Civil Procedure Code. *Miller* v *Lukhi Mani Debi* (5), referred to. [*ibid.*]

Appeal from an order of the District Judge, 24 Pargannas, dated the 29th April, 1929.

Mr. *Chandra Sekhar Sen*, for the Appellant.

Mr. *Surendra Nath Bose* (*Sr.*), for the Respondent.

Rankin, C. J.—This case raises some interesting questions. It is a case where the judgment-debtor had suffered a money decree and it seems that in September, 1927, an application to adjudicate him an insolvent under the Provincial Insolvency Act was presented to the appropriate Court. Before any order was made, the decree-holder on 13th February, 1928 applied for execution. On 12th April sale of certain property was held and on a day in May that sale was confirmed. On 8th May the insolvency Court appointed an *interim* Receiver, that is to say, a Receiver in whom nothing vests but who has the powers of a Receiver under the Civil Procedure Code. On 10th May, this *interim* Receiver applied to set aside the sale. He appears to have made a case under O. XXI, r. 90, Civil Procedure Code, but he also made a case to the effect that, as there were proceedings in insolvency, the sale should be set aside. I pause here to observe that he was too late on any possible view to take advantage of s. 52, Provincial Insolvency Act, which is applicable only where notice is given to the Court in time and before the sale. On 26th June an order of adjudication was made and the *interim* Receiver was appointed Receiver in the full sense of the word and the insolvent's property vested in him under the Statute for the benefit of the creditors. Originally, the application of the *interim* Receiver made on 10th May was allowed and the sale was set aside on 25th July. In September, the decree holder applied for a review of this order and the learned Munsif set aside the order and restored his previous order confirming the sale. From this, there was an appeal by the Receiver to the District Judge and there was a certain amount of objection to the effect that no appeal lay against an order granting a review to which the answer which *prima facie* seems to me to be a good one was that it was not an appeal against the order granting a review but against the order made upon the review, namely, confirming the sale setting aside the previous order. However the learned District Judge also dismissed the appeal on merits. From that order the present appeal is filed. As a matter of fact, leave has been given under s. 5, Limitation Act, extending the time for an appeal in view of what was said by the Division Bench before whom an application under s. 115, Civil Procedure Code, was made. We have however to consider whether the order of the District Judge refusing to interfere with the order discharing the order setting aside the sale is correct.

Now the first question which arises is whether or not there is any second appeal. In so far as the Receiver's application was an application by a person interested under r. 90, O. XXI, it is clear that there is no second appeal. We have therefore to see whether the Receiver's application to set aside the sale can be looked at in any other view.

A good deal has been said upon the question whether the Receiver under the Provincial Insolvency Act is a representative of the judgment-debtor for the purposes of s. 47, Civil Procedure Code. There is a good deal of authority in cases exactly like this to the effect that he is not a representative and the matter has been dealt with in the cases of *Kashi Prasad* v. *Miller* (1); *C. E. Grey, Official Assignee* v. *Hazari*

(1) 7 A. 752; A. W. N. (1885) 166

Lal (2), *Sardarmal Jagonath* v. *Aran Vayal Sabhapatty* (3); *Chandmull* v. *Ranee Soondary Dasi* (4), *Miller* v. *Lukhi Moni Debi* (5), *Frederick Peacock* v. *Madan Gopal* (6) and the *Official Assignee, Madras* v. *Aiyu Dikshithar* (7). It appears to me that any general statement to the effect that a Receiver is or is not a representative for the purposes of s. 47 of the Code is necessarily misleading. It all depends on the purpose and nature of the application made by the Receiver whether he is a representative of the judgment-debtor or not. For some purposes, he would be entitled as representing the judgment-debtor to litigate matters under s. 47 of the Code: but where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belongs to the Receiver the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the Receiver for the benefit of the creditors, then, for that purpose, the Receiver is not, in my judgment a representative of the judgment-debtor and the cases which I have referred to are, in my judgment, correct in that respect. The Receiver in such a case, if he is not acting under s. 52 of the Act, but acting under the usual provisions of the Civil Procedure Code is really a third party making a claim.

He is saying that while there is no objection to the judgment-debtor's property being sold for the judgment-debtors's debt the property attached is no longer the judgment-debtor's but belongs to a third person. I am therefore of opinion that the application to set aside the sale made by the *interim* Receiver was not an application competently made by him under s. 47 of the Code. If it was nevertheless brought under s. 47 of the Code, then the second appeal must be dismissed. If the true view that it is not under s. 47 of the Code, then it does not seem to me there is any second appeal. It may or may not be that where a sale has taken place, in certain circumstances, the Receiver could by bringing a suit get the sale set aside independently of O. XXI, r. 90. In this case, the Receiver has not done so. I need not, in these circumstances, enlarge upon the fact that at the time this application was brought the Receiver was only an *interim* Receiver because in that view, it was quite impossible for him to take the attitude that he could represent the judgment-debtor for the purpose of having the property escape execution. I would here refer to the observations of Banerjee, J., in the case of *Miller* v. *Lukhi Mani Debi* (5), at page 421* :—

"The question whether the point in this case comes under cl. (c), s. 144, Civil Procedure Code, has to be determined with reference to the nature of the objection raised by the Official Assignee".

In my view there are no merits in this case and the appeal must be dismissed with costs: hearing fee two gold mohurs.

Pearson, J.—I agree.

A. *Appeal dismissed*

(2) 30 A. 486; 5 A. L. J. 553; A. W. N. (1908) 203.
(3) 21 B. 205.
(4) 22 C. 259.
(5) 28 C. 419; 5 C. W. N. 761.
(6) 29 C. 428; 6 C. W. N. 577 (F. B.).
(7) 88 Ind. Cas. 85; A. I. R. 1925 Mad. 689; 48 M. L. J. 530.

*Page of 28 C.—[*Ed*]

CALCUTTA HIGH COURT.

Civil Appeal No. 1349 of 1930
May 14, 1931.

SUHRAWARDY AND GRAHAM, JJ.

MATILAL DEY SARKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

KAMAKSHYA CHARAN DEY SARKAR—PLAINTIFF—RESPONDENT.

Co-tenants—Partition between subordinate interest holders—Maintainability—Defendant holding fractional interest of landlord, effect of.

The sole basis upon which a claim to partition is founded is the joint possession of the parties. Hence a suit for partition can be brought by a person holding a subordinate interest in land against others holding a similar interest though a partition at the instance of a subordinate interest holder among persons holding other subordinate interest will not be binding upon the superior interest holder and will enure till the interest of the party seeking partition lasts. [p. 596, col. 2.]

The fact that one of the defendants happens to be a fractional landlord of the *jote* does not make any difference. *Hobson* v. *Sherwood* (4), *Baring* v *Nash* (5), *Sundar* v. *Parbati* (6), *Doman Pandey* v. *Panchu Koley* (7), *Lalit Kishore Mitra* v. *Girdhari Singh* (8) and *Mahomad Bakhsh* v. *Mana* (9), relied on, *Anath Bandhu Dutt* v. *Aisali Namadas* (10), distinguished. [p. 597, col. 1.]

Quære:—Whether a person interested in a portion of a property can claim a partition of that property, *Parbati Charan Deb* v. *Ainuddin* (11), doubted. [p. 597, col. 2.]

Appeal against the appellate decree of the First Class Sub-Judge, Dacca, dated the 25th January, 1930.

Messrs. *Sarat Charan Roy Choudhury* and *Bhupendra Kumar Basu*, for the Appellant.

Messrs. *Gunada Charan Sen* and *Sachindra K. Roy* for Respondent.

Suhrawardy, J.—This appeal arises out of a suit for partition of a homestead.

The plaintiff's claim for partition is based on the following facts: There was a *howla* called Jadu Nandan which was held by five persons; Rup Chand and Sreenath Das had a 4 anna share and in the remaining 12 annas Taranath and Prionath had 9½ annas share and Kali Kumar 6½ annas share treating the 12 annas interest in the *howla* as 16 annas. About 60 years ago, according to the defence, the predecessor of defendant No. 1 took a *jote* settlement of the 4 annas of Rup Chand and Sreenath. In 1300 B. S. the plaintiff took a *jote* settlement of 6 annas of the *howla* from Taranath, Prionath and Kali Kumar and about that time the defendants also took a *jote* settlement of the remaining 6 annas from these persons. In 1315 B. S. the defendants took *mirash* settlement of Kali Kumar's 6½ annas share in the 12 annas of the *howla* reckoned as 16 annas. In 1327 B. S., they purchased the *maliki* interest of Kali Kumar in that share. At the date of the institution of the suit, the position therefore was that the plaintiff had a *jote* right to 6 annas of the *howla* and defendants Nos. 1, 2 and 3 the same right to the remaining 10 annas. But they had also *maliki* right in about 5 annas of the *howla*. The plaintiff by the suit claimed partition of the *jote* from the defendants in respect of his share in it by metes and bounds. The defendants mainly contended that the suit was not maintainable, as there had been a previous partition under which the parties were in possession of different portion of the homestead, and that as the defendants had become co-sharer landlords, the suit was not maintainable in law. The defendants also pleaded limitation and abandonment under the terms of the lease to the plaintiff.

The trial Court overruled the defendant's objections and decreed the plaintiff's suit. The learned Subordinate Judge on appeal has concurred in the decree. Both Courts have found that the defendants have failed to prove previous partition. Defendants Nos. 1, 2 and 3 have appealed and several points have been raised on their behalf.

It is contended in the first place that the present suit is not maintainable, inasmuch as the plaintiff has only a temporary interest in the land in suit and as such is not capable of maintaining a suit for partition. The plaintiff's lease appears to be a yearly lease for no definite period. In support of this contention reliance has been placed on the Full Bench decision in *Himadri Nath Khan* v. *Ramani Kanta Roy* (1) and on the case of *Bhagwat Sahai* v. *Bipin Behari Mitter* (2). The Full Bench Case was one between the *patnidar* and the *zemindar* In a previous decision of this Court in *Mukunda Lal Pal* v. *Lehuraux* (3) it was held that in order to maintain a suit for partition the plaintiff must be of equal status with the defendant. The Full Bench decided that it was not necessary that parties should have equal rights in the joint property. In that case the suit was by a co-sharer *zemindar* against a *patnidar*. In *Bhagwat Sahai's case* (2), the suit was brought by a proprietor of a *mukarrari* interest in the properties in suit against the owners of shares of the *zemindari* interest therein, and their Lordships approving the decision of the Full Bench in *Himadri Nath Khan's case* (1) held that the suit was competent. But the contention before us is that those cases lay down that the holder of a permanent interest only is entitled to maintain a suit for partition against the holder of a different permanent interst. It so happened that in those cases the parties were holders of permanent interests though of different kinds. But I do not think that they are authorities for the view that a suit for partition can only be maintained by one who has some sort of permanent interest in the property in suit. It appears from the judgment of Banerji, J., in *Himadri Nath's case* (1) page 582*, that it was urged before the Full Bench that partition could be enforced only as between co owners whose interests were co-ordinate in degree, for otherwise parties having permanent interest might be put to frequent and needless expenses and trouble by having to watch the partition proceedings instituted at the instance of a holder of a temporary interest. The objection was not, however, considered because there both the parties had permanent interests in the property in suit and hence "there was no apprehension of the division effected not having an enduring effect." Beaverly, J., expressed an opinion that 'the right to partition can only exist as between co parceners holding similar interests in the property. But how "similar interests" could be defined the learned Judge felt difficult to say, though he opined that they should

(1) 24 C. 575; 1 C. W. N. 406 (F. B.).
(2) 7 Ind. Cas. 549; 37 C. 918; 37 I. A. 198; (P. C.).
(3) 20 C. 379.

*Page of 24 C. [*Ed.*].

probably be transferable permanent interests. In *Bhagwat Sahai's case* (2) their Lordships of the Judicial Committee have left the question expressly open but they

"agree with the opinion of the Full Bench in the case referred to, *Himadra Nath* v. *Ramani Kanta* (1), that the right of partition exists when two parties are in joint possession of the lands under permanent titles, although these titles may not be identical."

They proceed to observe:

"It is not necessary for their Lordships to consider whether the right to partition exists in any other case and they are desirous to avoid indicating any view upon such subject."

The question as to whether a suit for partition can be brought by a person not having a permanent interest in the property, has therefore not been authoritatively decided. It appears that in English Law such right exists and it has been asserted and accepted from a long time In *Hobson* v. *Sherwood* (4), the plaintiff was tenant for life in one-fifth of the estate, which life-tenancy was subject to extinction on his marrying. The suit was demurred on the ground that the plaintiff had such an unstable status that he was not entitled to maintain a suit for partition against persons having right to the estate and the remainder. The Master of Rolls in giving the judgment of the Court observed:

"As tenant for life, I apprehend there can be no question but that he is entitled to a partition. The question is whether circumstance of his life estate being determinable on his second marriage makes any difference. As at present advised, I think it does not. But I will further consider it."

On further consideration the Master of the Rolls ordered partition to proceed. In *Baring* v. *Nash* (5) the plaintiff was owner of a tenth share and the defendants of the remainder of the term of 500 years. They were also owners of inheritance of the other nine-tenth shares. On demurrer it was held that the plaintiff was entitled to maintain the suit, however small his interest in the joint property might be. There would be no objection due to minuteness of his interest, inconvenience or reluctance of other tenants, if there was no objection taken to the plaintiff's title, partition being a matter of right whatever might be the inconvenience or difficulty. In *Sundar* v. *Parbati* (6), the Judicial Committee held that a suit for partition would lie between two Hindu widows having life interest in the property on the basis of possession alone. In *Doman Pandey* v. *Panchu Koley* (7) it was held that between two *mal raiyats* whose interest was not permanent partition could be effected, but it would not be binding upon the superior landlord and would only be subsisting during the currency of the settlement. In *Lalit Kishore Mitra* v. *Girdhari Singh* (8) a Patna case the plaintiff was a lessee for a term of the underground mines and minerals in a village. The term was for a period of 999 years. But the trial Court dismissed the suit on the ground that the lessee for a term was not a joint owner of the minerals with the other owners of the village and was, therefore, not entitled to claim partition of the mines and minerals. The learned Chief Justice held referring to the Full Bench case and the decision of the Judicial Committee above referred to that the plaintiff had the right to claim partition on the ground that he was in joint possession with others. The claim or right to demand partition is one of the rights of ownership. Right to partition as right to possession is a right of property and such right depends not upon the co-ordination of interests of parties concerned, but on the fact of their being in joint possession.

Partition at the instance of a subordinate interest holder among persons holding other subordinate interest will not be binding upon the superior interest holder and will enure till the interest of the party seeking partition lasts. But the fact that such partition is not binding upon the landlord is no reason why it cannot be effected among the tenants. The sole basis upon which claim to partition is founded is the joint possession of the parties. In *Mahomad Baksh* v. *Mana* (9) it was held that a joint occupancy tenant was entitled to sue for partition of the joint occupancy holding though the *zemindar* was not made party to the suit. The view which apparently is in conflict with that taken in the Allahabad case is expressed in *Anath Bandhu Dutt* v. *Aisali Namadas* (10) but the decision in that case proceeded upon other grounds.

In some cases it has been suggested that partition under certain circumstances will result in great hardship, loss of time and money and in some cases, that it will not have an enduring effect. In the English cases I have cited this question was consi-

(4) (1841) 4 Beav. 184; 55 R. R. 40.
(5) (1813) 1 V. & B. 551; 35 E. R. 214.
(6) 12 A. 51; 16 I. A. 186; 5 Sar. 448 (P. C.).
(7) 5 C. W. N. 185.

(8) 135 Ind. Cas. 861; 1 Pat. L. J. 441; 2 P. L. W. 383; 20 C. W. N. 1306.
(9) 18 A. 334; A. W. N. 1896, 82.
(10) 97 Ind. Cas. 188; A. I. R. 1926 Cal. 1076; 43 C. L. J. 601

dered. In *Hobson's case* (4) referred to above the Master of the Rolls observed :

"I cannot help regretting that this suit should ever have been instituted. The plaintiff alone who is a tenant for life determinable on his second marriage, desires a partition ; the other parties desire to keep the estate together. If however, the plaintiff is entitled to the relief he asked for .he must have it however inconvenient it may be to the other owners."

A similar observation was made in *Baring's case* (5) where the Vice Chancellor observed :

"Partition being a matter of right, whatever may be the inconvenience and difficulty it must be ordered at the instance of the petitioner that partition be effected" : see also *Sundar's case* (6).

In my judgment the plaintiff in this case is entitled to maintain the suit for partition against the defendants who hold similar interest in the property. I may observe here that the objection to the maintainability of the suit on the ground that the plaintiff has a temporary interest in the lands in suit was not taken in any of the Courts below and was not even suggested in the grounds of appeal in this Court except by means of an additional ground placed before us at the hearing of the appeal. I am not sure that the question now raised by Mr Roy Choudhury is a pure question of law. It may involve an investigation into facts on evidence. We do not know what is the status of the defendants with reference to the lands of which they have taken *jote* settlement. It may be that they have a right similar to that of the plaintiff. It is also possible that the plaintiff by virtue of being a settled *raiyat* of the village has acquired a right of occupancy in the homestead under s. 182, Bengal Tenancy Act. Though this point has been raised for the first time, I have allowed it to be raised and discussed as a question of law.

The next question urged by Mr. Roy Choudhuri on behalf of the appellants is that the defendants being *maliks* of certain sharers of the *howla*, the plaintiff cannot maintain a suit for partition against them. The plaintiff claims partition against the defendant not in the latter's capacity as *maliks*, but as they are *jote* holders of the land in suit jointly with the plaintiff. The learned Subordinate Judge has considered this point and he observes :

"The mere fact that the appellant who is a co-sharer of the plaintiff in the *jote* under partition; happens to be a fractional landlord of the *jote* in question does not in my opinion alter the situation in any way."

I think the view taken by the learned Subordinate Judge is right. The effect of this partition will in no way be binding on the defendants in their capacity as *maliks*. It will still be open to them to claim partition as *maliks* against their co sharers in the *howla*.

Mr. Roy Choudhury has raised a ground also upon which the lower Courts decided against him and that is that on the terms of the plaintiff's lease it should have been held that this *jote* has come to an end. The *kabuliyat* says that if the lessee goes elsewhere in that event, he should have no claim or interest in the land or in the *jama* mentioned in the *patta*. The finding of the lower Appellate Court is that the plaintiff has still been in possession of the disputed plot through his *bargdars* and that the plaintiff went to his father in-law's place after the cyclone of 1326. Similar findings were entered by the trial Court which held that the defendants' story of abandonment had no legs to stand upon and that in the settlement record the defendant and the plaintiff had been recorded as tenants in possession of C. S. Plot No. 950 in suit. If there has been a forfeiture, it is the landlord who can claim or waive it. It is evidence that the plaintiff's landlord is still receiving rent from him.

Lastly, it has been contended that the plaintiff is interested only in one of several plots of which the *howla* is composed. It will be extremely inconvenient if a person interested in a portion of a property is allowed to claim partition of that portion, for it will set the defendants to a number of suits at the instance of other parties who are interested in other protions of the land and in support of the contention, reliance has been placed on *Parbati Charan Deb* v. *Ainuddin* (11). I am not quite sure whether the observation made by Garth, C. J, in that case can be held to be good law now. But this point also was not taken at the trial. We have got no findings of the Courts below as to whether the land of which partition is claimed by the plaintiff is a portion of a bigger plot. So far as the plot in suit is concerned it is the case of both parties that they have shares in it as claimed by them. There can be no objection that this plot held jointly by the parties under similar title should not be partitioned.

In the view I have taken in this matter the appeal fails and must be dismissed with costs.

Graham, J.—I agree that the appeal should be dismissed. Two main points

(11) 7 C. 577; 9 C. L. R 170.

were, as I understand, urged on behalf of the appellant: firstly, that the plaintiff being merely a temporary tenant could not sue for partition and secondly that such a suit would not lie where the defendants, as here, have rights as co sharer landlords. As to the first point it may be observed that no such case was made in the Courts below, nor was there any issue upon it in the precise form in which it has now been sought to be raised. No doubt it is a question of law and such questions may be raised at any time. But the decision of the matter would involve an investigation of facts. That being so, we ought not to allow it to be raised for the first time in second appeal.

With regard to the second contention, Mr. Roy Choudhury for the appellants referred to certain authorities in support of the proposition that there can be no partition in view of the fact that the defendants are co-sharer landlords. None of the cases however are on all fours with the present case and I do not see how the fact that the defendant happens to combine in himself a dual status of *raiyat* and landlord can deprive the plaintiff of his right to partition. Nor does it appear that defendants' interest will suffer in any way if partition be made. As a matter of fact we have been informed that partition has already been finally made.

A. *Order accordingly.*

CALCUTTA HIGH COURT.

Criminal Miscellaneous Case No. 92 of 1931.

May 22, 1931.

RANKIN, C. J. AND PEARSON, J.

SASHADHAR ACHARJYA—

PETITIONER

versus

SIR CHARLES TEGART—

OPPOSITE PARTY.

Letters Patent (Cal), cls. 24, 29—Crown Side Rules Chap. XXXVII, r. 2—Offence committed outside British India—Complaint before High Court, competency of—Jurisdiction of Appellate Side—Jurisdiction of Original Side over Europeans.

The petitioners complained to the High Court against certain Police Officers of British India in respect of certain acts done by them in the French territory of Chandernagore. The petitioners did not obtain the certificate of the Political Agent or Local Government or sanction under s. 197, Criminal Procedure Code :

Held, (*i*) that neither the Extradition Act nor the British Foreign Jurisdiction Act had any application to the case;

(*ii*) that neither cl. 24 nor cl. 29 of the Letters Patent, Calcutta, had any application to the case and the High Court, in its appellate side had no jurisdiction to entertain the application;

(*iii*) that so far as the Indian subjects complained against were concerned, they could not be proceeded against without the certificate of the Political Agent, or the sanction of the Government;

(*iv*) that as regards the Europeans who were resident within the ordinary original jurisdiction, if any application lay at all, it must be made on the Original Side.

Mr. *Jitendra Chandra Banerji*, for the Petitioner.

Rankin, C. J.—This is an application to this Court by two persons against certain named opposite parties with an indication that other unnamed opposite parties whose names the petitioners have not yet discovered are to be included. The petitioners complain against certain officers of the Calcutta Police in respect of certain acts done by them at Chandernagore in the territory of France where to put the matter shortly, a raid was conducted upon a house of which the first petitioner and the second petitioner appear to be tenants or sub-tenants.

The prayers in the petition are numerous; but the first matter is this, it is alleged that the first opposite party Sir Charles Tegart, the Commissioner of Police, who had been unsuccessfully prosecuted by the petitioners before the Chief Presidency Magistrate gave an undertaking to this High Court when dealing with an application in revision which undertaking he has broken and thereby made himself amenable to the jurisdiction of this Court in contempt. Upon examination, this charge appears to be altogether unfounded. It appears that at the argument in the revision case before the High Court, the petitioners' Advocate stated that Sir Charles Tegart was proposing to leave the jurisdiction of this Court and he was assured by the Advocate-General that he (Advocate-General) would not have been appearing for Sir Charles had there been any question of his evading the jurisdiction of the Court by going away. On the night of 5th March, it seems Sir Charles left Calcutta for England and, on the afternoon of the 6th, the application of the petitioners was altogether dismissed. In these circumstances, in May, a petition was presented complaining, as I understand it, not that Sir Charles Tegart was obliged to wait until the petitioners should bring another petition or another six petitions against him. They complain as we now know that whereas it

would have been quite right for Sir Charles Tegart to leave Calcutta on the evening of the 6th, it was contempt of Court for him to leave Calcutta on the evening of the 5th. It seems to me that this mere statement is sufficient to show that this Court cannot possibly think it a fit case in which to take any proceeding in contempt against the Police Commissioner.

The next matter is this: the petitioners have been unable apparently to prosecute their complaint in Chandarnagore under the French law; they have been unable to get their Political Agent or the Local Government to give any certificate for the prosecution of anybody in British India. They have been unable to get the sanction of the Local Government under s. 197, Criminal Procedure Code. They know perfectly well that the Advocate-General or any other officer on behalf of the Government is not willing to commence a proceeding under cl. 24 of the Letters Patent. In order to get over this difficulty, an application is made to this Court to recommend to the Local Government that the petitioners' Advocate should be clothed with the powers of the Advocate-General or other person appointed on behalf of the Local Government. Before us this somewhat remarkable application has been started by a contention that as the Advocate-General appeared in defence of this officer of the Government—the Commissioner of Police—at the hearing of the application in revision before the High Court, he has ceased to be the Advocate-General and, therefore, this Court ought to recommend to the Local Government to do something superseding him. That seems to me to be a confused and extravagant application which may be dismissed without further comment.

Another matter which may be stated by way of keeping out of this case certain of the confusions which have been introduced is that, on no view of the case has the Extradition Act or the British Foreign Jurisdiction Act of 1890 any application to this case.

I come now to consider the case as being an application under r. 2 of the Crown Side Rules of the Original side. By that rule, any application made under cl. 24 or cl. 29 of the Letters Patent is to be made in the first instance, at the Appellate Side and this Bench is now sitting to hear this petition in so far as one of its aspects is an application of that character. When we look to the Letters Patent it is abundantly evident, and indeed it is now conceded that cl. 24 has no application at all. Clause 24 is a clause which gives power to this High Court to remove from some Court in the *mofussil* a criminal trial and have it before this Court itself and it can do that upon charges preferred by the Advocate-General or by any Magistrate or or other officer specially empowered by the Local Government in that behalf. The present case is not a case for removing a prosecution which would normally be competent in a *mofussil* Court to the High Court. This is a case of totally different character. The provision referred to has nothing to do with this matter. Clause 29 has equally little to do with the matter. As has been pointed out by Sir Barnes Peacock, C. J., in the case of *Queen* v. *Nabadwip Chandri Goswami* (1) cl 29 is a clause under which, if a criminal case or appeal is proceeding or is about to be begun in the *mofussil*, the High Court has power to remove it and to direct any other Court of sufficient jurisdiction to hear the criminal case or appeal and in that connexion there is an ancillary power that this applies not only to a criminal case or appeal but applies also to inquiries. The High Court has power to direct a preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or to try it though such a case belongs in the ordinary course to the jurisdiction of some other officer. We are not concerned with any question of transfer of a case from the *mofussil* to Calcutta or *vice versa*, nor is any case made out before us why we should transfer this case from any officer whose duty it would be to deal with it to any other officer or Court

There is a further point so far as regards the Indian subjects of His Majesty—names unknown—whom the applicants in this case desire to proceed against. There is a provision in the Penal Code, for the trial of an Indian subject of this country for a criminal act that he may have done in any foreign country. That is a matter which is governed by the Penal Code, and in the Code of Criminal Procedure, there is an express qualification which says that that can only be done on the certificate of the Political Agent, if there is one, or otherwise of the Local Government. The position of an Indian subject of His Majesty accused of an offence in a foreign state is perfectly clear and plain. He can be tried in an Indian Court and he cannot, in any view, be tried except on a certificate of the Political

(1) 1 B. L. R. Cr. 15.

Agent or with the sanction of the Local Government.

A large number of English Statutes have been mentioned in this petition apparently by way of suggesting that there is power in this Court, so far as Europeans are concerned, to put them on their trial for an offence committed outside British India. As against residents within the ordinary original jurisdiction of this Court, any such application as that would appear to be an original side application and if it lies at all it must be made upon another petition presented in proper course according to the rules of the Original Side. Any such petition when presented will no doubt be dealt with. So far as the present petition is concerned, we must treat it as an application to this Court on the appellate side and it must be altogether dismissed.

Pearson, J.—I entirely agree.

A. *Petition dismissed.*

CALCUTTA HIGH COURT.

Civil Revision in the matter of the Court-Fees Act.

May 15, 1931.

RANKIN, C. J.

In re NANDA LAL MUKHERJEE.

Court Fees Act (VII of 1870), Sch. II, Art. 17 (vi)—Suit for partition · Plaintiff in possession—Court-fee—Prayer for unnecessary relief in trial Court—Right to confine to proper relief in appeal

If a person is out of possession on his own allegation he cannot sue for partition without suing for possession also and he would have to pay court-fee on the market value of his share. But where the plaintiff sues for partition on the footing that he is in actual possession it is unnecessary for him to pay court-fee upon a claim for recovery of possession. He need not do so even if the defendants deny his title. *Kirty Churn Mitter* v. *Annath Nath Deb* (1) and *Rajani Kanta Bag* v. *Rajabala Dasi* (2), referred to.

Where the plaintiff had claimed unnecessary relief such as declaration of title and injunction in a partition suit, is it open to him on appeal to confine his relief to the proper reliefs and to pay court-fee on such relief alone.

Messrs. *Panchanan Ghose* and *Hira Lal Ganguly*, for the Appellant.

Messrs. *Sarat Chunder Basak* and *Nasim Ali*, for the Government.

Judgment—In this case, the plaintiff brought his suit alleging that he and defendant No. 1 were brothers. As regards the property Sch I it was alleged that that was their ancestral property and that the two brothers were in possession thereof in equal shares. That property was said to be of the market value of some Rs. 16,000. As regards Sch. II property the plaintiff's case was that it was acquired by the joint family fund when defendant No. 1 was the *karta*. This appears to be a residential house in the suburbs of Calcutta and its value is put down as Rs. 84,000. The plaintiff's case is that he had been actually living in that house when the events which I am about to mention happened. He says that defendant No. 1 mortgaged the whole of Sch. II property - I omit all reference to the property of Sch. I—to defendants Nos. 2 to 4 on the footing that defendant No. 1 was the sole owner of the house and he also executed a subsequent encumbrance in favour of defendant No 5.

The first mortgagees brought a suit to which defendant No. 5 was made a party and got a mortgage decree for sale and, in the mortgage sale, the property was purchased by defendant No. 6 brother of defendant No. 5. Now, when the plaintiff brought his suit, he alleged that these mortgages by defendant No. 1 were all fraudulent—apparently fraudulent—on the part of the mortgagor and the mortgagees, and he said that the suit and the execution sale and everything else he could think of were fraudulent. He further alleged that the sale in execution had thrown a cloud upon his title and that he was threatened with being evicted from possession of the house by process under the mortgage sale; and, as is usually the case in the *mofussil* he asked for various forms of relief, particulary, declaration of title and permanent injunction restraining the mortgagee defendants from taking possession of the plaintiff's share. That suit has been dealt with by the trial Court. As regards Sch. I property, the trial Court has declared the plaintiff's title to an eight annas share and has decreed that the plaintiff is to get possession of it after partition. So far as that part of the decree is concerned, the plaintiff makes no complaint at all

As regards Sch. II property, the plaintiff's claim has been simply dismissed and the plaintiff brings this appeal. The appeal is clearly concerned only with Sch. I property. The grounds mentioned in the body of the memorandum of appeal are all grounds concerning the question whether this Sch. II property was really joint property in which the plaintiff had an interest or was the sole property of defendant No. 1 But, under the cause title, the plaintiff put the following;—

"Appeal valued at Rs. 100,000 for declaration of title and partition and at Rs. 100 for injunction."

Accordingly the Stamp Reporter and the learned Registrar have been occasioned a great deal of difficulty in finding out the proper court-fee payable on this appeal. Before me the learned Advocate for the appellant very clearly says that it would be quite sufficient for his purpose to get a decree for partition in respect of Sch. II property. It matters nothing to him, he says whether defendant No. 1 has or has not validly parted with his own half-share. Defendant No. 1 and also defendant No. 6 are parties to this suit. Declaration of title is a pure empty thing in the circumstances and a claim for injunction is a pure empty claim and the learned Advocate comes in with the suggestion that if this appeal is limited to a complaint against the decree of the Court below only in so far as it refuses to the plaintiff partition of Sch. II property it seems perfectly clear that the court-fee already paid is sufficient. I have therefore to see whether there is any objection to the appellant having leave to amend his memorandum of appeal and taking the course which he proposes.

Now, if this were a case in which the plaintiff was according to his own showing out of possession I do not suppose that it would be right to allow him to appeal merely upon the question of partition. A person is not entitled to partition unless and until he is in possession of his share. But, if he is out of possession of his share, the Court does not require him to bring two suits. He can bring a suit in which he may claim to recover possession of his share and he may also claim to have that share partitioned by the same decree. If it appears that he is out of possession according to his own showing then he has to bring a suit to get possession of his share; and it is perfectly true that, in that case he would have to pay court fee on the market value of that share. It is not a question of declaration or declaration with consequential relief. He would have to pay court-fee as in a suit for possession. That I take to be the meaning of what was said by Garth, C. J., in the case of *Kirty Churn Mitter* v. *Annath Nath Deb* (1) and also by Chakravarti, J., in *Rajani Kanta Bag* v. *Rajabala Dasi* (2).

In the latter case the principle applicable seems to be laid down with great clearness. The present case, in my judgment, is a case where the plaintiff is now claiming partition of a residential house on the footing that he is actually sitting there and living there and has been doing so for some time. That being so it is entirely unnecessary to make him pay court-fee upon a claim to recover possession. In my judgment, it a clean case of partition and is not converted into a case of claim to possession because the defendant brother or the defendant mortgagees went to set up that the house is not joint property and that the plaintiff has no title to it. It is quite true that these considerations would not be applicable to a plaint drawn as this plaint was drawn because whatever reliefs the plaintiff required to ask for he did ask for various reliefs declaration, injunction and so forth. But when the case is disposed of and he comes before the Court again as an appellant, he is not obliged to appeal against any part of the decree that he does not want to appeal against and, in my judgment he is quite entitled to say in this appeal:—

"I made all sorts of unnecessary claims (they may be wrong claims) in the Court below; but one claim of mine was right namely; that I was entitled to partition and I shall confine my appeal to that.

The learned Advocate for the appellant taking that view and being willing to confine his appeal purely to the question whether or not he is entitled to partition, I am of opinion that he ought to be allowed to do so and on the memorandum of appeal being amended in the sense which I have referred to, it is quite clear that the Court-fee already paid is sufficient. That is the order which I propose to make upon this matter.

A. *Order accordingly.*

(1) 8 C. 757; 11 C. L. R. 95.
(2) 85 Ind. Cas. 870; A. I. R. 1925 Cal. 320; 52 C. 128; 29 C. W. N. 76.

CALCUTTA HIGH COURT.

Civil Appeal No. 2568 of 1929.
April 23, 1931.

RANKIN, C. J. AND PEARSON, J.

RAM CHARAN TRIPATHI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MADAN MOHAN JANA AND OTHERS—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3, s. 184—Suit for ejectment—Plea of special limitation—Onus of proof—Lease—Construction—*Raiyati *holding—Burden of proof—*Bhag chashis, *status of.*

Where the plea of special limitation under the Bengal Tenancy Act has been on the record from a comparatively early stage and the matter has been

investigated, the Appellate Court should not set aside the question merely on the ground that it was not pleaded so early as it ought to have been. [p. 602, col. 2.]

A lease of 99 *bighas* of land was given to a *Brahman* pensioner; the *patta* was both *mourasi* and *mokarrari*; the landlord took a *salami* of one thousand rupees; no rent was payable for the first year and for some years rent was payable on an increasing scale; about 20 *bighas* were cultivated by the tenants themselves and about 75 *bighas* were cultivated by *bhagchashis*. The lease provided as follows: 'You go on enjoying and possessing the said land by dwelling on the same, by cultivating it, by planting trees etc., by cutting them down, by excavating tanks, by erecting *pucca* buildings etc., generation after generation with power to transfer by gift, sale etc.': *Held*, that the lease was not a *rayati* lease. [p. 603, col. 2.]

In a suit by the plaintiffs for possession of land on the allegation that they are lessees and that they had been dispossessed by the defendants landlords the burden of making out the plea of special limitation is on the defendant. [p. 602, col. 2.]

A *bhag chashi* is a person somewhere between a hired servant and a partner in those cases, at all events, where he has not been given an interest in the land so as to make him a tenant. [p. 604, col. 1.]

Appeal against the appellate decree of the District Judge, 24-Parganas, dated the 3rd May, 1929.

Mr. *Brojo Lal Chuckerburtty* (with him Mr. *Nasim Ali*), for the Appellants.

Messrs. *S. C. Maity* (with him Messrs. *Apurba Churn Mukherji*, *Saroj Kumar Maity* and *Biraj Mohan Majumdar*), for the Respondent.

Rankin, C. J.—In this case, the plaintiffs brought a suit upon the basis that in 1909, defendant No. 1 gave a lease to their father of some 99 *bighas* of land in the Sunderbuns and that in 1917, after the plaintiffs' father had died, defendant No. 1 dispossessed the plaintiffs from this land so far as regards 50 *bighas* of it and in 1920 leased out the same again to defendant No. 2. The suit was brought in 1927 and it has engaged the attention of several Courts: but the actual position at which it has now arrived is that it has been found upon a local inquiry that a quantity of land which was taken possession of by defendant No. 2 in 1920 did belong to the land let out to the p laintiffs' father.

When the matter came before the learned Subordinate Judge on the last occasion, the main point for his determination was whether the suit on that footing was barred by the special limitation provided by the schedule to the Bengal Tenancy Act. That question depends upon whether or not the plaintiffs are *raiyats* under the lease which their father obtained in 1909. The Subordinate Judge was for the defendants to make out their plea of special limitation and he held, upon a consideration of the *patta* and of the incidents of the transaction, that he was not satisfied that the defendants had shown that the plaintiffs were *raiyats*. Accordingly he held that the suit was within time and decreed it.

On first appeal before the learned District Judge of the 24 Parganas, the learned Judge pointed out that the only question apart from the question of the *quantum* of damages was whether it was open to the defendants to take the plea of special limitation and he considered the question whether or not under the *patta* the plaintiffs were *raiyats*. He came to the conclusion that the lease was a *raiyati* lease because it granted a right to hold the land for purposes of cultivation and, on that basis, he gave effect to the plea of special limitation and dismissed the plaintiffs' suit.

We have in this appeal been invited to hold, first of all, that the plea of special limitation is not open to the defendants. On this point it appears to me that the learned District Judge was entirely right in view of the express terms of the Bengal Tenancy Act. It does not seem to me to be possible to say that with the matter investigated, as it has been investigated, it would be open to this Court under s. 184 to shut its eyes to the question of limitation merely on the ground that it was not pleaded so early as it ought to have been. In addition to that fact the plea of special limitation has been on the record though not from the beginning from a comparatively early stage and I have no doubt at all that that plea of limitation must be dealt with.

The question is whether the learned District Judge was right or wrong in holding that the plaintiffs' father took a *raiyati* lease. The terms of the *patta* are before us and it may be observed, to begin with, that the tenant Ananta Ram Tripathi was a *Brahmin* and a pensionholder residing in Midnapur. The *patta* is both *maurasi* and *mukarrari*. It recites that the condition of the land is that jungles have been cut and embankments have been made, that the embankments require to be maintained and that there is a good deal of underwood or bushes which require to be cleared. The lease is not in the full sense a reclamation lease because the rough work of reclamation has

a good deal to do before the land was fit for ordinary purposes of cultivation. We notice that the amount of land is 99 *bighas*, that the landlord took a *selami* of Rs. 1,000 and it was provided that the rent should not be payable at all for the first year and that for some years after that the rent should be on an increasing scale. There was a provision as to road-cess etc., which I do not lay any great stress upon and it was provided that, if the tenant did not maintain the *bund* and clear the small bushes and the landlord or other tenants of his sustained any loss the lessee was to be responsible for the same. The main clause of the *patta*, however, according to the translation with which we have been furnished by the learned Advocate for the appellants is this:

"You go on enjoying and possessing the said land by dwelling on the same, by cultivating it, by planting trees etc., by cutting them down, by excavating tanks, by erecting pucca buildings etc., generation after generation with power to transfer by gift, sale etc."

There is a provision that, if the land or any part of it is compulsorily acquired by Government, the tenant is to get 10 annas and the landlord 6 annas share of the compensation money. There is also a provision to say that the landlord maintains the right to minerals and a provision preventing the tenant from setting up any market, *ghat* and so on. These are the circumstances which are to be found in the document itself.

Apart from the circumstances disclosed by the document the position is fairly clear. It seems that some 20 *bighas* or so have been cultivated by the tenants themselves and that the bulk of it, 75 *bighas* have been cultivated by *bhag chashis*. It does not seem as one would expect that the plaintiffs or their father settled tenants upon the land in the sense that people who came there made their living out of that land and settled on it and took an interest in the land. What seems to have happened is that cultivators having some land of their own in the neighbourhood were given some more land by the plaintiffs and they cultivated some of the plaintiffs' land at different periods and gave the plaintiffs a share in the profits. The question is not an easy one in these circumstances to decide and we thought it fair to take time to have it examined in order that the Court might carefully look at the decided cases and consider the various elements which required to be considered.

In this case there are good many elements which tell against the plaintiffs being *raiyats*. Without going outside of what is said by the decided cases and even by the Privy Council, we have the fact that the lessee was a pension-holder, a *Brahmin* and a resident of Midnapur. We find that he paid a *selami* of Rs. 1,000. Of course a *raiyati* may be *mukarrari*. On the other hand in this case he took a permanent lease on fixed terms with the very largest right in the property. The clause which refers to cultivation also refers to dwelling houses being built, tanks being excavated and interest granted from generation to generation with power to transfer by gift or sale. While the lease is not a reclamation lease still it is a lease of land which is in a somewhat primitive condition. In one year, there is not to be any rent and the rent is to be graduated after that.

Now the learned District Judge on reading the main clause says: 'It grants a right to hold the land for the purpose of cultivation." But the learned Judge does not seem to have applied his mind to the real question under s. 5, Bengal Tenancy Act. There can be no doubt that the purpose of the tenancy was cultivation. The question is whether it was cultivation by the tenant himself or by the members of his family or hired servants or with the aid of partners or whether the method to be employed to bring it into cultivation was that the plaintiffs' father should let it out by establishing tenants on the land. In my judgment it would be wrong to read the main clause in the lease as showing that the primary object of this grant was that it was to be cultivated by the grantee himself or his family or hired servants. The clause is really directed to give to the grantee the largest rights; the right to erect dwelling houses, cultivate, excavate tanks and so on. In my opinion it was left entirely to the discretion of the grantee whether he would cultivate it himself or whether he would let it out to tenants. It must here be observed that while the presumption under cl. (5), s. 5, Bengal Tenancy Act does not arise in the sense that where the holding is under 100 *bighas* there is no presumption that it is a *raiyati* interest, nevertheless we do know that where the holding is over 100 *bighas* there is a presumption that it is a tenure because so large a holding as that it is not practicable to work by the tenant himself or his

family or servants. In the present case, the holding is 99 *bighas* and it hardly seems convincing to suggest that a pension holder from Midnapur is intending to cultivate 99 *bighas* by himself or his family or hired servants. In the case of *Secretary of State* v. *Govind Prasad Barik* (1), both Fletcher and Teunon, JJ., pointedly observed that *bagh-chashis* were no hired servants. I think that too much might be made of this point as the definition of a *raiyat* is not absolutely exhaustive and a *bagh-chashi* is a person somewhere between a hired servant and a partner in those cases, at all events, where he has not been given an interest in the land so as to make him a tenant. But the economic meaning of the transaction which we are discussing is not, it seems to me, that this Sunderbuns land was to be occupied by the grantee or his family or servants. The point is that such land was hardly in a condition that a tenant could make a living by it to begin with. Very probably there was not a supply of land less labourers on the spot but there were people with a certain amount of land of their own who could do with more land if they could get it. Accordingly we find that the plaintiffs' father being able to pay a *selami* of Rs. 1,000 fulfilled the function of a very useful middleman because he got a right to these 99 *bighas* and proceeded to give a certain amount of these lands to each of a number of cultivators on the footing that they were *bhag-chashis* and in that way the cultivators got more land than they would be able to get otherwise for their own cultivation. We have here to remember that it was for the defendants who wanted to defeat the plaintiffs' claim to recover a large quantity of land which the defendants had taken from them to satisfy us that the plaintiffs were *raiyats*. That is laid down in the case of 11 Ind. Cas. 164 *Tara Nath* v. *Iswar Chundar Das* (2). In my opinion the true result upon this document and upon the facts disclosed in the evidence is that it is not made out that the holding was a *raiyati* holding. In this view it appears to me that this appeal ought to be allowed, the decree of the learned District Judge should be set aside and the decree of the Subordinate Judge ought to be restored with costs before the District Judge and of this appeal.

Pearson, J.—I agree.

Appeal allowed.

(1) 39 Ind. Cas. 934; 21 C. W. N. 505.

(2) 11 Ind. Cas. 164; 14 C. L. J. 598; 16 C. W. N. 398.

CALCUTTA HIGH COURT.

CIVIL Appeal No. 2481 of 1929.

January 27, 1931

PEARSON AND JACK, JJ.

PRIYANATH CHAKRAVARTY —APPELLANT

versus

KALICHARAN CHAKRAVARTY —RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Jurisdiction of Court—Prior adjudication by Munsif—Same property claimed along with others in later suit—Valuation of suit—Competency of former Court to try subsequent suit—Tests.

The plaintiff sued in the Court of the Subordinate Judge to recover one-half of certain lands by inheritance from *U* and the other by inheritance from *S* and also by adverse possession. The suit was valued at Rs. 2,100. It appeared that as regards the claim against *S* there had been a prior adjudication by the Munsif regarding two of the plots which were valued at more than Rs. 50:

Held, (*i*) that to decide whether the Munsif was entitled to try the later suit, only the value of that half which was claimed under the same cause of action, namely inheritance from *S*, had to be considered; [p. 605, col. 1.]

(*ii*) that from the value of this one-half, *viz.*, Rs. 1,050, the value of the two plots (which exceeded Rs. 50) must be deducted and the suit would therefore, came within the jurisdiction of the Munsif and was barred by *res judicata*. *Drupad Chandra Nashkar* v. *Bindumoyi Dasi* (1), followed, *Shibo Kant* v. *Baban Kant* (2), distinguished, *Bhugmanpati* v. *H. Forbes* (3), referred to. [p. 605, col. 2.]

Messrs. *Braja Lal Chakravarty* and *Hira Lal Chakravarty*, for the Appellants.

Messrs. *Gopendra Nath Das* and *Pashupati Ghose*, for the Respondent.

Jack, J.—This appeal has arisen out of a suit for possession of certain lands on a declaration of the plaintiff's title thereto and for mesne profits. The suit was dismissed in the Court of first instance on the ground of *res judicata* but was decreed in the lower Appellate Court on the finding that the suit is not barred by the principle of *res judicata* and that the plaintiff's title to the disputed portion of the land in suit was established by adverse possession.

In this appeal it is urged that the suit is barred by the principle of *res judicata* and that the learned Officiating Additional District Judge was wrong in holding that the suit is not so barred on the ground that the Munsif who tried the previous suit was not entitled to try the present suit. The present suit is valued at Rs. 2,100. This valuation includes Rs. 500 claimed as mesne profits the lands claimed being valued at Rs. 1,600. Now it appears that half of the lands are claimed by inheritance from Uma Charan, grandson of Raj Narain; whereas

the other half is claimed by inheritance from Sashi Bhusan, another grandson of Raj Narain and also by adverse possession as against his widow. There being different causes of action as regards these two halves of the lands in suit, in deciding whether the Munsif was entitled to try the present suit we have only to consider that portion which is claimed under the same causes of action, namely, inheritance from Sashi Bhusan and adverse possession as against his widow. A sum of Rs. 800 represents the value of the lands of this portion and this taken with a sum of Rs. 250 which represents the claim for mesne profits of these lands makes the value of the suit Rs. 1,050. But as regards two plots included within this land, namely, plots Nos. 148 and 842, the plaintiff's claim had already been the subject-matter of the previous suit and on the authority of *Drupad Chandra Naskhar* v. *Bindumoyi Dasi* (1) these plots should be excluded from the present suit, the previous suit as regards these two plots being between the same parties and the causes of action being the same. These two plots and another plot, namely plot No. 119 were valued in that suit at Rs. 100 and the value of plots Nos. 148 and 842 would be more than Rs. 50. Deducting the value of these plots from Rs. 1,050 the value of the land in suit would come to less than Rs. 1,000 and the suit would therefore come within the jurisdiction of the Munsif. In this view the Munsif who tried the previous suit might have also tried the subsequent suit and therefore the decision of the previous suit was *res judicata* as regards the present suit.

The case of *Shibo Kant* v *Baban Kant* (2) on which the lower Appellate Court relies in holding that the two plots should not be excluded from the present suit is distinguishable inasmuch as that suit was held, not on valuation but on other grounds, to be beyond the Munsif's jurisdiction, and there the plaintiff in the second suit was a defendant in the first suit while in this case the plaintiff in both suits was the same person. In that case also the decision that the land should not be excluded was made under peculiar circumstances: the learned Judge states that he might have omitted the land which was the subject-matter of action before the Munsif and it might be argued that it was not land that the plaintiff was entitled to claim. But this argument was not of sufficient force to induce him to extend the principles of the decision in *Bhugwanpati* v. *H Forbes* (3) to a case the facts of which differed so essentially. I think therefore that the lower Appellate Court was wrong in not accepting the decision of the case reported as *Drupad Chandra* v. *Bindumoyi Dasi* (1) and in not excluding these plots in the calculation of the value of the present suit. In the previous suit it was decided that Debnath defendant No. 9 is a first cousin of Sashi Bhusan and the owner of the two annas share which the plaintiff has claimed by inheritance from Sashi Bhusan. The contesting defendant No. 4 claims by purchase from Debnath.

It was decided in that suit on the question of adverse possession that the adverse possession of the plaintiff Kali Charan began only from the date of the death of the widow of Sashi Bhusan which occurred within 12 years of the suit, namely, in 1318. This decision as regards adverse possession is also *res judicata* in the present suit.

Another point raised is that as regards the remaining share of the lands in suit claimed by inheritance from Gange Jiban the plaintiff's title was not disputed. On this point the lower Appellate Court has found in favour of the defendants inasmuch as defendant No. 4 states in his evidence that he is in possession of two annas 17½ *gandas* share by virtue of his purchase, that share being included in the purchase deed. Sashi had only two annas share so that a portion of the plaintiff's share was claimed by defendants. In the plaint also the plaintiff stated that the defendants were obstructing the realization of rent from the tenants holding at a money rent in respect of schedule *ka* (2) share. On this point the lower Appellate Court seems to be correct. The plaintiff had cause of action also as regards this portion of the claim. But his claim by inheritance and adverse possession of the land of schedule *ka* (1) of the plaint must fail on the ground of *res judicata*.

The result is that the decree of the Court of Appeal below as regards the land of schedule *ka* (1) of the plaint is set aside and this portion of the claim is dismissed. The plaintiff's suit is decreed as regards the lands of schedule *ka* (2) of the plaint. He will get half his costs throughout with interest at the rate of six per cent. per annum and his possession of the lands described in schedule *ka* (2) of the plaint will be confirmed.

Pearson, J.—I agree.

A. *Decree modified.*

(1) 97 Ind. Cas. 209; A. I. R. 1926 Cal. 1053; 43 C. L. J. 606.

(2) 35 C. 353; 12 C. W. N 359.

(3) 28 C. 78; 5 C. W. N. 483.

CALCUTTA HIGH COURT.

Civil Appeal No. 2277 of 1929.

June 9, 1931.

SUHRAWARDY AND GRAHAM, JJ.

GOSTA BEHARI PRAMANIK AND OTHERS —DEFENDANTS—APPELLANTS

versus

NAWAB BAHADUR OF MURSHIDABAD —PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 109—Whether retrospective—Applicability to pending suits—Interpretation of Statutes—Retrospective effect—Right of suit, whether vested right.

Section 109, Bengal Tenancy Act, does not relate to a mere matter of procedure but confers a substantive right and the amendment introduced to the said section by Act IV of 1928, has no restrospective operation. The amended section is not therefore applicable to suits instituted before the amendment came into force. *Purna Chandra* v. *Narendra Nath* (1), *Raja Rishee Case Law* v. *Satish Chandra Pal* (2), *Sardar Ali* v. *Dalimuddin* (3), *Delhi Cloth & General Mills Co. Limited* v. *Income-tax Commissioner Delhi* (4) and *Colonial Sugar Refining Co. Ltd.* v. *Irving* (5), referred to.

Appeal against the appellate decree of the District Judge, Murshidabad, dated the 21st March 1929.

Mr. *Gopendra Nath Das*, for the Appellants.

Mr. *Suresh Chandra Mukherji*, for the Respondent.

Suhrawardy, J—The only question of importance to be determined in this case is whether s. 109, Bengal Tenancy Act, before its amendment bars the plaintiff's suit or whether the section as amended in 1928 has retrospectively removed the bar. There were other questions raised, such as limitation, which have all been decided in favour of the plaintiff by the Court of appeal below. The trial Court found two main issues against the plaintiff and held that the suit was barred by limitation and also by the operation of s. 109 before its amendment.

The suit was instituted on 14th April 1927. The decision of the first Court was pronounced on 16th April 1928. The amended Bengal Tenancy Act came into force on 21st February 1929 and the judgment of the lower Appellate Court was delivered on 21st March 1929, that is, after the new Act came into operation. The decision of the trial Court was undoubtedly correct according to the law as it stood at the date it was pronounced. The learned District Judge is of opinion that as s. 109 which relates to a matter of procedure only has since been amended, the law as it stood when he gave his decision should apply.

It appears that the defendant was recorded in the Record of Rights as a tenant under the plaintiff and his tenancy was recorded as "no rent paid, liable to assessment of rent." In 1918 the plaintiff applied under s. 105, Bengal Tenancy Act, for settlement of fair and equitable rent payable by the defendant in respect of the land held by him. Soon after he withdrew the application with liberty to bring a fresh suit. On these facts the trial Court on the authority of the Full Bench decision in *Purna Chandra* v. *Narendra Nath* (1) and also the decision of the Privy Council in *Raja Rishee Case Law* v. *Satish Chandra Pal* (2), held that the present suit could not be maintained. The learned District Judge on appeal holds that s. 109 relates to a matter of procedure only, and according to the well-known canon of interpretation of statute relating to procedure only, applies to all proceedings pending at the time when it comes into force. Section 109 as amended by the Act of 1928 entitles the landlord to maintain a suit in the ordinary Civil Court even if his application under s. 105 has failed provided it has not been decided on the merits. The learned Judge admits that if the new law has no retrospective effect or does not apply to pending proceedings he is bound to follow the Full Bench decision. But he is of opinion that though the amended section does not say that it will function retrospectively there can be no objection to allowing this point of procedure to be decided by the new law. In my judgment this view of the law is not correct It is not necessary to go in detail into the rule of interpretation of Statutes relating to the matter in issue which is to be found in Maxwell's Interpretation of Statutes, Edn. 7, pages 192 and 197.

The matter has been fully threshed out in the Special Bench decision in *Sardar Ali* v. *Dalimuddin* (3). There the question was whether the amended Letters Patent, which took away the right of appeal from the judgment of a single Judge of this Court except with the permission of the Judge had retrospective effect and should be applied to suits instituted before the amendment of the Letters Patent It was held that the law applicable with regard to the right of appeal was the law which was in force at the time when the suit was instituted. But it may be argued in this case that the position here is just the reverse. At the time

(1) 88 Ind. Cas. 637; A. I. R. 1925 Cal. 845; 52 C. 894; 41 C. L. J. 456; 29 C. W. N. 755.

(2) 116 Ind. Cas. 396; A. I R. 1929 P. C. 134; 56 I. A. 179; 57 C. 118; 33 C. W. N 705; 57 M. L. J. 43; 30 L. W. 279; 10 P. L. T. 871 (P.C.).

(3) 113 Ind. Cas. 49; A. I. R. 1928 Cal. 640; 56 C. 512; 48 C. L. J. 150; 22 C. W. N. 1130 (S. B.).

when the present suit was instituted the plaintiff had no right to bring a civil suit; but when the matter came up for consideration before the lower Appellate Court he had been given such a right by change in the law. Such a question too is covered by the decision of the Judicial Committee in *Delhi Cloth and General Mills Co. Ltd.* v. *Income tax Commissioner, Delhi* (4), where no right of appeal to His Majesty in Council existed under s. 66, Income-Tax Act, when the proceedings were instituted, but such right of appeal to England was given by subsequent amendment of the Income Tax Act. The Judicial Committee relying upon the decision in the case of the *Colonial Sugar Refining Co. Ltd.* v *Irvin* (5), held that the right of appeal is a substantive right and if it is given or taken away by subsequent amendment of the law the law as it stood at the initiation of the proceedings will apply.

The question therefore that falls for consideration is whether the provision of s. 109, Bengal Tenancy Act as it stood before its amendment related to procedure only or conferred in certain circumstances a substantive right to the other party. There seems hardly room for doubt that s. 109 did not merely lay down the procedure but by taking away the ordinary right of suit of the plaintiff conferred a very valuable right on the defendant in some cases. The immunity from a civil suit thus gained by the defendant is a substantive right inasmuch as it enabled him to hold the property in the right mentioned in the Record of Rights without further litigation. In essence it is difficult to distinguish such a right from a right of appeal. If no right of appeal is given by Statute at the date of the suit the successful party acquires a certain right under the decision of the suit which is not open to challenge in appeal. In a case under s. 109 of the old Act where an application is made and withdrawn the defendant obtains the right to hold the property as recorded in the Record of Rights without further risk of litigation. I accordingly hold that the right which the defendant in this case obtained under s. 109 of the old Act is a substantive right which cannot be affected except by express words by subsequent alteration of the law. This view seems to be in accordance with s. 8 (*a*), General Clauses Act X of 1897 and s. 6 (*a*), Bengal General Clauses Act, 1896. The result is no doubt unfortunate and the plaintiff is not so much to blame for it as the conflicting decision of this Court on the question, but the result is inevitable and the only relief I can give to the plaintiff in this suit is not to allow any costs to the defendant.

In the result the appeal is allowed. The judgment and decree of the lower Appellate Court are set aside and those of the Court of first instance restored.

Each party to bear its own costs throughout.

Graham, J.—I agree. In my judgment s. 109, Bengal Tenancy Act, as it stood before the amendment of 1928, was applicable to the case and operated as a bar to the present suit. I am also of opinion that the learned District Judge erred in holding that the matter related to one of procedure only.

A. *Appeal allowed.*

(4) 106 Ind. Cas. 156; A. I. R. 1927 P. C. 242; 54 I. A. 421; 4 O. W. N. 1053; 8 P. L. T. 791; 25 A. L. J. 964; 53 M. L. J. 819; 47 C. L. J. 1; 30 Bom. L. R. 60; I. L. T. 40 Lah. 1; 32 C. W. N. 237; 29 P. L. R. 37; (1928) M. W. N. 25; 27 L. W. 179; 9 L. 284.

(5) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 21 T. L. R. 513.

CALCUTTA HIGH COURT.

Civil Appeal No. 786 of 1929.

February 3, 1931.

MITTER, J.

DIGAMBAR DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BEPIN BEHARI RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Lease—Duration—Lease for residential purposes, whether terminates on death of lessee.

Where a lease is given for residential purposes, in the absence of an intention to the contrary, the leasehold interest must be regarded as heritable and the lease does not terminate on the death of the lessee. *Kisorilal Roy* v. *Kishna Kamini* (1) and *arilal Singha* v. *Rupa Manjari Barman* (2), referred to. [p. 608, col. 1.]

Appeal against the appellate decree of the District Judge, Khulna, dated the 29th September 1928.

Mr. *Bijan Kumar Mukherji* (with him Mr. *Rajendra Nath Das*), for the Appellants.

Mr. *Brojo Lal Chakravarti* (with him Messrs. *Hemendra Chandra Sen*, *Jitendra Nath Roy* and *Nakuleswar Some*), for the Respondents.

Judgment—This appeal is on behalf of the plaintiffs and arises out of a suit in ejectment. The plaintiffs' case is that they have got a *raiyati* interest in the lands in dispute; that the father of Radha Nath Sardar held it as an *under raiyat* under the plaintiffs and that he Radha Nath, died in *Aswin* 1326 B. S. It is also said that the huts which were on the land fell down in the cyclone in the year 1326 B. S. and that as the under-*raiyati* interest of Radha

Nath is not heritable under the law, defendant No. 8 has no right to retain possession of the same. The plaintiffs have, therefore, acquired right to enter into possession. The plaintiffs went to take possession of the land in *Baisak* 1330 B. S. when they were resisted not only by defendant No. 8 but also by defendants Nos. 1 to 7. Hence the present suit. Defendants Nos. 1, 2 and 8 filed separate written statements, that is, defendants. Nos land 2 filed one written statement and defendant No 8 filed another. The defence of defendant No. 8 is substantially this that the land in dispute formed the homestead of Radha Nath and that as Radha Nath is a *raiyat* of village Sarai where the lands in dispute are situate with respect to other lands he has acquired the right to resist eviction having regard to the provisions of s 192, Bengal Tenancy Act. It is further said that having regard to the terms of the lease by which this tenancy was created defendant No. 8 certainly had a heritable interest in the disputed land and consequently the suit must fail. Defendants Nos. 1 and 2 by their separate written defence raised the same contention. The Munsif accepted the defendants' defence so far as it was based under the provisions of s. 182 Bengal Tenancy Act. He also accepted the other defences that under the terms of the instrument under which the tenancy is held it was heritable. In this view the Munsif dismissed the plaintiffs' suit.

Against this decision an appeal was taken to the Court of the District Judge of Khulna The learned District Judge agreed with the Munsif on the question that the tenancy was heritable and that it was governed by the provisions of the Transfer of Property Act, but disagreed with the Munsif on the question namely, that the defendant was not entitled to fall back on the provisions of s. 182, Bengal Tenancy Act seeing that on the evidence the District Judge was not satisfied that defendant No. 8 held some other lands in village Sarai as a *raiyat* or in other words, that it was not established to his satisfaction that Radha Nath was a settled *raiyat* of of the village with reference to the other lands in the village Sarai.

Against the decision of the District Judge affirming that of the Munsif the present appeal has been brought and it has been contended by Dr. Mukherjee who appears for the appellant that from the terms of the *kabuliyat* it would appear that the lease was given to Radha Nath and in the absence of any term in the instrument it must be regarded that it enured during the lifetime of Radha Nath and that with the death of Radha Nath the *kabuliyat* spent its force. Consequently the plaintiff was entitled to recover possession. The terms of the lease are set forth in substance in the judgment of the learned District Judge at page 10 of the paper book. Therefrom it will appear that the lease was given for residential purposes. That being so it appears on the authorities which have been relied on by the District Judge and which have also been cited by Mr. Brojo Lal Chakrabarty for the respondent before me that in the absence of an intention to the contrary the lease-hold interest must be regarded as heritable. Reference may be made in this connexion to the decision in the cases of *Kiserilal Roy* v. *Kishna Kamini* (1) and *Harilal Singha* v. *Rupa Manjari Barman* (2). These cases which have been placed before me undoubtedly support the contention of the respondents and also support the view taken by the learned District Judge in this behalf. The appeal therefore should fail on this ground. It has been argued for the respondent that this Court should not rest its decision on the other finding which has been arrived at by the District Judge with reference to the applicability of s 182, Bengal Tenancy Act. I am unable to agree with this contention. The learned District Judge has analyzed the evidence and he has come to the conclusion on the findings that he is not satisfied that Radha Nath or his successor held as a *raiyat* under the Malik Nur Mahmud. He has considered the evidence of the plaintiff and also the evidence of D. W. 6 and has come to the conclusion on the question of fact as to whether the *raiyati* interest of Radhanath under Nur Mahmud has been established or not. He has found that all that appears from the evidence is that Radha Nath had a *karsa* right in the land and the witness who speaks about the *karsa* right meant a right held under a *kaimi* right. The *dakhilas* are also not conclusive on this question. In these circumstances I think that the decision cannot be rested only on the ground that the interest of Radha Nath was heritable.

The result is that the appeal fails and must be dismissed with costs.

A. *Appeal dismissed.*

(1) 5 Ind. Cas. 500; 37 C. 377; 11 C. L. J. 401.
(2) 15 Ind. Cas. 137; 17 C. L. J. 459.

ALLAHABAD HIGH COURT.
FULL BENCH.

Civil Revision No. 359 of 1929.

July 9, 1931.

SULAIMAN, ACTG. C. J., BOYS AND MUKERJI, JJ.

RAM BHAROSE—APPLICANT

versus

GANGA SINGH—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), s 17 —Application for setting aside ex parte *decree accompanied by security—Court not directing particular kind of security but issuing notice to other party—Application valid—Civil Procedure Code (Act V of 1908), O. V, r. 20—'Duly served,' meaning of—Substituted service, defendant's right to challenge propriety of—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 164.*

Where a person against whom an *ex parte* decree has been passed by a Court of Small Causes, without formally applying for the court's direction as to the nature of security to be furnished applies to such court for setting aside the *ex parte* decree and furnishes security with it and the court directs a notice to issue to the other party the court must be taken to have directed the applicant to furnish security of the kind actually furnished by him. [p. 612, cols. 1 & 2.]

The provisions of s. 17, Provincial Small Cause Courts Act, are not merely directory but imperative and mandatory. [p. 615, col. 1.]

The rule that substituted service is to be taken to be as effectual as personal service only means that the court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. Therefore, when an order for substituted service is made by a court on the representation of plaintiff, it is open to the defendant when he makes an application for setting aside *ex parte* decree to challenge the propriety of the order and to show that the method employed was not calculated to effect the purpose, namely of informing the defendant of the institution of the suit If the court having regard to all the circumstances of the case comes to the conclusion that there was no due service, limitation would be computed from the date of applicant's knowledge of the decree. [*ibid*]

Civil Revision against a decree of the Munsif of Kanauj, at Farrukhabad, dated the 19th October, 1929.

On 28th April 1931, Bajpai, J., made the following

Order of Reference to a Full Bench.—This is an application in revision against an order of a Small Cause Court Judge, dated the 19th of October, 1929, restoring a case which was decreed *ex parte*.

The order of the court below against which this revision is directed has not been placed upon my paper-book, and I direct that a copy of the said order should be placed upon the paper-book.

It appears that on the 31st of July an *ex parte* decree was passed against the defendant. Attempts had been made to effect personal service, but they were evidently infructuous, and in the last instance service by publication in a local newspaper was ordered. Some time in 1929 the defendant applied to the court below for setting aside the *ex parte* decree on the ground that he had no notice whatsoever of the suit, and he came to know of the decree only four days back when execution was levied The application was accompanied by an affidavit and by a surety bond. On the 19th of October, 1929, when this application came for hearing, the learned Judge of the court below was of the opinion that the security was sufficient for the decretal amount and that the ends of justice required that the case should be disposed of on the merits. As I said in the beginning, the present application in revision is directed against this order, and the points raised are that the provisions of s. 17 of the Small Cause Courts Act have not been satisfied and that substituted service in law being sufficient service, the learned Judge had no jurisdiction after three years to set aside the decree These two points have been developed in argument before me. It is stated that it is necessary to obtain the direction of the Small Cause Court Judge before filing a security bond as to whether such a security bond would be accepted or not, and a failure to obtain such a direction is fatal to the application for setting aside the *ex parte* decree, and in support of that contention the case of *Jhabboo Misir* v. *Hawaldar Tewari* (1) is cited before me. The learned Judges, who decided that case, although they are not agreed on all the points, are undoubtedly agreed upon one thing, *viz.*, that when anything but cash deposit is sought to be put in, the direction of the court must be obtained previously, and Mr. Justice Niamat Ullah at the end of his judgment says that an omission to obtain such direction is fatal to the success of the application. Upon the basis of this observation it is argued before me that inasmuch as there was no application for any such direction before the security bond was filed, the court below had absolutely no jurisdiction to set aside the *ex parte* decree. On the other hand, it is argued by the opposite party that failure to obtain such a direction does not necessarily oust the jurisdiction of the court, but the applicant takes the risk of having his application dismissed on that ground alone, but if the court is not prepared to take that stringent step and considers the security suffi-

(1) 122 Ind. Cas. 658; (1929) A. L. J. 1273; A. I. R. 1929 All. 840; Ind. Rul. (1930) All. 285; 52 A. 158.

cient, the court has still the jurisdiction to entertain the application. I am inclined to agree with the latter view. It is desirable that the court's direction should be obtained by a separate application, but if it has not been done and if the other provisions of s. 17 have been complied with, then the court's jurisdiction to proceed with the application is not ousted, and I do not think that the learned Judges, who decided the above mentioned case, have gone to the extent to which the Counsel for the applicant says they have gone. As to the other question, that the substituted service must be deemed to be sufficient, I am in some difficulty by reason of the indefinite finding of the court below. The learned Judge says: "Application supported by affidavit. Reasons sufficient." This would mean that the court below was satisfied with the reasons given by the defendant and was of the opinion that the case should be restored. He later on says: "Service on applicant was effected (*sic*) by publication" He does not say whether he deems such service as due service, but the trend of his order shows that he did not consider it as sufficient. He, however, makes the defendant pay Rs 5 as costs to the plaintiff which goes to show that the defendant was to blame, and the learned Counsel for the plaintiff argues that this shows that the learned Judge of the court below considered the service to be not invalid. There is some force in his argument. Both these points (especially the first one) raise questions of some importance, and I think it desirable that they should be decided by a Bench of two Judges.

I, therefore, direct that the case be laid before a Bench of two Judges.

Mr. *B. Malik*, for the Applicant.

Mr. *A. P. Bagchi*, for the Opposite Party.

Opinion.

Mukerji, J.—This reference to the Full Bench has arisen out of an application made by Ganga Singh, the opposite party to this revision, to set aside an *ex parte* decree made against him on 30th July, 1926, in favour of the applicant before us, Ram Bharose.

The application filed on 22nd August, 1929, for setting aside the *ex parte* decree, which had been made by a Munsif exercising the powers of a Judge, Small Cause Court, in his Small Cause Court jurisdiction, was accompanied with a security bond furnished by one Sadho Singh for the sum of Rs. 175, which was large enough to cover the decretal amount. The Judge before whom the application was made directed a notice to issue to the plaintiff, Ram Bharose, on the same day that the application was made. The application was heard on 19th October, 1929, and was allowed, subject to payment of Rs. 5 costs to the plaintiff.

The petition of revision came before a learned single Judge of this Court. He referred it to a Bench of two Judges, and the learned Judges before whom the matter came eventually referred the case to a Full Bench, in order that the law on two points might be settled.

These two points are, (1) relating to the effect of substituted service on an applicant for setting aside an *ex parte* decree, and, (2), what are the rules that a defendant in an *ex parte* Small Cause Court decree against him must comply with, in order to be able to have the *ex parte* decree set aside.

It appears that when some attempt had been made to serve Ganga Singh with a summons of the suit, the plaintiff applied that a substituted service should be effected as against him. This was done, and the service having been effected, the *ex parte* decree was made.

It has been urged on behalf of the applicant before us (the plaintiff) that under Art. 164 of Sch. I of the Limitation Act, 30 days are allowed for making an application by a defendant for setting aside an *ex parte* decree, and two dates are furnished from which this period of 30 days runs. These periods are, (1), the date of the decree, and, in certain other circumstances, (2) the date of the knowledge of the applicant of the decree. The circumstances in which the second date is the starting point is "Where the summons was not duly served." It is further argued that under O. V, r. 20, sub-r. (2) of the Civil Procedure Code, "service substituted by order of" the court shall be as effectual as if it had been made on the defendant personally", and, therefore, where substituted service has been ordered and effected, according to the directions of the court, there is due service of the summons within the meaning of Art 164 of the Limitation Act, and the application for setting aside the decree must be made within 30 days of the decree.

I am unable to accept this argument. The object of issuing a summons is to inform the party, against whom a suit has been instituted, of the fact that there is a suit against him, and if he so chooses he may come and defend it. If that be the

object of a summons and if, for no fault of his own, a defendant was never put in a position to know that a suit had been instituted against him, whatever steps may have been taken for serving the summons on him, these steps can never be accepted as amounting to "due service". When an order for substituted service is made by a court, on the representation of a plaintiff, only one side is present before the court and it acts on the representation of one party. Obviously it should be open to the defendant, when he appears, to show that the method employed was not calculated to effect the purpose, which the court had in view, namely, informing the defendant of the institution of the suit. If this is so, the court has to consider, in view of all the circumstances of the case, for example, the place where the defendant was when the summons was issued to him, where and how the summons was served, and so on, in order to see whether there was due service. For example, if a man has gone to Burma to earn a living and he has relations at home with whom he is in constant touch, and the summons is served on the defendant by affixation of a copy of it on the outer door of his house, it may be open to the court to infer that the service was good, it being expected that the defendant's close relations, living jointly with him, in the same house, would inform him of the case. Again, where it is found that the defendant knew that a suit was likely to come and, in order that a summons may not be served on him, he leaves the place, it may be open to the court to hold that there was due service by substitution. On the other hand, if the defendant went, say, to Burma to earn a living and left no one at home, which remained vacant, and at the instance of the plaintiff a substituted service was ordered by publication of the fact of the institution of the suit in a paper published, say, at Aligarh, where the suit was instituted, the court would be in a position to hold that there was no due service.

The rule that substituted service is to be taken as effectual as personal service only means that the court hearing the case may proceed with the suit as if the summons had been personally served on the defendant.

The result is that, in my opinion, whether there has been 'due service' or not is to be considered by the court to which an application has been made for setting aside an *ex parte* decree, having regard to all the circumstances of the case as described above. If the conclusion is that there was due service, then, if the applicant has not come within 30 days of the decree, he is barred by time. If the conclusion is that there was no due service, the limitation would be computed from the date of the applicant's knowledge of the decree. The mere fact that a substituted service had been ordered is immaterial by itself.

In this particular case before us the court was satisfied, on the affidavit furnished on behalf of the applicant, that there was no proper service and the *ex parte* decree should be set aside. It is true that the Judge, Small Cause Court, does not give his reasons in detail; but that is because his orders are final, subject to the High Court's power of interference in revision, and the learned Judge was not bound to give reasons *in extenso* for his opinion. I would hold that the application was within time.

Now I come to consider the second point. On a plain reading of s. 17 of the Provincial Small Cause Courts Act the applicant for the setting aside of a judgment has to do these things To start with, he ought to apply to the court to which he proposes to make an application to tell him what kind of security, in the circumstances detailed in the applicant's application, the court would require of him to furnish. Usually the court would ask for a cash security, but it may be satisfied on the applicant's representation that a cash security may be dispensed with. In rare cases, as in the illustration given by me in my judgment in *Jhabboo Misri's case* (1) cited below, the court may refuse to take a cash security and may insist on other kind of security being taken and may insist on the moveable property in dispute being itself produced. When the court gives its direction, namely, whether the applicant is to furnish cash security or is to give some other kind of security, the applicant should present his application for setting aside the decree, together with the security demanded. Then his duties are over. The security filed will then be scrutinised by the court, and the court shall see whether the security is to its satisfaction. Then presumably, a notice would go to the plaintiff to show cause why the decree should not be set aside. This was also the view which I took in the case of *Jhabboo Misir* v. *Hawaldar Tewari* (1).

Although the rule (s. 17, Small Cause Courts Act) requires that the security is to be furnished at the time of presenting an application for setting aside an *ex parte* decree it has been held in this court in

Ramchandra Das v. *Durga Prasad* (2) that the security may be furnished even after the application has been made, provided the security is forthcoming within the period of 30 days of limitation. To this decision I was a party. This view was taken by other High Courts also. [See *V. M. Assan* v. *M. E. Rahim* (3), *Jneu Muchi* v. *Budhiram Muchi* (4) and *Narain* v. *Pudan* (5)] The reason of this decision is that the previously made application may be taken as made on the date on which the security was furnished, as the period of limitation has not yet expired, and it would be a mere formality which may be safely dispensed with, to direct the applicant to file a fresh application on the day when he furnishes the security. Having regard to the principle of these decisions, it has been urged that the giving of directions by the court, as required by s. 17 of the Small Cause Courts Act, may also be postponed to any time within 30 days of the period of limitation allowed by Art. 164 of the Limitation Act. I think this contention is correct.

Where an applicant, without formally applying for the court's direction, makes an application for setting aside an *ex parte* decree and furnishes security with it, and the court directs a notice to issue to the other side, it must be taken the court is cognisant of the fact that the applicant has furnished security as required by s. 17 of the Small Cause Courts Act. The order that notice should issue may be taken as an approval by the court of the security furnished, and in the circumstances disclosed by the applicant in his application and affidavit (if any). We may also take it that, the court, by implication, gave the applicant a direction that he should furnish security of the kind actually furnished by him. This is not a mere attempt to get over what may be believed to be rather hard directions of the law. If the court, instead of issuing a notice in the case just mentioned, rejects this application because its direction has not been obtained, and if limitation has not already expired it would be open to the applicant to make a fresh application and to furnish such security as the court may direct. A party cannot suffer by the act of a court and, therefore, we must accept the position that the court has given the direction, according to law, to the furnishing of the security actually furnished, where the court instead of rejecting the application of the defendant directs that a notice should issue.

Where the court rejects the application because its direction has not been obtained or because it considers that the kind of security furnished is not to its mind, and, if in the meantime limitation has expired, the applicant has no remedy. By not complying with the rule of the law he took a risk and he has nothing to complain of.

The court may and should always exercise its inherent powers to set wrongs committed by itself right, and if, for the fault of the court, directions are not given at the right time, it will see that a party does not suffer.

The conclusion that I arrive at, therefore, is that the proper course is for a party to make an application to the court to obtain its directions as to the nature of the security, and then to apply with the security of the nature directed by the court for setting aside the *ex parte* decree. The security furnished must comply with the directions of the court, and the court will see that the security is to its satisfaction, *i. e.*, sufficient. But where the court accepts a security without question and directs a notice to issue, it by necessary implication gives a direction that the security should be of the nature directed by it and that the security furnished is sufficient to its mind.

Applying this rule to the present case before me, the procedure adopted by the defendant is within the law.

In the result I would dismiss the application in revision.

Boys, J.—This application under s. 115 of the Code of Civil Procedure was referred by the Single Judge, before whom it first came, to a Bench of two Judges, and at their request it has been referred by the direction of the Acting Chief Justice to the present Full Bench. There are two questions for consideration: the first dealing with the proviso clause to s. 17 of the Provincial Small Cause Courts Act; and the second with the words "duly served" in Art. 164 of the Limitation Act.

The facts are simple. The present applicant Ram Bharose, filed a suit in the Court of Small Causes against the present opposite party, Ganga Singh. After an endeavour to serve notice personally on Ganga Singh, and notice by registered

(2) 128 Ind. Cas. 765; A. I. R. 1930 All. 830; (1931) A. L. J. 7.

(3) 55 Ind. Cas. 977; 43 M. 579; 11 L. W. 543; 38 M. L. J. 539; 28 M. L. T. 17; (1920) M. W. N. 375; 27 M. L. T. 273 (F. B.).

(4) 32 C. 339; 1 C. L. J. 43.

(5) 122 Ind. Cas. 328; 5 Luck. 284; 6 O. W. N. 1014; A. I. R. 1930 Oudh 1; Ind. Rul. (1931) Oudh 104.

post, had as alleged, failed, the court upon the application of Ram Bharose, directed substituted service, not in the manner provided in the earlier portion of O. V, r. 20 but by publication in a local newspaper, and (*sic*) by a further effort to serve the summons by a peon of the court. There is material even on the present record to show that the notice was published in a paper as directed. There is nothing to show whether or not any endeavour was made to serve the notice personally or otherwise by a peon, or if, such effort was made, what was the result. The incident is five years' old, and it would appear that many of the papers have been weeded out.

On July 31st, 1926, the applicant got a decree *ex parte*. On 22nd August, 1929, *i e*, rather more than three years later, Ganga Singh came into the Court of Small Causes with an application under s. 17 of the Provincial Small Causes Courts Act asking for an order to set aside the decree. This application was supported by an affidavit of Ranjit, the brother of Ganga Singh, which briefly stated that he and his brother had only learnt of the decree four days previously. Further a bond executed by one Sadho Singh as surety for the payment of the decree, if eventually it was maintained, was also filed. The court on that same day, August 22nd, ordered notice to issue. Nothing further occurred until 19th October, 1929, when the court set aside the decree on payment by Ganga Singh of Rs. 5 costs. From this order Ram Bharose has come up in revision.

The points urged by Mr. Malik on his behalf are two-fold. He contends that the direction of the court referred to in the last five lines of the proviso to s. 17 should have been taken before security was furnished, and that no direction was in fact given within 30 days of the decree, and, therefore, the subsequent order was invalid. Secondly, he was contended that Ganga Singh did not in his application under s. 17, or in his affidavit, challenge the power of the court to order substituted service, nor challenged the details of that order or the facts relating to its execution; nor did the Judge *suo motu* consider the existence of any such defects and therefore the service must be regarded as good, and therefore the application was barred by limitation These objections on behalf of the applicant Ram Bharose are not as stated in the memorandum of appeal but as dictated by his Counsel in response to a question of the court at the conclusion of the argument. In substance they amount to this that the literal directions contained in the proviso to s. 17 were not complied with by Ganga Singh, and that the notice on him must be taken to have been duly served. At this point the immense amount of trouble taken by Mr. Malik with the case may receive full recognition.

He has placed before us a very large number of cases, particularly in reference to the first point. It is not, however, necessary to enter into a detailed consideration of all those cases. It suffices to say that there is a general consensus of opinion that the proviso to s. 17 is incapable of literal application. Some learned Judges holding the words to mandatory and some holding the words to be merely directory, none have been able to apply the proviso literally as it stands. No other view is possible. It is incapable of literal application.

According to the proviso as it stands, an applicant for an order to set aside an *ex parte* decree must, at the time of presenting the application, deposit the amount or give security. The choice is in our view clearly not with him, but as the court may direct. Therefore reading the words literally he must get this direction before he makes his application, for he must furnish the cash or security at the time of presenting his application, and he cannot know which he has to furnish, unless he has got a previous direction. How then is he to get his previous direction without making an application? He cannot make an oral application, for manifestly the court would ask him what it was all about, and to present a written application. He cannot present a written application to get the order set aside without furnishing cash or security, or his application would have to be dismissed. The only course which it would seem distantly possible for him to take to comply with the section, if he desires to be allowed to file security, would seem to be:

(*a*) to file preliminary application setting out the facts, not asking for the decree to be set aside but merely stating that he intends to file an application asking for an order to set aside the decree, and asking for the moment only for a direction that he may adopt the course of filing security; (*b*) having got his direction, to present a second, the principal, application with the security bond for an order to set aside the decree, and, in the case of a security bond pledging immoveable property, after

getting it executed, registered and verified.

And all this he must get done within 30 days. It is impossible to think that this is what the law intended The matter is a Small Cause Court matter, and the Legislature could never have intended to multiply proceedings thus unnecessarily.

"Where the main object and intention of a Statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used." (Maxwell, 7th Edn., p 198).

Now, despite the obscurity of the language used, the main object and intention of the Statute are clear. "It is clear.

(1) that there must be an application for an order to set aside the decree:

(2) that the court must be satisfied either by the deposit of cash or security that the decree-holder will be able to get his money if the decree is upheld;

(3) that these matters must be complete before the expiration of the 30 days' limitation provided by Art. 164 of the Limitation Act."

The first two requisites are essential on the face of the proviso. The third is an inevitable deduction from the use of the words "at the time of presenting his application" and from the fact that this proviso exists at all. If it was not the intention of the Legislature to secure promptness by securing a complete and properly supported application before the expiry of the 30 days, it would have been unnecessary to have this proviso at all, and it would have sufficed to rely upon the Code of Civil Procedure. In our view, then, it must be held that the application is sufficient if it fulfils the above three conditions. The conclusion from this, then, is that no initial defects in the making of the application must be allowed to stand in the way of the applicant getting a notice issued to the decree-holder, provided that an application has been filed and further that cash has been deposited, or, if the court has so permitted, security has been given, all before the expiry of 30 days. A reasonable and practical interpretation of the section is, therefore, as follows:—

(1) The applicant must within 30 days file his application either with cash or with a statement that he is prepared to give security (and in the latter case he may, of course, tender the security he proposes) and ask for the direction of the court.

(2) In the case where he wants to give security, if the court refuses to direct security, he must deposit cash within the 30 days, or his application will be rejected.

(3) If the court agrees to direct security, then (*a*) it will consider the security already offered, if it has been so offered; or (*b*) name security to its satisfaction which must be filed within the 30 days.

(4) If the applicant does not in fact ask for a direction or if, though the applicant does ask for a direction, the court does not in fact give any direction, but in fact the court does issue notice, the court shall be taken to have approved the deposit of cash or the security offered as the case may be.

(5) If filed within the 30 days and accepted by the court expressly or impliedly by the issue of notice the application is a good application, though it will be open to the decree-holder to challenge the nature and sufficiency of the security and to the court under O. IX, r. 9 to make such further conditions as it thinks fit.

In the course of the argument it has been suggested that difficulty might arise if the court delayed in giving its direction, or approving expressly or impliedly the security already tendered, so long that the period of limitation had expired before the applicant had fair opportunity of complying with the direction. It is not a case which we have now to consider, but in a suitable case it would be open to the court itself to consider and exercise its inherent powers reserved to it by s. 151 of the Code of Civil Procedure.

The next question we were invited to consider was the scope of the words "duly served" in Art. 164 of the Limitation Act. These words appear capable of only one interpretation. It is open to the applicant to satisfy the court that there was no real ground for allowing substituted service at all; that he was not "keeping out of the way for the purpose of avoiding service"; that there was no reason why the summons should not have been served upon him in the ordinary way; that the order for substituted service was not carried out by affixation in the court-house and upon any conspicuous part of the defendant's house etc.; that it was not carried out in any alternative method directed by the court that the alternative method directed by the court was not a proper method such as was reasonably calculated to secure that notice should reach the defendant, etc.

Now, applying what has been said above to the present case, it is clear that rightly or wrongly the learned Judge of the Small Cause Court was satisfied that the notice

had not been properly served. The applicant decree-holder, before us, has not been able to satisfy us either that the method of substituted service which was ordered by the court was a reasonable and proper method; nor that even such substituted service as was ordered was actually carried out.

Further we are satisfied that the three essential conditions which we have laid down above were fulfilled in reference to the application itself. The application was filed within the 30 days. There was within the 30 days a deposit of security which was approved by the Judge, and all the requisites were complete within the 30 days. This being so, the application should be dismissed with costs.

Sulaiman, Actg. C. J.—I concur in the conclusions.

Under Art. 164 of the Indian Limitation Act, an application by a defendant for an order to set aside a decree passed *ex parte* must be made within 30 days of the date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree. The expression "duly served" obviously means served as required by law. The procedure for the service of summonses is laid down in O. V., Civil Procedure Code. Where the service is not personal, it may be substituted. Under O. V, r. 20 (2) service substituted by order of the court is as effectual as if it had been made on the defendant personally. But as at the time when the substituted service is ordered the proceedings are *ex parte*, it would be open to the defendant when he appears later to challenge the propriety of the order and ask the court to re-examine its fitness. If in view of any additional circumstances which he is able to place before the court he can satisfy it that he was not keeping out of the way and that there was no sufficient reason why the summons could not be served in the ordinary way or that the manner of service decided upon was not fair and just to him, he would have discharged the burden of showing that there was no due service.

As to s. 17 of the Provincial Small Cause Courts Act, I have no doubt in my mind that its provisions are not merely directory but that they are imperative and mandatory. Discretion to impose terms before setting aside an *ex parte* decree is given to the court under O. IX, r. 13, Civil Procedure Code The procedure prescribed in the Code of Civil Procedure has been made applicable to a Court of Small Causes with a proviso. The whole object of the proviso is to introduce a variation in a Small Cause Court suit. If the proviso was not meant by the Legislature to be indispensable there would have been no need for the proviso at all, as the court has ordinarily discretion in the matter.

As Small Cause Court cases are petty cases arising out of mere money claims without any real dispute as to the title to any immoveable property, the Legislature apprently intended that the procedure regulating the setting aside of an *ex parte* decree should be strict, and a defendant should not be allowed to harass the decree-holder by such a proceeding without the penalty of furnishing adequate security for the decretal amount which can be conveniently availed of by the decree-holder if the application is dismissed.

Notwithstanding a few cases, there is an overwhelming preponderance of opinion in favour of the view that the proviso is mandatory. Both on the language of the section and on the principle of *stare decisis* I would hold that it is not merely directory.

No doubt the language of the proviso is very unhappy and there is some apparent inconsistency between the expression "at the time of presenting his application" and the expression "as the court may direct." If we take the two expressions literally, the two things cannot happen exactly simultaneously. But the direction of the court may be obtained before the application is presented or just after presenting the application.

It is quite clear to me that an application cannot be presented after the prescribed period, nor can cash or security be deposited after the expiry of that period. The court is not given any discretion at all to extend the time. If the security deposited within the time is discovered afterwards to be defective or unsatisfactory in any way, the court has no power to direct a fresh security to be substituted for it after the expiry of the period

It also seems to me that the expression "as the court may direct" does not relate to "to the satisfaction of the court" but to the nature or character of the security, that is to say, whether it is to be cash or other security. The application has no absolute choice as to the kind of security, but it has to be subject to the direction of the court.

It however seems to me that if no security is deposited at the time of the presenting of the application or no direction of the court

as to its nature is obtained before or at the time, even then the proviso would be substantially complied with if before the expiry of the fixed period the defect is cured. It is open to an applicant to file a complete application accompanied with the necessary security up to the last day of the period. If previously he filed an applicant which is either irregular or defective, there is nothing to prevent him from filing within the time a fresh application which is not so defective. There is, therefore, no justification for not treating the previous application as having been properly presented on the date when it was every way complete.

I have therefore no hesitation in holding that no matter what the defects might have been in the application or in the security or in obtaining the direction of the Court at the time when the application was first presented, if that defect is absolutely cured before the expiry of the fixed period, the application becomes a proper one and fulfils the requirements of the proviso.

I felt somewhat inclined to hold that as the expression used is the present tense *viz*, "court may direct" and not the present perfect tense 'the court may have directed' the direction may be given even after the expiry of the period, provided that the security had been deposited in them and was sufficient. In this view the applicant would be bound to file the application and make the deposit in time, taking the risk of the security not being accepted; but there would be nothing to prevent the court from accepting it afterwards. My learned brothren rightly point out that the word is 'direct' and not 'approve' and accordingly a subsequent acceptance would not be direction but approval. I, therefore, do not wish to differ from their opinion.

In the present case although the security was deposited without obtaining any previous direction the court ordered notice to issue before the period expired. It must accordingly be deemed to have by implication given the necessary direction.

Of course, the question whether the security is sufficient and satisfactory need not be finally determined during the period of 30 days. Indeed, the plaintiff-decree-holder may come in afterwards and challenge its sufficiency. The mere fact that it is found afterwards that the security was sufficient, would not make the deposit of the security within the time in any way defective.

By the Court.—The application in revision is dismissed with costs.

E. L. *Application dismissed.*

ALLAHABAD HIGH COURT.

First Civil Appeal No. 125 of 1929.

June 22, 1931.

SULAIMAN, ACTG. C. J., AND BANERJI, J.

GAURI SHANKER PRASAD—DEFENDANT—APPELLANT

versus

SITA RAM SAH (PLAINTIFF) AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Pre-emption—Building sites in Benares City—Proof of custom as to buildings—Evidentiary value.

The burden of proving the existence of a custom of pre-emption with regard to building sites is on the party who alleges the existence of such a custom and he cannot succeed by merely establishing that there is a custom of pre-emption with regard to houses. But ordinarily the same principle of exclusion of strangers would apply to building sites as applies to houses and if a custom of pre-emption with regard to houses is proved slight evidence ought to be sufficient for establishing that the same custom applies to building sites. *Ejnash Koeri* v. *Sheikh Amzudally* (1), *Deendayal* v. *Saja* (2), *Joogal Kishore* v. *Pooch Singh* (3), *Nusrat Raza* v. *Umbul Khyr Bibi* (4), *Abdul Aziz* v. *Khondkar Hamid Ali* (5), *Ram Gobind Roy* v. *Syud Kushuffudoza* (6), *Gobind Chand* v. *Mon Mohan* (7), *Sheoratni* v. *Munshi Lall* (8), referred to. *Ram Chand* v. *Goswami Ram* (9), distinguished. [p. 617, col. 2.]

First Appeal from a decision of the Additional Subordinate Judge, Banares, dated the 18th February, 1928.

Mr. *B. E. O'Conor*, Sir *Tej Bahadur Sapru*, Dr. *K. N. Katju* and Messrs. *B. Malik*, *Nanak Chand* and *Govind Das*, for the Appellant.

Messrs. *P. L. Banerji* and *N. Upadhaya*, for the Respondents.

Judgment.—This is a defendant's appeal arising out of a suit for pre-emption based on an alleged custom, of the sale of a building site in the city of Benares. The plaintiff alleged that there was a custom in Benares applying to all residents under which any person wishing to transfer any house or building site or land was bound to offer it to his co-sharers in the property to sharers in the appendages and to adjoining neighbours. The plaintiff also alleged that he had performed the two demands which were in accordance with the rules of the Muhammadan Law. The contesting defendant admitted that there were certain customs prevailing within the said part of the city of Benares, but pleaded that 'the custom of pre-emption that prevails in Benares relates to residential houses only, and there is no custom of pre-emption regarding house sites and lands in Benares.' It was further pleaded that the plaintiff had not in fact made the necessary demands. The allegation of the plaintiff that the property sold consisted of a house was also repudiated. Under the sale deed in dispute

the defendant purports to have purchased the site of this plot only without the materials of the structure which stands upon it. It is admitted that this is a *par-jotdari* plot; the ownership of the land vests in the proprietor who is the vendor. There was some dispute as to whether there was any structure upon it which could be called a house and as to whether this structure belonged to the vendor and was actually sold by him. A photograph of the shed standing upon it is on the record and it shows that it is a fairly large shed of which the roof is of tiles and corrugated iron sheets. There is evidence to show that certain coolies and workmen live in it and cook their food. There is also a sort of almirah which serves the purpose of a store-room. We do not think that it can be said that this structure is not a place of human habitation so as to make the custom relating to houses inapplicable to it.

At the same time we are of opinion that the evidence on the record falls short of establishing that the materials of this structure belonged to the vendor. The plaintiff led practically no evidence to show that the vendor owned the materials of this construction. On the other hand the defendant produced the occupier Govind who stated that he was the owner of the materials and had put up the *chapper* himself. There was also the evidence of the witness Ali Jawwad to the effect that the shed had been put up by the tenant of the land some years ago. The evidence being uncontradicted we must assume in favour of the defendant that the materials of the structure do not belong to the vendor and that they have obviously not been acquired by the vendee. We may, therefore, take it that the plot is a building site on which admittedly many many years ago a *pucca* house stood which was subsequently replaced by a tiled house which stood for some years. Later on this was pulled down by the occupier who proceeded to build a *pucca* construction upon it. He laid the foundation but a suit by the proprietor was promptly instituted which continued for several years with the result that the construction was stopped. This suit was decreed and the occupier was ejected. Since then it has been let out to other people who have put up another structure upon it. The land is undoubtedly in the nature of a building site on which a structure stands even now. It is not merely a plot of waste land or an agricultural plot.

The court below was held that the custom of pre-emption even with regard to building sites has been established by the evidence in the case. The learned Advocate for the appellant rightly argues that the burden of proving the existence of the custom is on the plaintiff and that he cannot succeed by merely establishing that the custom of pre-emption applies to houses in the city of Benares. The learned Advocate for the respondent replies that the custom of pre-emption with regard to building sites and small parcels of land, where a custom of pre emption with regard to houses is admittedly proved, is quite common and that small evidence ought to be sufficient for establishing that the same custom applies to such building sites Our attention has been drawn to several cases where the same rule has been applied to small parcels of land as applied to houses. We may refer to the cases of *Ejnash Koeri* v. *Sheikh Amzudally* (1), *Deendayal* v. *Saja* (2), *Joogal Kishore* v. *Pooch Singh* (3), *Nusrat Raza* v *Umbul Khyr Bibi* (4), *Abdul Aziz* v. *Khondkar Hamid Ali* (5), *Ram Gobind Roy* v. *Syud Kushuffudoza* (6) and *Gobind Chand Mon Mohan* (7) as also to a recent case of the Patna High Court 97 Ind. Cas. 618 *Sheoratni* v. *Munshi Lall* (8).

It seems to us that ordinarily the same principle of exclusion of strangers would apply to building sites as applies to houses.

The learned Advocate for the appell nt has relied strongly upon the case of *Ram Chand* v. *Goswami Ram* (9) where a Division Bench of this Court held that the custom of pre-emption for a piece of land which was an orchard or a fruit garden in Benares had not been established in that case. The learned Judges pointed out that the custom of pre-emption was based upon the idea of preventing the intrusion of strangers into the co-parcenary body and in their opinion no such consideration applies to a case like the one before them where people congregated together in cities The plot in dispute in that case was not a residential plot of land and obviously the question of excluding strangers was not of the same paramount

(1) 2 W. R. 261.
(2) 2 Sud. Dew. Ada. 418.
(3) 8 W. R. 413.
(4) 8 W. R. 309.
(5) 10 W. R. 356; 3 B. L. R. A. C. J. 63.
(6) 14 W. R. 1 (F. B).
(7) 14 W. R. 43 (F.B).
(8) 97 Ind. Cas. 618.
(9) 74 Ind. Cas. 379; 21 A. L. J. 385; 45 A. 501; A. I. R. 1923 All. 513.

importance as in cases where a house or building site has been sold. There is no doubt that the cases quoted before us do show that the same rule which applies to houses has been applied to building sites and small parcels of land which can be used as such. The question before us is whether there is any evidence in this case and whether that evidence is sufficient to prove that the same rule applies to building sites in Benares.

It cannot be disputed that the right of pre-emption as regards the houses is established and extends to the sites covered by the houses. This was expressly held in a judgment dated the 16th of May, 1887. The learned Munsif in that case went so far as to suggest that the right of pre-emption was really derived from the ancient Hindu custom and applied to immoveable properties in general including gardens. In a judgment dated the 8th of January, 1894, the learned Munsif referred to an earlier case of pre-emption which had been decreed with regard to a grove in Ramapura. The value of this judgment however must be discountenanced in view of the pronouncement of this court in *Ram Chand Khanna's case* (9). But a judgment of the Munsif of Benares dated 23rd of December, 1908, in a case in which the defendants were absent, shows that the suit related to a portion of land in Benares. The judgment does not show that it was a house at all. The claim does not appear to have been contested and it was decreed. The mere fact that the defendants did not chose to contest the suit would not necessarily destroy the value of the judgment, for the custom might be so well established that the defendant might not think it worth while to resist the suit. This judgment does show that the custom was in force with regard to a mere piece of land though it was not absolutely covered by structure. There was another litigation which resulted in a decree dated the 22nd of March, 1919. The defendants in their written statement had pleaded that the plaintiff's share in the so-called house was a mere piece of waste land. The learned Subordinate Judge found that the plaintiff's house was nothing but a house in ruins which had fallen down and that only the gateway of the house remained standing. The case was a converse one because the point was whether the plaintiff who did not own any house could claim pre-emption on the ground of vicinage. As the right of pre-emption is a reciprocal right the same rule would apply to that case as would apply to a case where the property in dispute is a house in ruins. "The learned Judge came to the conclusion. The right is founded on vicinage and it matters little whether there is a good house or a falling house or a fallen house standing." He held that the plaintiff was entitled to pre-empt.

It seems to us that the common usage of extending the right applicable to houses to building sites was adhered to in the cases referred to above which are clear instances, of the exercise of the right of pre-emption based on custom with regard to mere building sites as distinct from houses. There was also some oral evidence of a general nature in the case. The learned Subordinate Judge on a consideration of the entire evidence came to the conclusion that even if the house had not been transferred to the vendee, the custom relating to *khandhars* (ruined house sites) and house sites had been established. We think that we should not differ from this finding.

The next question is whether the plaintiff made the necessary demands as are required by the rules of the Muhammadan Law which are applicable to such a custom in Benares. So far as the first demand is concerned we have oath against oath and there is no other evidence. The rival versions of the story are as follows:—According to the plaintiff the defendant came to his house on one evening and taking him aside mentioned to him in a clear way that he had purchased the plot in dispute and was in need of the adjoining plot of the plaintiff and asked him whether the plaintiff would part with it at a reasonable price. The plaintiff suggests that the way in which the matter was put to him was to divert his attention from the main point. According to the plaintiff he promptly made the first demand and then the defendant told him that he would return in a few days and then the matter would be settled. According to the plaintiff the defendant left the place immediately so that there was no occasion to make the second demand at the same time. The defendant on the other hand says that he called on the plaintiff that evening and taking him aside asked him whether he would sell to him the plot adjoining the one which he had purchased and the plaintiff instead of making any demand began to make calculation and then promised to give a definite reply some time later. The defendant says that they then came back to the place where they had been sitting and remained

so in the company of Prof. Datta and Mr. Deb for nearly half an hour and then the defendant left the place. According to him there was no conversation in the presence of these strangers.

The learned Subordinate Judge has rather too strongly criticised the evidence of the defendant and has unnecessarily attributed to him the motive of over-reaching the plaintiff and entrapping him. At the same time as he had to choose between these two rival statements, the learned Subordinate Judge had to weigh the evidence in the case and arrive at his conclusion based on the impression which he formed of the parties in the witness-box. He has rightly pointed out that as the defendant is a legal practitioner he would be more alert than the plaintiff. Had it been a fact that the plaintiff had omitted to make the first demand and had he given to the defendant an impression that he was not aware of the necessity of making the first demand promptly, the chances are that the defendant would have brought up the matter again in the course of the conversation with the other strangers in order that he might have evidence available showing that no demand had been made. The learned Subordinate Judge was also impressed by the behaviour and the straightforward manner of the plaintiff more than that of the defendant. As the question is one of fact we find it most difficult to take a contrary view. We must accordingly hold that the first demand was made.

As regards the second demand there is plenty of evidence in support of the plaintiff's assertion and we see no reason to doubt the testimony of these witnesses. The fact that the second demand was made promptly also supports the view that the first demand must have also been made as alleged by the plaintiff.

The learned Advocate for the appellant has strenuously contended that the plaintiff being a Hindu gentleman could not have been aware of the formalities of the Muhammadan Law which were required. The plaintiff, however, has made it clear that he had been a student of a law class for two years, that he had on several occasions previously, come to know of the necessity of these demands and that he had actually appeared as a witness in a pre-emption suit. It is also clear that he had previously been negotiating for the purchase of this very plot of land and it is natural that he would have made enquiries and ascertained what formalities he would have to perform to get the land. We, therefore, think that the contention that the plaintiff was not aware of necessity of these demands cannot be accepted. When the custom is prevalent the necessity of the demand is also a matter of common knowledge.

The appeal is dismissed with costs.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 473 of 1929.
Connected with Second Civil Appeal No. 474 of 1929.
December 18, 1931.

PULLAN AND NIAMAT ULLAH, JJ.

Kunwar ABDUL WAHAB—DEFENDANT—APPELLANT

versus

Musammat SUGHRA BEGUM—PLAINTIFF—RESPONDENT

Muhammadan Law—Waqf—*Objects*—*Salary and pension of servants*—Waqf *silent as regards amount payable*—*Subsequent declaration of amount by* waqif—*Validity*—*Power of* mutawalli *to reduce amount fixed.*

Under the Muhammadan Law a provision for the salary and pension of servants is a valid object of *waqf*. [p. 620, col. 1.]

If a provision is expressly made in the deed of *waqf* it is not open to the *waqif* to revoke it or to derogate from it, but if he has deliberately deferred making provision on a particular subject to a future date and does make such provision, such provision should be considered to be part and parcel of the deed itself. [p. 621, col. 1.]

A *mutawalli* has no right to interfere with the amount fixed by the *waqif* where the pay or pension of servants is made a valid object of the *wakf*. [*ibid.*]

Second Appeal from a decision of the District Judge, Aligarh, dated the 12th February, 1929.

Mr. *T. A. K. Sherwani*, for the Appellant.

Mr. *A. M. Khawaja*, for the Respondent.

Judgment.—These are defendant's appeals arising out of two suits, one brought by *Musammat* Sughra Begam, the respondent in Second Appeal No. 473 of 1929, and the other by Rahim Bakhsh, the respondent in Second Appeal No. 474 of 1929, for recovery of arrears of maintenance fixed by Khurshed Ali Khan who executed a deed of *waqf* on 1st April 1919, by which he dedicated property yielding a net income of Rs. 7,000 a year for certain charitable purposes. Khurshed Ali Khan died on the 28th of December, 1926, up to which date he acted as *mutawalli*. The defendant-appellant

succeeded his father in the office of the *mutawalli*. Among other provisions contained in the deed of *waqf* one is in favour of the respondents who were old servants of Khurshed Ali Khan. A certain amount was mentioned in the deed of *waqf* to be paid as salaries and pensions of the *waqif's* servants whose names were not specified, nor were the amounts mentioned. It was, however, clearly stated that particulars as regards names and the amounts should be taken from the pay bills bearing his signature. Apparently the *waqif* had not decided as to what amount should be paid to each servant, and he reserved the power of nominating beneficiaries out of the servants and the allowance to each for a subsequent occasion. During the seven years which intervened between the date of the *waqf* and his death he paid Rs. 60 a month to *Musammat* Sughra and Rs. 30 a month to Rahim Bakhsh. It should be mentioned that the two are wife and husband. The pay bills in which these salaries are entered bear the signature of Khurshed Ali Khan. It has also been found by the lower Courts that the defendant-appellant himself paid allowances to the respondents at the above rates after the death of Khurshed Ali Khan before the period in suit. Relations between the parties became strained, and it became necessary for the respondents to institute the suits which have given rise to these appeals. The defence, so far as it is necessary to state for the purposes of the present appeals, was that, according to Muhammedan Law, it is not one of the valid objects of the *waqf* to make provisions for salaries and pensions of servants; that no allowances having been fixed in the deed of *waqf*, subsequent action of Khurshed Ali Khan should be considered the act of *mutawalli* who is not entitled to amend the provisions of the deed of *waqf* and that in any case, it is open to a succeeding *mutawalli* to reduce the salaries and pensions to reasonable amounts. Both the lower Courts have overruled these defences and decreed the plaintiff's claim.

The learned District Judge, who has written an excellent judgment dealing with the various questions raised before him, has held, and we think rightly, that a provision for the salary and pension of servants is a valid object of *waqf*. In Ameer Ali's Muhammedan Law, Vol. I, page 276, Fourth Edition, a number of valid objects of *waqf* are stated. One of them is the *waqif's* own descendants, another is kindred and neighbours. Even strangers are mentioned as objects of bounty. Dependants and servants are specifically mentioned as persons for whose maintenance provision can be made in a *waqf*. Tyabji in his notes under s. 457 of his book on Muhammedan Law, Second Edition has also mentioned that provisions for individuals may be a charitable object according to Muhammedan notions. We entertain no doubt that the view taken by the learned District Judge is correct and is borne out by the authorities to which reference has been made. The learned Counsel for the appellant contended that only the poor can be beneficiaries under the *waqf*, if they do not belong to the family of the *waqif*. He argues that in so far as *Musammat* Sughra and Rahim Bakhsh are possessed of other sources of small incomes, they cannot be classed among the indigents He has quoted no authority in support of his contention which is opposed to the rules given by Ameer Ali and Tyabji already referred to. The words "rich and poor" are relative terms, and it cannot be stated that a person having a certain minimum income cannot be considered to be indigent in any circumstances. It is obviously a very laudable act for a Muhammedan to make a provision for his faithful servants. We may note that the pensions granted to the respondents are for their life only and that after their death, that part of the income will lapse into the general purposes of the *waqf*.

It is next contended that the *waqf* deed being silent as regards the amount payable to each servant, and the allowance having been fixed by Khurshed Ali Khan at the time when he was not the owner of the property but a *mutawalli*, the respondents are not entitled to the allowances claimed by them. On general grounds there is nothing to prevent a *waqif* from reserving to himself the power of naming beneficiaries subsequent to the execution of the deed of *waqf*, provided charitable intention is clearly indicated in the deed. In Ameer Ali's Book on Muhammedan Law, Vol. I, page 426, Fourth Edition, it is stated to be the rule that "the *waqif* can reserve to himself, at the time of the dedication, the power to alter the beneficiaries of the trust by either adding to their number or excluding some, or to increase or reduce their interest in it. He cannot do so afterwards." It is obvious that, if a provision is expressly made in the deed of *waqf*, it is not open to the *waqif* to revoke it, or to derogate from it. But if he has deli-

berately deferred making provision on a particular subject to a future date and does make such provision, such provision should be considered to be part and parcel of the deed itself. As regards the contention that it is open to a subsequent *mutawalli* to reduce the amount fixed by the *waqif*, we are clearly of opinion that, if the pay or pension was made a valid object of the *waqf*, as we think it is in the present case, it is not open to any *mutawalli* to interfere with it. This contention has in our opinion no force.

In the view of the case we have taken, these appeals have no force and are dismissed with costs including Counsel's fees in this court on the higher scale.

N. K. & A. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

Criminal Revision No. 828 of 1930.

March 16, 1931.

KENDALL, J.

RAGHUNANDAN PRASAD —APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 133, 539 (B)—'Public' and 'community,' meanings of—Trade injurious to neighbours but not to community in general—Jurisdiction to make order under s. 133—Local inspection—Omission to make memorandum—Validity of trial.

Though the words 'community' and 'public' are used indiscriminately in s. 133, Criminal Procedure Code, there is no reason for making a distinction between the public and the community and for holding that a man may carry on a trade or occupation that is injurious to the health or physical comfort of his neighbours or of the public without becoming liable under s. 133 merely on the ground that there may be some part of the community which is not affected. *Krishna Mohan Banerji* v. *A. K. Guha* (1), *Berckefeld* v. *Emperor* (2) and *Indra Nath Banerji* v. *Queen-Empress* (3), referred to. [p. 621, col. 2; p. 622, col. 1.]

Omission to make a memorandum of local inspection as provided by s. 539 (B), Criminal Procedure Code, will not vitiate the whole proceedings unless it has occasioned a failure of justice. [p. 622, col. 2.]

Mr. *G. S. Pathak*, for the Applicant.

Dr. *N. U. A. Siddiqi*, for the Opposite Party.

Judgment.—This is an application for the revision of an order of the City Magistrate of Bareilly made under s. 133 of the Criminal Procedure Code, forbidding the applicant to work the engine of his factory from 9 P. M. to 5 A. M. The learned Sessions Judge after considering the case fully has declined to interfere with the orders passed. The applicant owns a factory in the city, the engine of which, it appears, makes a considerable noise, but the factory has been working for a number of years. A complaint was made in March, 1930, and the evidence produced before the Magistrate showed that although the factory had been working for some years in a congested part of the town, new machinery had been added from time to time and especially an oil engine had been replaced by a steam engine within the last two years. The complaint alleged that the noise made by this engine amounted to a public nuisance within the meaning of Chap. X of the Criminal Procedure Code, and the question before the Court was whether in the circumstances of the case it could be held to be 'injurious to the physical comfort of the community'. The Sessions Judge has come to certain findings which may be summarised as follows:—

"It is impossible for the complainant to sleep at night or to concentrate on his work during the day. The factory has been in existence for a good many years and it is difficult to see how the Courts can order the removal of a well established factory merely because it is a nuisance to its neighbours. The noise of the engine may, when it is working fully, be a *great nuisance to the neighbours* but it cannot be said that the noise of the steam engine in these days of hideous noises is *so intolerable as to make the life of the neighbours impossible.*"

Assuming as I must do that these findings are correct, the question is whether the Magistrate was justified in interfering with the working of the engine under s. 133 of the Criminal Procedure Code.

It is not necessary to show that the noise made by the working of the engine is absolutely intolerable. The finding of the Sessions Judge is sufficient to show that it is a *serious nuisance to the neighbours*, and not only to the complainant. If it is a serious nuisance and if it is sufficient to prevent neighbours from sleeping at night and from concentrating on their work during the day, it must undoubtedly be held to be injurious to their physical comfort. The paragraph to which I have referred in s. 133, Criminal Procedure Code, does not, it is true, mention the physical comfort of *neighbours*, but the physical comfort of the *community* and I have been asked on behalf of the opposite party to hold that the terms 'neighbours' and 'community' are for the purpose of this section

interchangeable. Certain decisions have been pointed to, *viz* :—

Krishna Mohan Banerji v. *A. K. Guha* (1), *Berckefeld* v. *Emperor* (2) and *Indra Nath Banerji* v. *Queen-Empress* (3) among others in which action has been taken under this section in somewhat similar circumstances, and in which, so far as can be judged from the reports, the evidence related to the physical comfort of neighbours. Moreover it has been pointed out that Chap. X, relates to 'public nuisances'; and although words in the paragraph are not the physical comfort of the public it would be very difficult to hold, after reading the whole of the section, that the Legislature really intended to discriminate between the public and the community. In s. 268 of the Indian Penal Code, a person is said to be guilty of a public nuisance 'who does any act.....which causes any common injury, danger of annoyance to the public or to the people in general who dwell or occupy property in the vicinity'. If the public nuisances referred in Chap X of the Criminal Procedure Code are equivalent to the public nuisances defined in s. 268 of the Indian Penal Code, the 'public' and again people in general who dwell or occupy property in the vicinity', or in other word the neighbours, must be regarded as to all intents and purposes the same body of people. I can find no authority for distinguishing the meaning of the words 'community,' (which according to the dictionary is a relative term) either from the 'public' or the 'neighbours'. It is certainly curious that the word 'community' is used in the third paragraph of s. 133, whereas references in other parts of the section are to the public or persons living or carrying on business in the neighbourhood etc., but after considering the matter to the best of my ability I do not think that there is sufficient reasons for making a definite distinction, and for holding that a man may carry on a trade or occupation or keep goods or merchandise that is injurious to the health or physical comfort of his neighbours or of the public without becoming liable to an order under s. 133 merely on the ground that there may be some part of the community which is not affected.

Another point that has been taken in support of the application is that both the Magistrate and the Judge made a local inspection of the factory, but failed to record a memorandum of the relevant facts observed at the inspection in spite of the mandatory provisions of s. 539-B of the Criminal Procedure Code. If there was a formal inspection under this section after due notice to both parties, as I understand there was, it was necessary to record the memorandum, and as none was recorded there was an irregularity in the proceedings. This however would not be sufficient to vitiate the whole of the proceedings unless it occasioned a failure of justice by prejudicing the accused. All that the Judge appears to have done was to go to the spot and observe the position of the factory. The Magirtrate has given a full account of his inspection in the course of his judgment, and the mere fact that a separate note was not recorded can hardly have prejudiced the applicant, who had a full opportunity of drawing attention to any inaccuracies in the Magistrate's description when he made his application to the Sessions Judge.

In these circumstances I do not think that there is any occasion for me to interfere with the orders passed. If the Magistrate could act under the section, as it seems to me he was justified in doing, no fault can be found with the nature of the order passed for regulating the conduct of the applicant's trade or occupation in such a way as to interfere as little as possible with the comfort of the neighbours. The application, therefore, fails and is dismissed.

A. *Application dismissed.*

(1) 57 Ind. Cas. 829; 32 C. L. J. 42; 21, Cr. L. J. 669.
(2) 34 C. 73; 5 C. L. J. 40; 5 Cr. L. J. 45.
(3) 25 C, 425; 2 C. W. N. 113.

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1207 of 1928.
March 11, 1931.

MUKERJI AND BENNET, JJ.

SHEO NATH SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Lala BANSIDHAR—PLAINTIFF—RESPONDENT.

Pleader and client—Statement of Pleader, value of – Contradiction by client, effect of—Moqadma', *meaning of.*

When a Pleader, who is authorized by his *vakalatnama* to appear for a party, does appear and makes a statement of fact on behalf of that party, the mere allegation of that party to the contrary is not material sufficient to contradict his Pleader.

The word "*moqadma*" is a general term meaning "case" and applies not only to an original suit but to an appeal.

Second Appeal from a decision of the Second Class Subordinate Judge, Cawnpore, dated the 30th March, 1828.

Messrs. *A. P. Dube, S. N. Seth* and *Brij Narain Mahrotra*, for the Appellants.

Mr. *N. P. Asthana*, for the Respondents.

Judgment.—This is a second appeal by the defendants against a decree of a lower Appellate Court. The facts are that the plaintiff sued as *zemindar* of an entire *mahal* against the two defendants for certain acts of trespass alleged to have been committed by the defendant. The Court of first instance granted a relief in regard to para. (c) of the plaint only which was the removal of a brick-kiln from plot No. 322 area 2 *bighas* 9 *biswas*. The plaintiff filed an appeal, and that appeal was argued by Pleaders for the parties on 28th of March, 1928. The case was then adjourned to 30th March, 1928 for judgment. On the 30th March, 1928, the Pleaders for the parties appeared before the Appellate Court accompanied by the plaintiff and a statement was taken down by the Court at the dictation of the Pleaders for the parties to the effect that the parties had come to terms and the terms were set forth. This statement was signed by the Pleaders for each party and by the plaintiff and by the lower Appellate Court. The lower Appellate Court then proceeded to pass a decree in the terms of this compromise. The proceedings of the lower Appellate Court were taken under O. XXIII, r. 3, Civil Procedure Code. In second appeal various grounds have been taken to the effect that the defendant-appellants never intended to confer upon their Pleader Pandit Mangali Prasad any authority to compromise the appeal, and that their *vakalatnama* had no such authority, and that he could not bind the defendants by a compromise which went beyond the subject matter of the suit and the appeal. There is nothing on the record to sustain these allegations of the defendants. The defendants rely on an affidavit which they filed in certain proceedings by way of application for review of judgment, and that application was made on 10th April, 1928. In the first place we are not sitting in appeal from the order refusing review of judgment. Secondly, if we were sitting in appeal from that order, it is obvious that the mere affidavit of a defendant would not be sufficient material for us to come to a finding contrary to the finding of the lower Appellate Court under O. XXIII, r 3 that this suit had been adjusted by a compromise between the parties. It was open to the defendants to examine Pandit Mangali Prasad to prove the contention of the defendants that they did not intend to confer authority on him to compromise or that they did not give him instructions that the suit had been compromised. In view of the fact that the defendants made no attempt to examine their Vakil on this point, we consider that the mere affidavit of the defendants would be altogether insufficient to establish these allegations of fact. When a Pleader, who is authorised by his *vakalatnama* to appear for a party, does appear and makes a statement of fact on behalf of that party the mere allegation of that party to the contrary is not material sufficient to contradict his Pleader.

The next point which was argued was in regard to the authority which is contended in the *vakalatnama* of Pandit Mangali Prasad. This *vakalatnama* clearly states in cl. 2 that authority is given "*ya moqadma men tasfia karen.*" It was argued that this only applies to original suits, but the word "*moqadma*" is very much more general and should be translated by the word 'case' and applies not only to an original suit but to an appeal. Further in cl. 2 of the *vakalatnama* it is also stated "*ya pairavi moqadma ki karen*". If the argument was correct, then the Vakil would not have been authorised by his power of-attorney to argue the appeal before the lower Appellate Court. We consider that the *vakalatnama* clearly gives power to compromise cases to Pandit Mangali Prasad. Some reference was made to the various rulings, but the circumstances of these rulings were entirely different and do not throw any light on the present case. As regards the allegation that the compromise went beyond the subject-matter of the suit, it is founded on a statement in the terms of the compromise that the defendants should continue to pay Rs. 20 a year to the plaintiff for taking the produce of the trees. We do not consider that this matter travels beyond the subject-matter of the suit and in any case the compromise does not purport to be one which was made by the Vakil but it purports to be one which was made by the party. Under these circumstances we consider that there is no force in this appeal and we dismiss it with costs.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No 557 of 1929.
April 10, 1931.
BANERJI AND KING, JJ.

NET RAM—PLAINTIFF—APPELLANT
versus
ROSHAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—'Acknowledgment', essentials of—Mere statement of existence of earlier mortgage deed, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 66.

Where a second mortgagee who had obtained a decree on his mortgage stated in the verified statement accompanying an application for sale of the property under O. XXI, r. 66, Civil Procedure Code, that upon an examination of the Registration Office he found that there was a mortgage-deed of the property of which the sale proclamation was to issue which had been registered on a certain date (which was prior to the date of his mortgage):

Held, that this did not amount to an acknowledgment of any liability affixed to the property or personal under the earlier mortgage and did not give a fresh starting period for a suit on the earlier mortgage.

Second Appeal from a decision of the Subordinate Judge, Meerut, dated the 30th January, 1929.

Messrs. *Panna Lal* and *Vishwa Mittra*, for the Appellant.

Messrs. *L. M. Roy* and *S N. Seth*, for the Respondents.

Judgment.—This is a plaintiff's appeal in a suit for sale on a mortgage of the 12th of August, 1910, executed by Qadam Singh. On the 18th of January, 1915, Qadam Singh executed another mortgage in favour of Shib Shankar. On the 26th of May, 1920, Shib Shankar sued on his mortgage of the 18th of January, 1915, and obtained a decree which was made final on the 2nd of February, 1921. Shib Shankar then sold the decree to Roshan Lal, respondent No. 1.

On the 21st February, 1923, Net Ram, the plaintiff-appellant, instituted a suit for sale against Qadam Singh, his sons and grandsons to enforce his mortgage of the 12th of August, 1910. In this suit he did not implead either Shib Shankar or Roshan Lal. He unsuccessfully tried to implead the subsequent mortgagee or his representative in the execution proceedings but failed. On the 26th of June, 1925, Roshan Lal, in execution of his decree on foot of the mortgage of the 12th of January, 1915, purchased the property now in suit and obtained possession thereof on the 11th of November, 1926

Net Ram finding that he could not obtain possession of the property mortgaged to him instituted a second suit for sale on the mortgage of the 12th of August, 1910, impleading Qadam Singh, his sons and grandsons and Roshan Lal the purchaser of the property in execution of the decree obtained under the subsequent mortgage. The plaintiff was met with the plea that the claim was barred by limitation as the time for suit expired on the 13th of August, 922. This the plaintiff admitted but pleaded that Roshan Lal had acknowledged his liability on the 17th of June, 1921, in a statement made in an affidavit of that date.

The Court of first instance disallowed the plea of the defendant and decreed the suit. On appeal the learned Judge has dismissed the suit; hence this second appeal before us.

We have heard the learned Advocate for the parties and have examined all the cases that have been laid before us carefully. We have come to the conclusion that the case must be decided on what the defendant Roshan Lal must be deemed to have said in the affidavit of the 17th of June, 1921, and if that amounts to an acknowledgment of liability, *i e*, an admission of any liability by himself or liability on the property the claim cannot be held to be barred by limitation.

Under O. XXI, r. 66 of the Code of Civil Procedure every application for an order for sale was to be accompanied by a statement signed and verified in the manner prescribed for the signing and verification of pleadings and containing "so far as they are known to or can be ascertained by the persons making the verification the matters required by sub-r 2 to be specified in the proclamation." Clause (c) of sub r. 2 says "any encumbrance to which the property is liable is to be stated."

An examination of the statement of Roshan Lal dated the 17th of June, 1921, in our opinion shows that all that Roshan Lal informed the court was that upon an examination of the Registration Office he found that there was a mortgage-deed of the property of which the sale proclamation was to issue which had been registered on the 17th of August, 1910.

This in our opinion is not an acknowledgment of any liability affixed to the property for personally to Roshan Lal. It cannot be taken to be an acknowledgment of a liability within the meaning of s. 19 of the Indian Limitation Act.

For the above reasons we are of opinion that this appeal must be dismissed and we dismiss it with costs.

A. *Appeal dismissed.*

PRIVY COUNCIL.

Appeal from the Patna High Court.

March 4, 1932.

VISCOUNT DUNEDIN, LORD THANKERTON AND SIR DINSHAH MULLA.

SHAMA KANT LAL AND OTHERS—
APPELLANTS
versus
Mahanth RAMDHAN PURI—
RESPONDENT.

Adverse possession—Long possession of share proved -Absence of evidence to identify such share—Effect —Burden of proof of identity of land.

Where in a suit by the plaintiff who was the recorded proprietor of a 12-annas share in a *mauza* for ejectment of the defendants who were entered as *mokararridars* in respect of four annas comprised within the said twelve annas on the ground that the entry was wrong and the defendants were mere trespassers, the defendants were found to have been in possession of some interest in the *mouza* for a long time but there was nothing to identify the land of which they had been in possession for so long with the four annas in dispute:

Held, that it could not be presumed that the defendants were in possesson of the shares in dispute and the failure of the defendants to identify their interest with the four annas share in dispute was of itself sufficient ground for rejecting the plea of limitation and adverse possession raised by them. [p. 627, col. 2]

Mr. *S. Hyam*, for the Appellants.

Mr. *W. Wallach*, for the Respondent.

Lord Thankerton—This is an appeal from a decree of the High Court at Patna, dated the 1st July, 1927, which varied a decree of the Court of the Subordinate Judge of Gaya, dated the 29th August, 1923.

The present suit was instituted on the 30th November, 1921, by Mohunt Dalmir Puri in whose place the present respondent was substituted on the 2nd August, 1922, against eight defendants. Defendant No. 1 having died, his interest passed to his sons, who were defendants Nos. 2 and 3, and on the 14th August, 1923, the defendants were renumbered. Defendants Nos. 1 to 6 are now represented by the present appellants, and defendant No. 7 was Babu Nageshwar Prasad, but service of the summons on him was not proved and he did not appear to resist the suit, and his name was removed from the record under the judgment of the Subordinate Judge.

The respondent is the proprietor of a 12 annas share in *Mauza* Baghore, District of Gaya, the remaining four annas being the property of one Kameshwar, who gave a *mokarrari* of his four annas to one Gyani Lal. Nageshwar formerly defendant No. 7, succeeded to the *mokarrari* interest of Gyani Lal, and is in possession as *mokarraridar* under Kameshwar. In the Record of Rights, which was published on the 2nd December, 1915, the respondent was recorded as the proprieror of 12 annas of the *mauza* and defendants Nos. 1 to 6 were recorded as *mokarraridars* in respect of four annas comprised within the respondent's 12 annas under a "verbal" *mokarrari*.

In the plaint the respondent challenged the correctness of the entry in the Record of Rights and alleged that the defendants had no legal right to possession and that their possession was against right and as of "trespassers." The prayer of the plaint was for possession and for mesne profits, and, in the alternative, that a proper and fair rent might be assessed upon the lands, if the court found that the defendants had any tenancy rights in the lands in question. He alleged that his 12 annas share was let in oral *thika* to Nageshwar from 1902 to 1915, and that Nageshwar paid rent up to 1914 at the annual rate of Rs. 1,955; that he had recently learned that Nageshwar, in league with the appellants, had joined them in four annas out of the twelve annas oral *thika* without the respondent's knowledge or consent; that the appellants had got themselves recorded as holding such four annas as oral *mokarrari* in the Record of Rights in 1915 and that the respondent first came to know of the matter after the publication of the Record of Rights.

The appellants, in their original written statements, in addition to certain defences no longer in question, claimed that the four annas out of the respondent's twelve annas was their permanent *bafarzandan mokarrari*, and that it had been in their possession for over twenty years and was never in *sir* possession of the respondent; that the *jama* was fixed in perpetuity at Rs. 159, which, by arrangement was payable at Rs. 158 to revenue and cesses by them. They further claimed that the suit was barred by limitation as they had been openly and adversely in possession for over twelve years to the full knowledge of the plaintiff, and denied that they were in league with Nageshwar.

In a set of additional written statements, the appellants stated that the four annas in suit had been held by their ancestors since 1857, that in 1871 Gossain Lachman Puri, predecessor-in-interest of the respondent, brought a suit against Din Dayal Lal, a predecessor of the appellants, and against Dalchand Ram, brother-in-law of Din Dayal Lal for recovery of *khas*

possession of eight annas share of *Mauza* Baghore, in which the plaintiff repudiated any *mokarrari*, and that the *mokarrari* set up by Din Dayal was confirmed by the High Court of Calcutta: and that this constituted *res judicata* as between the present parties.

Among the issues framed by the Subordinate Judge were the following:—

(3) Is the suit barred by limitation?

(4*a*) Is the suit barred by *res judicata*?

(5) Have the defendants no title to the share in dispute, and is the survey entry recording them as *mokarraridars* incorrect?

(6) Have the plaintiffs any right to get the *mokarrari jama* assessed? If so, how much?

(7) Is the plaintiff entitled to get *sir* possession over the property in dispute by evicting the defendants?

The learned Subordinate Judge found against the appellants on issues Nos. (3), (4*a*) and (5). He held on the evidence that there was no proof of *mokarrari* right, and that the survey entry was without foundation and incorrect.

In support of the plea of *res judicata*, the appellants had produced a copy of the judgment of the High Court of Calcutta in the suit of 1871, from which it appeared that the plaintiff, as owner of eight annas of *Mauza* Baghore and two annas thirteen dams of *Mauza* Bhandajore, sought a declaration that a *mokarrari* deed for, *inter alia*, the whole sixteen annas of *Mauza* Baghore set up by one Girwardhari Singh was forged, fraudulent and collusive. The deed was dated 28th July, 1857, and was in favour of Girwardhari Singh. The High Court upheld the deed The appellants' case was that Girwardhari Singh was a *benamidar* for Din Dayal Lal, and that he was the same man as Girdhari Singh, a former *tehsildar* of the present appellants. The Subordinate Judge held that this identity was not proved, and that any way Girwardhari could not be *benamidar* for Din Dayal Lal, as the judgment of the High Court of Calcutta observes: 'It should be noticed that the real lessee was Repal Singh, the name of his son Girwardhari being used." He further pointed out that there was absolutely no evidence worth the name that Repal Singh's *mokarrari* came down to the appellants. He, therefore, rejected the plea of *res judicata*. He also rejected the plea of limitation in respect that, having failed to prove a *mokarrari* right, the appellants had not proved any adverse title, or non-payment of rent, or any overt act which would show adverse possession.

The learned Subordinate Judge, however, expressed the view "that the defendants are found to have been in possession of some interest in the *mauza* since a very long time and for want of better explanation, the presumption relates to the share now in dispute which is in present possession of the defendants," and stated, "The plaintiff is not anxious to evict the defendants and has conceded the long possession of the defendants and is quite willing to treat them as tenants"; he, therefore, assessed Rs. 183 besides legal cesses as the rent for the lands from 1919.

From this decree the present appellants appealed to the High Court of Judicature at Patna, and the present respondent filed cross-objections, denying that he had made the concession stated by the Subordinate Judge, and claiming *khas* possession. The High Court, in their judgment dated the 1st July, 1927, concurred in the finding of the Subordinate Judge that the defendants had failed to establish any *mokarrari* right, and in his finding as to *res judicata*. On the question of limitation and assessment of rent, the judgment states, "It is the common case that the learned Subordinate Judge was not entitled to assess a rent payable by the defendants to the plaintiff. If the plaintiff's suit was barred by limitation, the learned Subordinate Judge should have dismissed it; but that, if it was not barred by limitation, there was no escape from the conclusion that the plaintiff was entitled to a decree for *khas* possession. I am of opinion that this view which has been presented before us by both the parties is right and that the order of the learned Subordinate Judge cannot be maintained. Either the plaintiff is entitled to a decree for *khas* possession or his suit should be dismissed." The learned Judges held that the defendants had failed to identify the land of which they had been in possession for so long with the four annas in dispute, and they declined to accept the presumption of identification which the Subordinate Judge had applied in favour of the defendants; they also held that the evidence showed that the plaintiff was in *sir* possession of the entire twelve annas in 1900 and that the plaintiff was clearly in possession of the entire twelve annas from 1902 to 1915 through Nageshwar as *thikadar*, so that the suit must be regarded as in time. They, therefore, agreed with the Subordinate

Judge in rejecting the plea of limitation, and awarded *khas* possession to the plaintiff.

The present appeal is taken by the defendants from the decree of the High Court. It may be noted that, defendant No. 3 having died shortly before the date of that decree, appellants Nos. 3 and 4, his widows, had been substituted in his place. In September, 1931, before the appellants' case had been filed, a petition was presented by the respondent on the narrative that appellant No 4 had died, that appellant No. 3 was the proper person to be substituted in her place on the record, and that appellant No 3 had made a compromise with the plaintiff respondent, under which she renounced all claim to her alleged one anna and four pie share out of the disputed four annas share in Baghore; he accordingly asked that the compromise should be recorded and that the appeal might stand dismissed to the extent of the interest of the third appellant.

In the case of appeal subsequently presented by the remaining appellants only two grounds of appeal were stated, *viz*: (1) Because the plaintiff's suit for *khas* possession was barred by limitation, and (2) because the plaintiff gave up his claim for *khas* possession before the Subordinate Judge recognised the defendant's tenancy and only asked for a fair assessment of rent.

On the 19th January, 1932, the appellants presented a petition for admission of further documents as evidence in the appeal and for the amendment of their case by the addition of four further reasons of appeal. These documents all formed part of the record in the 1871 suit, which the appellants had discovered to have come up on appeal to this Board, who, on the 21st January, 1879, affirmed the judgment of the High Court of Calcutta. The case is reported in Sutherland's Judgments of the Privy Council, Vol. III, 581. This petition was first dealt with at the hearing and their Lordships refused the admission of the documents, but allowed the amendment of the appellants' case by the addition of another ground of appeal, *viz*,: "3. Because in the circumstances of the case the respondent's claim is barred as *res judicata*."

The appellants did not seek to maintain their second ground of appeal, but, as in the argument before the High Court, they accepted the position that, if the suit was not barred by limitation or *res judicata* the respondent was entitled to decree for *khas* possession.

On the question of limitation, their Lordships see no reason to differ from the conclusions of both courts below, but they would point out that the failure of the appellants to identify the "some interest in the *mauza*," of which the learned Subordnate Judge found they had been in possession "since a very long time," with the four annas in dispute is of itself sufficient for rejection of the plea of limitation, and that, if the Subordinate Judge had not erroneously given the appellants the benefit of a presumption, he would evidently have agreed that the appellants had failed in that identification.

In their Lordships' opinion the appellants equally fail to establish their plea of *res judicata*. They are entitled, of course to refer to the judgment of this Board of 1879 and, in so far as it may be necessary for elucidation of that judgment, to refer to the record in the appeal. A perusal of the judgment makes clear (*a*) that the plaintiff in that suit, as owner of an eight annas share in Baghore, challenged the genuineness of a *mokarrari* grant of 1857 of the entire sixteen annas; (*b*) that the only issue raised or decided was the genuineness of the deed and that the right of the defendants *inter se* was not in issue or decided; and (*c*) that Din Dayal Lal was made a defendant as the purchaser of a share in the *mokarrari*. The appellants no longer maintained that Girwardhari was *benamidar* for Din Dayal Lal, and there is no evidence to show that any share Din Dayal Lal had has come to the appellants and, even if that were assumed, there is no evidence to identify such share of Din Dayal Lal with the four annas share in dispute in the present suit.

Their Lordships will humbly advise His Majesty that the compromise between appellant No. 3 and the respondent should be recorded, that the appeal should be dismissed and that the respondent should be paid his costs in the appeal up to the 14th September, 1931, by appellants Nos. 1 to 3 and 5 to 7, and his costs thereafter by appellants Nos. 1, 2 and 5 to 7.

A. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *Barrow, Rogers & Nevill.*

Solicitors for the Respondent.—*Hy, S. L. Polak & Co.*

PRIVY COUNCIL.

Appeal from the Nagpur Judicial Commissioner's Court.

March 8, 1932.

VISCOUNT DUNEDIN, LORD THANKERTON AND SIR DINSHAH MULLA.

LAL INDRA SHAH—APPELLANT

versus

SHEOSHANKAR AND OTHERS—RESPONDENTS.

Central Provinces—Inferior proprietor—Rights over village waste and forest produce—Burden of proof—Absence of entry in wajib-ul-arz*—Inference.*

There is no presumption that the inferior proprietors of a district in the Central Provinces possess the same rights and privileges which are possessed by the inferior proprietors of the other districts of the Province. [p. 629, col. 1]

Therefore, where the inferior proprietors of a *mauza* claim right in respect of the village waste and forest produce they can only succeed if they show either that they acquired their rights by custom or those rights were granted to them when the last settlement of the *mauza* was made with them their predecessors. [*ibid.*]

Further, where there is no proof of the existence these rights before a particular settlement the ence of any entry in the *wajib-ul-arz* prepared g the settlement cannot be interpreted as a ation of any such right. [*ibid*]

Messrs *L. DeGruyther K. C.*, and *J. M. Parikh*, for the Appellant.

Sir Dinshah Mulla.—The appellant is the *zemindar* and superior proprietor of *Mauza* Deosur in the Ambagarh Chowki *zemindari* situated in the Drug District in the Central Provinces. The respondents are inferior proprietors of the *mauza*.

The suit out of which this appeal arises was instituted by the respondents in the Court of the Additional District Judge of Raipur against the appellant for a declaration that the respondents as inferior proprietors were entitled to all rights over the forest and *banjar* within the boundaries of the *mauza* as the *zemindar* himself had over the rest of his estate subject only to the annual payment of Rs 90, and that the entries in the *wajib-ul-arz* of 1925 which declared the *zemindar* to be entitled to those rights were not correct, and they prayed that those entries should be cancelled.

The trial Court dismissed the suit. On appeal, the Judicial Commissioner of the Central Provinces reversed the decision of the trial Court, and decreed the respondents' claim. From that decree the *zemindar* has brought the present appeal to His Majesty in Council. The respondents did not appear before their Lordships at the hearing of this appeal.

Ambagarh Chowki *zemindari* was formerly in the Chanda District, and was transferred to the Drug District in 1907.

The first regular settlement of the *zemindari* was made in 1862—1869, but no inferior proprietors were created at that settlement.

The next settlement of the *zemindari* was in 1902-1904. At that settlement the respondents' predecessor-in-title was recorded in the *Khewat* as inferior proprietor of the *mauza*, and a sub-settlement was made with him. A *wajib-ul-arz* of the *mauza* was prepared which consisted of several clauses each with a distinct heading. Clause XIX of the *wajib-ul-arz* is headed "Rights of inferior proprietors over the village waste and the forest produce." There are no entries under that heading, but there appears the mark—X—below the heading of that clause in the official copy filed by the respondents and the mark in the official copy filed by the appellant It appears from the evidence of respondent No. 1 given in this suit that his predecessor claimed at that settlement the rights which are now claimed by him, but his claim was rejected.

The last settlement was made in 1924-1925, and a fresh *wajib ul arz* of the *mauza* was prepared which recorded that the *zemindar* was entitled to sell the timber growing in the *mauza* and to the grazing and *mahua* dues and to all other rights which are now claimed by the respondents. The respondents objected to these entries before the Settlement Officer, but the objection was disallowed. They then appealed to the Settlement Commissioner, but the appeal was dismissed.

The respondents then instituted the present suit in January, 1926. The ground of their claim was that they and their predecessors had been in enjoyment of the rights claimed by them in this suit long before 1864, and that they were entitled to those rights by custom. They also claimed that the very status of inferior proprietors implied those rights, that those rights were not taken away by the *wajib ul-arz* of 1904, and that the entries in the *wajib ul arz* of 1925 in so far as they declared the *zemindar* to be entitled to those rights were incorrect and should be cancelled.

The trial Judge found that the respondents had not enjoyed the rights claimed by them before 1903, and that even after 1903 they enjoyed them only occasionally, and they were therefore not entitled to them by custom. He held that the status of inferior proprietors did not carry with it the rights claimed by them, and that the

absence of entries in cl. XIX of the *wajib ul-arz* of 1904 showed that inferior proprietors had no rights in respect of the village waste and the forest produce, and he dismissed the suit.

This decree was reversed by the Judicial Commissioner on appeal. The Judicial Commissioner in his judgment said that an inferior proprietor in the Saugor and Nerbudda territories and in the Bilaspur District had all such rights over the forest and *banjar* in his village as the *zemindar* himself enjoyed over the rest of the *zemindari*, and that an inferior proprietor in the Chanda District must be presumed to have the same rights and privileges as were enioyed by an inferior proprietor in the other districts of the province. Starting with this presumption he proceeded to inquire whether those rights were cut down or curtailed by the *wajib ul arz* of 1904, and he held that they were not, and decreed the respondents' claim. As to the marks in the *wajib-ul-arz* of 1904 he observed that if the Settlement Officer wanted to say that the inferior proprietor had no such rights, he could have easily used the word *nahi (nil)* instead of leaving the entry blank and not writing anything under that heading.

Their Lordships are unable to adopt this view. There is no presumption that the rights which an inferior proprietor enjoys in other districts of the province are enjoyed by an inferior proprietor in this *mauza*. The respondents therefore can only succeed if they show either that they acquired those rights by custom as alleged by them or they were granted to them in 1902-1904 when the sub settlement of this *mauza* was made with their predecessor. As regards custom, their Lordships see no reason to differ from the finding of the trial Court that it has not been proved. They also think that no such rights as are now claimed by the respondent were conferred upon them at the settlement of 1902—1904. Further, there being no proof of the existence of these rights before that settlement the absence of any entry in *wajib-ul arz* of 1904 cannot be interpreted as a reservation of any such rights.

Their Lordships are therefore of opinion that the respondents have failed to establish their case, and they will humbly advise His Majesty that this appeal should be allowed, the decree of the Judicial Commissioner reversed, and the decree of the Additional District Judge restored. The respondents must pay the appellant's costs throughout.

A. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *T. L. Wilson & Co.*

PRIVY COUNCIL.

Appeal from the Patna High Court

February 12, 1932.

LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES

Raja RAGHUNANDAN PRASAD SINGH AND ANOTHER—APPELLANTS

versus

Raja KIRTYANAND SINGH BAHADUR—RESPONDENT

Surety—Stay of execution of mortgage-decree—Bond by surety—Construction—Suit to enforce bond—Limitation—Cause of action, whether arises from date of appellate decree or sale of property in execution—Practice—New point in appeal.

During the pendency of an appeal from a decree for sale to enforce a mortgage the Appellate Court ordered stay of execution of the decree for a period of 1 year on the appellant furnishing security for Rs. 1,12,000 and, if the appeal was not decided within one year, for a further period of one year for a similar sum of Rs. 1,12,000. In pursuance of this order a person stood surety and executed a bond which provided as follows: "I of my own free will stand security to the extent of rupees seventy-seven thousand out of rupees one lac and twelve thousand as therein ordered and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court within one year from the 1st April, 1919, the said defendants shall duly act in accordance with the decree of the said Appellate Court and they shall pay the sum of rupees seventy-seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand, but if they should fail to pay the sum of rupees seventy-seven thousand, then any amount so payable as aforesaid shall be realised from my person and my legal representatives shall be personally liable to pay the same. If the judgment-debtors fail to furnish security to the extent of rupees one lakh and twelve thousand on the 1st April, 1920, in case the appeals be not decided within that date then the decree-holders according to the order of the High Court shall be able to execute their decree with interest and shall be able to realise rupees seventy-seven thousand from me and my representatives the money secured by this bond" The appeal was heard on the 19th July 1921 and dismissed On 26th January 1925 the property was sold and there was a deficit of Rs. 93,000. The decree was confirmed on appeal on 16th December 1925 and on the 25th January 1927 the decree-holders made an application to enforce the bond against the surety. The High Court held that the sum of Rs 77,000 had become payable on the 1st April 1920 and that the claim was time-barred:

Held, (1) that the security bond did not put upon the giver of the bond an obligation to make an immediate payment in cash but only gave the decree-holders a realisable security up to Rs 77,000 for the balance of the sum, if any, remaining unpaid

after the mortgaged property had been realised. [p. 632, col. 1.]

(2) that until the property was sold the liability of the surety could not be enforced, and the application made in January 1927 was within time inasmuch as under the Indian Limitation Act it must either be within three years if the application was properly an application in the suit, or within six years if the application should have been made by independent suit: [p. 632, cols. 1 & 2.]

Held, further that it was not open to the defendants to take the plea that the application should have been made by an independent suit, having regard to the fact that the point had never been taken before, and that if it was allowed to be taken in appeal and succeeded the appellants would be barred by lapse of time, although their original application was in time. [p. 632, col. 2.]

A security bond must be construed in the light of the order directing the security to be given. [p. 631, col. 2.]

Messrs. *L. DeGruyther*, K. C. and *W. Wallach*, for the Appellants.

Messrs. *A M. Dunne* K.C. and *Hyam*, for the Respondent.

Lord Tomlin.—On the 22nd December, 1917, a decree was obtained in a suit to enforce a mortgage against the mortgagor and a puisne mortgagee, who is respondent here. The decree was in the ordinary form of such decrees in India; that is, six months were given for redemption, and at the end of that time in default of redemption the property was to be sold. The decree did not contain, and having regard to O. XXXIV of the Civil Procedure Code could not contain, a personal judgment against the mortgagor for the mortgage money. An appeal to the High Court against the decree was duly taken by the mortgagor. On the 31st August, 1918, the decree was made absolute.

On the 25th October, 1918, an application was made to the Subordinate Judge by the decree holders to bring the property to sale.

On the 2nd April, 1919, an Order of the High Court was made by consent for a stay, and the Order was in these terms: "Let the respondents' petition for execution"—the respondents means the decree-holders—"now pending be stayed for the period of one year as and from the 1st April, 1919, upon the appellant" (meaning thereby the mortgagor) "furnishing solvent security in the lower Court to the satisfaction of the Subordinate Judge by the 1st May, 1919, for the sum of 1 *lakh* and 12,000 rupees. In the event of the appellant's appeal to this Court not being disposed of within the period of one year calculated from the 1st April, 1919, let a further stay be granted for a period of one more year from the 1st April, 1920, upon the defendant's [*sic*] furnishing solvent security in the lower Court to the satisfaction of the Subordinate Judge for a further sum of 1 *lakh* and 12,000 rupees, such last-mentioned security to be furnished on or before the 1st April, 1920, in the event of such further or additional stay being necessary."

Pursuant to that order there was executed by the respondent here (he being as already indicated a puisne encumbrancer and as such the second defendant to the suit) a bond by way of security to satisfy in part the solvent security required by the High Court for the sum of 1 *lakh* and 12,000 rupees. The sum of 1 *lakh* and 12,000 rupees seems to have been fixed because it represented one year's interest on the mortgage money, and the object was to put the decree-holders ultimately in the position of being no worse off by reason of one year's delay in enforcing their security.

The bond so executed by the respondent, was in this form:—It recited the suit and the decree of the 22nd December, 1917, in favour of the plaintiffs in the suit and that the defendants in the suit had preferred appeals to the High Court, and it further recited that the decree-holders had applied to execute the decree and that the defendants had made an application for a stay and that they had been called upon to furnish security by the order of the 2nd April, 1919, to which reference has already been made. Then it proceeds as follows: "Accordingly I of my own free will stand security to the extent of rupees seventy-seven thousand out of rupees one lac and twelve thousand as therein ordered and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court within one year from the 1st April, 1919, the said defendants shall duly act in accordance with the decree of the said Appellate Court and they shall pay the sum of rupees seventy-seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand, but if they should fail to pay the sum of rupees seventy-seven thousand, then any amount so payable as aforesaid shall be realised from my person and my legal representatives shall be personally liable to pay the same."

Up to this point the document provides for the case of the decree of the first Court being confirmed or varied by the Appellate Court within one year from the 1st April, 1919—an event which did not happen. The next clause, however, deals with events which did happen in the following

terms: "Be it known that if the judgment-debtors fail to furnish security to the extent of rupees one lakh and twelve thousand on the 1st April, 1920, in case the appeals be not decided within that date then the decree-holders according to the order of the High Court shall be able to execute their decree with interest and shall be able to realise rupees seventy-seven thousand from me and my representatives the money secured by this bond."

In December, 1920, the application by the decree holders to bring the property to sale seems to have been struck out. The appeal against the decree in the suit was not heard before the 1st April, 1920. It was, in fact, heard on the 19th July, 1921, and was dismissed. On the 6th March 1922, there was a further application for execution of the judgment, and on that application an order was made for the sale of the property. On the 26th January, 1925, the property was sold under that order, and, as appears from the account of the proceeds of the sale, the sale did not realise by a sum of 93,000 odd rupees enough to satisfy the amount due on the mortgage.

On the 16th December, 1925, there having been an appeal from the High Court to their Lordships' Board, an Order in Council was made affirming the original decree and making an order with regard to additional costs.

On the 25th January, 1927, the decree-holders made an application in the suit, to enforce the bond against the respondent here. Upon that application the questions arose which fall for the determination of the Board to-day.

On the 18th May, 1927, a decree was passed in the suit ordering the mortgagor in the suit to pay the balance of the mortgage money. After that the application of the present appellants to enforce the respondent's bond came before the Subordinate Judge, and on 28th July, 1927, he delivered his judgment. He stated that the issues were as follows:— (1) Is the application barred by limitation? (2) As the interest due from April, 1919 to March, 1920, has already been realised by the sale of the mortgaged property, can the decree-holders realise the surety money from the applicant? (3) Is the security without consideration? (4) Is the petitioner precluded from raising this point after notice under O. XXI, r 22? Has the said notice been served? He dealt, first of all with the point with regard to interest and their Lordships understand that the view that he took was this: Inasmuch as the one lakh and twelve thousand rupees was fixed by reference to the amount of the interest for one year, the rupees seventy-seven thousand mentioned in the bond was, in fact, part of the interest for that one year ending 31st March, 1920, and further that as the purchase money received on the sale would have been applied first in satisfaction of interest before being applied in satisfaction of capital, therefore the liability for which the seventy-seven thousand rupees had to answer had disappeared and, that being so, the giver of the bond was under no liability in respect of it. That was his answer to the second point.

The learned Judge held upon the first point, which he dealt with next, that the application was not barred by the Statute of Limitations.

Then he dealt with the points about consideration and notice which do not now arise, and he concluded that the decree-holders, the appellants here, were not entitled to realise anything in respect of the bond as the dues for which the respondent here stood surety had all been satisfied.

An appeal was taken to the High Court and on 16th August, 1928, the judgment of the High Court was delivered and the appeal was dismissed. The Judges of the High Court took a different view from that of the Subordinate Judge. They rejected the conclusion of the Subordinate Judge that the bond was given for interest only and held that upon the true construction of the bond the sum of Rs. 77,000 had become payable on the 1st April, 1920, and therefore that the appellants were statute-barred and not in a position to enforce the bond against the respondent.

In their Lordships' judgment the success or failure of this appeal depends primarily upon the true construction of the bond, the material passages of which have already been stated. The bond must be considered in the light of the order directing the security to be given. It will be observed that under the terms of that order no payment had to be made immediately on the expiration of the first year for which the stay was granted, but what is said is that the stay is allowed for one year from the 1st April, 1919, upon the decree-holders furnishing solvent security in the lower Court for the sum of one lakh and twelve thousand rupees; in other words, the decree-holders are to get, in addition to the existing mortgage, further security for one

lakh and twelve thousand rupees which shall put them in a position not worse than they would have occupied if the stay had not been granted.

In those circumstances what is the meaning of the language employed in the bond? In the first part of the clause which has been read this phrase occurs: "And they shall pay the sum of rupees seventy seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand." Although that phrase occurs in the clause which applies to the event which did not happen it is some indication as to whether or not the rupees seventy-seven thousand was an absolute sum which was to be paid in any case, and in their Lordships' judgment, it indicates that it was not necessarily such a sum. When the terms of the clause which operated in fact are looked at it is found that two things are to result in the event there mentioned; one is that the decree-holders shall be able to execute their decree with interest, and the other is that they shall be able to realise rupees seventy-seven thousand from the giver of this bond and his representatives. It is not a clause which puts upon the giver of the bond an obligation to make an immediate payment in cash; it is a clause which puts the decree-holders in the position of having a realisable security of rupees seventy-seven thousand. The question is whether that is an absolute security which the decree-holders are to be free to realise immediatly on the first April, or whether it is security to the extent of rupees seventy-seven thousand for the balance of the sum, if any, remaining unpaid after the mortgage property has been realised.

In their Lordships' judgment, upon the true construction of this document having regard to the circumstances in which it was executed, this bond is a bond for securing the balance unprovided for by the proceeds of sale of the mortgage property, up to a sum not exceeding seventy-seven thousand.

Upon that view of the case it is plain that until the property was sold the liability of the giver of the bond, the respondent here, could not be enforced. The application which was made in January, 1927, was necessarily within time inasmuch as under the Indian Limitation Act it must either be within three years if the application is properly an application in the suit, or within six years if the application should have been made by independent suit.

The point was not raised below that the application should have been made by independent suit and the point was not taken by the respondent in his printed case before their Lordships' Board. Having regard to the fact that the point has never been taken before, and that if it was allowed to be taken now and succeeded the appellants would be barred by lapse of time although their original application was in time, their Lordships are of opinion that it is not open to the respondent to take the point here.

The result, therefore, is that the appeal must be allowed. There will be a declaration that the appellants are entitled to receive from the respondent, his person and property the amount now properly payable under the bond on the footing that the bond is a security up to seventy-seven thousand rupees for the deficit on the mortgage. If necessary, there must be an enquiry to ascertain what the amount is and for that purpose the case should be remitted to the High Court. The appellants must have their cost throughout. Their Lordships will humbly advise His Majesty accordingly.

Appeal allowed.

Solicitors for the Appellant—Messrs. *W. W. Box & Co*

Solicitors for the Respondent.—Messrs. *Barrow, Rogers* and *Nevill.*

PRIVY COUNCIL.

Appeal from the Court of Appeal for the Federated Malay States (State of Perak)

February 19, 1932

LORD BLANESBURGH, LORD RUSSELL OF KILLOWEN AND LORD MACMILLAN.

TUAN MAN AND AN OTHER—APPELLANTS

versus

CHE SOM AND OTHERS—RESPONDENTS.

Appellate Court—Remand for impleading new party—Indicating order which trial Judge should make—Propriety—Administration suit—Necessary parties—Legal representative.

A Court of Appeal while sending a case to the trial Judge for the purpose of having a necessary party brought before the Court should not proceed, before the new party has been joined or heard and without considering what defences may be available against him, to indicate the order which the trial Judge should make when he tries the case in the presence of proper parties. [p 637, cols. 1 & 2]

The only proper plaintiff to recover the asset of a

deceased person is, in default of evidence to the contrary, the legal personal representative of the deceased and even if a beneficiary could sue in his own right making the legal personal representative a defendant his only claim would be an order for transfer of the asset to the legal personal representative to which claim all defences available against the legal personal representative would be open to the defendants. In a case of this nature the addition of the legal personal representative is not the mere curing of some technical defect not affecting the substance of the dispute between the original parties to the action but the matter goes to the substance of the plaintiff's claim. [p. 637, col. 2.]

Messrs. *Wilfred Greene*, *K. C.*, and *Cyril Radcliffe* for the Appellants.

Sir *Gerald Hurst*, *K. C.*, and *F. O. Langley* for the Respondents.

Lord Russell of Killowen.—This appeal is brought by the defendants to an action which was tried by Burton, J at Ipoh in the State of Perak. The action was dismissed; but an appeal by the plaintiffs to the Court of Appeal of the Federated Malay States was allowed, and an order was made by that court, which is set out hereafter, and from which the defendants have appealed to his Majesty in Council.

For the proper appreciation of the cause of action which the plaintiffs seeks to enforce, and of the methods and procedure which they adopted for that purpose, and of the relationship of the parties it is necessary to embark upon considerable detail.

Tuan Kundor was a Rajah of Raman, in the kingdom of Siam, who died in the year 1867. He was the owner of a tin mine at Klian Hitam in Siam. He had nine children, five sons and four daughters all of whom, according to one witness, survived him. His eldest son was Tuan Timoon, who became Rajah and entered into possession of the mine on his father's death. On the death of Tuan Timoon, in the year 1875, he was succeeded as Rajah by his brother, Tuan Jagong who also took possession of the mine and kept it until his death in 1901. Tuan Timoon had left a widow him surviving, Raja Prempuan, who subsequently married Tuan Jagong. She survived Tuan Jagong, and on his death she took possession of his property and of the tin mine. She continued in possession of the tin mine until her death in 1916. Letters of Administration with her will annexed were granted in 1918 to the appellants, who assumed and continued in possession of the tin mine.

Their title to the tin mine was called in question by the present action, which was commenced on the 17th September, 1927. By that time all the children of Tuan Kundor had died. The plaintiffs in the action were (1) Tuan Balai Jawa, the son of Tuan Timoon; (2) Tuan Kalumpang, the son of Tuan Cherik (a son of Tuan Kundor), (3) Nai Tuan Tandok, the son of a daughter of Tuan Kundor; (4) Toh Nang Bayam a daughter of Tuan Jagong; (5) Toh Nang Kechik, the daughter of Tuan Timoon; and (6) Toh Nang Keboon a daughter of another daughter of Tuan Kundor. The first named plaintiff died *pendente lite*, and his administrator, Che Som, was substituted as a plaintiff in his stead. A few further facts as to pedigree should be stated. Tuan Jagong left another daughter, Tuan Kembang, who was married to the said Tuan Kalumpang and also a son, Tuan Leebeh, who had disappeared in the year 1902 and of whom nothing had since been heard.

One other fact of importance must be stated. The tin mine in question was until the year 1909 situate in the kingdom of Siam. In that year certain Siamese territory which included the mine, was ceded by treaty to the Government of Perak.

In view of the various contentions which have at different times been raised on behalf of the plaintiffs, it is necessary to scrutinize with some care the cause of action alleged in the plaint and the nature of the relief which is therein claimed.

As their Lordships read this document, the plaintiffs claim to be entitled to the mine, or to shares therein, as persons who are entitled to shares in the estate of Tuan Kundor, as on an intestacy. Each plaintiff is claiming to assert a personal right of ownership in regard to the mine upon the footing that it belonged to Tuan Kundor, and that it still forms part of his estate. In terms, the claim of ownership is asserted in respect of the whole estate of Tuan Kundor, moveable and immoveable, but the asset more specifically referred to is the mine. The relief claimed by the prayer is (1) an account of Tuan Kundor's estate which the Raja Prempuan held "as trustee for the beneficiaries of Tuan Kundor," and which had come to the hands of the administrators of Raja Prempuan; (2) an enquiry as to 'who are the beneficiaries of the estate of Tuan Kundor, deceased, and the shares to which they are entitled"; (3) distribution and payment to the plaintiffs of their shares; and (4) administration of the estate of Tuan Kundor.

That was the frame of the action as

launched. As is apparent, it had a twofold object and asserted a twofold claim, *viz.*, (*a*) to recover from the defendants assets alleged to belong to the estate of Tuan Kundor, and (*b*) to have those assets divided among the persons beneficially entitled to them.

By their defence the defendants called for strict proof of the allegation that the plaintiffs were entitled to share in the estate of Tuan Kundor. Further, they did not admit that Tuan Kundor had died intestate.

At the trial the plaintiffs called five witnesses; the defendant called none. It is of importance to note both what was proved and what was not proved. It will be convenient to state first what was not proved.

No evidence was called to establish any title in the plaintiffs. At the relevant dates the mine was situate in Siamese territory, but no attempt was made to prove who, according to Siamese Law, would become entitled to the property, assuming it to be a fact (which itself was not proved) that Tuan Kundor had died intestate. No attempt was made to establish by legal proof that the plaintiffs had any beneficial or other interest in the mine.

It is true that reliance was placed upon a document which was executed by Raja Prempuan in the year 1904, and it may be that the plaintiffs considered that the document sufficiently proved their case in these respects; but, as will hereafter appear, when the terms of the document are set out, it is quite insufficient for this purpose.

The only witness called who could speak as to events in Tuan Kundor's lifetime was an old man who had been in the service of the family. From his evidence it would appear that Tuan Kundor was in the habit of making payments out of the profits of mine to his brothers and sisters and to his children; that on his death Tuan Timoon had possession of the mine and made similar distributions among relations; that on his death Tuan Jagong had possession of the mine and pursued the same practice; and that when Tuan Jagong died, his widow, Raja Prempuan, received the money from the mine.

There is nothing in that evidence to assist the plaintiffs in establishing the title which they claim. Indeed, it would suggest, if anything, successive ownership of the mine in Tuan Kundor, Tuan Timoon and Tuan Jagong, coupled with some sort of benefits conferred by them upon their relatives. It would certainly appear to be inconsistent with the view that the mine still forms part of the estate of Tuan Kundor.

The matter, however, is carried a stage further by the evidence of Tuan Kalumpang (hereinafter referred to as Kalumpang), who was the only one of the plaintiffs to give evidence. He stated that, after the death of Tuan Jagong, Raja Prempuan "took charge of the property and, among the rest of the property, of the mine"; and he added, "I objected before the *Kathi* because Che Ning"—[*i. e.*, Raja Prempuan]—"did not give the shares to the *waris*. We wanted the *Kathi* to distribute the estate according to Muhammadan Law."

This evidence refers to a lawsuit which Kalumpang instituted in 1903 before the *Kathi*, or Judge, but it leaves in doubt the exact nature of the litigation. In particular, it leaves in doubt who was the ancestor whose *waris* are referred to and whose estate is being considered. But the litigation is of importance because in the course of it there came into existence the document above referred to.

The *Kathi* was called as a witness, and he deposed to the following facts. Kalumpang complained to him about the Raja Prempuan, and he issued a summons to her. The Raja Prempuan settled the case by handing a letter to the court. It was read aloud and handed to Kalumpang. The case was then noted in the Judge's book as withdrawn. It is impossible to gather from this evidence the nature of the action and unfortunately the court records have been destroyed by fire.

The letter is adressed by Raja Prempuan to Kalumpang. It is dated the 8th May, 1904, and runs, according to an official translation, thus:

"This letter is from your mother, Raja Prempuan of Kota Bahru, the wife of Raja Rasadin Chawang, Raja of the State of Rahman who is now lost—may the Almighty God cause this to be sent to the presence of the assembly of my illustrious son Khun Rat Muntri Ni Ampor and his wife, my daughter, Tuan Kembang, of Kota Bahru in State of Rahman, with safety and soundness.

"I beg to inform you and your wife that as regards the rights of property left by Raja Rasadin Chawang, who is lost, I shall give you and your wife some elephants and other property, as also to my daughter Tuan Bayam for maintenance in the meantime. As to the land Klian Itam, this must be regarded as an ancestral mining land which still belongs to Toh Nek Kundor, the father of Raja Rasadin Chawang. I shall apply for a title deed (of this land) from His Majesty the King, which will be kept by me until my son, Luang Raya Phakdi, returns from Bangkok, Siam, when I will divide the land, Klian Itam, and other property and give you (your share), according to the Muham-

madan Law of distribution; but so long as I hold the land, Klian Itam, I shall give you your share in hard cash from the proceeds derived from the land

"Such is my information to you. With many *salaams* to you and your wife".

In this letter the "Raja Rasadin Chawang" referred to is Tuan Jagong; 'the illustrious son" referred to is Kalumpang, and the son Luang Raya Phakdi referred to is the son Tuan Leebeb, who had disappeared in the year 1902.

Before considering the terms of this document (hereinafter referred to as 'the letter"), it will be convenient to state shortly the subsequent history of the matter.

The letter was taken away by Kalumpang. He says that his co-plaintiffs in the present action were pleased at the letter, but nothing more seems to have been heard of it until 23 years later, when it re-appeared in the plaint filed in the present action.

The Raja Prempuan was granted a lease of the mine for 20 years, expiring in 1924. The lease is dated the 18th February, 1903, but upon the evidence must, their Lordships think, be taken to have been in fact executed subsequently to the letter of the 8th May, 1904.

According to the evidence of Kalumpang, Raja Prempuan made payments after the letter to himself "and the other beneficiaries of Tuan Kundor"—but he adds a very curious statement, *viz.*: "But I thought there must be some reason for her generosity, that I had a claim on her ..... The amounts and the times of the payments she made were uncertain."

The Raja Prempuan died in the year 1916. After her death nothing seems to have been paid to Kalumpang. Letters of Administration with her will annexed were granted in 1918 to the appellants. In 1919 Kalumpang consulted his solicitor about the mine and commenced proceedings for the revocation of the above-mentioned grant, in which, however, no mention was made of the letter. The proceedings proved abortive, and the next move of Kalumpang was the institution of the present action by him on behalf of himself and his co-plaintiffs, in the year 1927.

The action was tried by Burton J, who by his decree dated the 26th November, 1928, dismissed the action with costs. The basis of this decision was that the evidence did not establish the fact that the mine formed part of Tuan Kundor's estate. The learned Judge pointed out that the letter was the sole evidence adduced of this alleged fact, but was of the opinion that it was not consistent with the previous history of the property and was not (especially in view of the fact that it was first produced after the death of Raja Prempuan who had knowledge, not possessed by the defendants, of the circumstances in which it was written) sufficient to establish the fact essential to the plaintiff's case.

The learned Judge considered, and, as their Lordships think, correctly, that the foundation of the plaintiffs' case was the allegation that the mine still formed part of Tuan Kundor's estate.

In this connection it is to be observed that the opening speech at the trial of Counsel for the plaintiffs seems to have suggested that the plaintiffs were alleging that by the letter Raja Prempuan had constituted herself a trustee for the plaintiffs, and, it was pointed out by the Counsel for the defendants that such a suggestion was inconsistent with the pleadings. Thereupon Counsel for the plaintiffs in his reply said that the letter was not a declaration, but "an admission that she was trustee for the specific purpose of distributing according to Muhammadan Law."

From the trial judgment an appeal was made to the Court of Appeal and was heard by three Judges. Counsel for the appellants, in opening the appeal, asked for a declaration that the mine still formed part of the estate of Tuan Kundor and ought to be distributed as such, and for an enquiry as to the person then entitled and in what shares, presumably upon that footing. Thereupon the defendant's Counsel pointed out that the plaintiffs had failed to prove that they had any interest in the mine, or that Tuan Kundor had died intestate, or how the mine had devolved. In reply, notwithstanding that no evidence as to any foreign law had been given, Counsel for the plaintiffs contended (1) that the letter was sufficient evidence that Tuan Kundor's estate devolved by Muhammadan Law, and (2) that Tuan Kundor's representative was not a necessary party to the action, because by Muhammadan Law the property of an intestate vested at once in his heirs as tenants in common. He accordingly claimed the mine as specific property, and amended the claim for relief to the following form:—

"1. Declaration that defendants as legal representatives of the Raja Prempuan hold the mine as trustees for the persons entitled by Muhammadan Law to share in distribution of the estate of Tuan Kundor.

"2. Enquiries as to who are such persons as aforesaid?

"3. Transfer to such persons in undivided shares or alternatively sale of mine subject to incumbrances and payment into court of proceeds of sale to credit of this suit.

"4. Account of rents and profits from mine since death of Raja Prempuan.

"5. Payment into court of amount found due in pursuance of para. 4.

"6. Liberty to apply."

It was suggested in argument before the Board that this amendment showed that the letter was relied upon as a declaration of trust by which Raja Prempuan constituted herself a trustee of the mine. Their Lordships cannot accept this view. It is, in their opinion, clear that the plaintiffs' case throughout has been based upon the contention that the mine at the date of the action formed part of the estate of Tuan Kundor.

The Judges in the Appeal Court, although concurring in the order which was eventually made, do not appear to have been in agreement in their views of the case. The Chief Justice treated the letter as an admission that the mine formed part of Tuan Kundor's estate and, in the absence of evidence in rebuttal, as sufficient to establish that fact. He also added, however, that the letter was a contract of compromise, a view which suggests that the letter created a title, and was not merely evidence of a pre-existing title. The learned Judge, however, pointed out that the pedigree of the plaintiffs and their heirship to Tuan Kundor had not been proved, and that, except for the letter, no evidence had been given as to the law applicable to the distribution of Tuan Kundor's estate. As to this, their Lordships are content to observe that the letter of Raja Prempuan can in no sense be described as evidence of any law.

The learned Chief Justice, however, pointed out that it was necessary, since the plaintiffs claimed administration of the mine as part of Tuan Kundor's estate, that the legal personal representative of Tuan Kundor should be a party to the action. He appears to have overlooked the amended relief, which in the course of the hearing of the appeal had been claimed by Counsel for the plaintiffs.

Farrer-Manby, J thought that the case of the plaintiffs was based on the letter, which he treated as an admission of a pre-existing trust. He agreed with the order proposed by the Chief Justice

Prichard, J. simply agreed with the judgment of the Chief Justice.

Later, supplemental judgments were delivered, in the course of which the Chief Justice stated that no evidence had been tendered as to "any contractual or other effect" which the letter had on the rights of the parties under Siamese Law, and that although in his view the plaintiffs' claim could be supported without resort to the contractual effect of the letter, a higher tribunal might take a different view. He thought, thererefore, that the plaintiffs should have liberty to lead further evidence as to the effect of the letter by Siamese Law. The plaintiffs formally declined to avail themselves of this liberty.

The order made by the Court of Appeal must now be considered; it is, so far as material, in the following terms:—

"It is ordered that the cross-appeals of the defendants-respondents be dismissed with costs to be taxed. And it is ordered that the judgment dated the 26th day of October, 1928, of Burton, J., be reversed. And it is ordered that the suit do stand over for six months from the date of this order or for such extended time, if any, as may be allowed by the Court of first instance, to give time for the plaintiffs-appellants to remedy the defect caused by the legal personal representatives of Tuan Kundor not being a party to the suit in such manner as they may be advised. And it is ordered that if the plaintiffs-appellants do not remedy the said defect within the time aforesaid or within such extended time as aforesaid the defendants-respondents be at liberty to apply to the Court of first instance for an order dismissing the suit with costs to be taxed, and if the suit be so dismissed with costs the plaintiffs-appellants do pay to the defendants-respondents their taxed costs of this appeal. And it is ordered that if such defect be remedied within the time aforesaid, or within such extended time as aforesaid the plaintiffs-appellants be at liberty to apply to the Court of first instance for judgment in the following terms with such variations, if any, as altered circumstances may render necessary (and with the omission of Enquiries Nos. 2 and 3 hereinafter directed if in the circumstances the Court of first instance shall consider such enquiries to be unnecessary), that is to say;—

"Declare that the lease of a mining land, District of Upper Perak (Kroh), No. 1 Kroh, dated the 8th day of November, 1904, issued to Che Ning binti Che Nek in lieu of the Siamese Mining Lease in the plint mentioned, forms part of the estate of Phya Ratana Phakdi Tuan Kundor *alias* Phya Ratana Phakdi, in the plaint referred to as Tuan Kundor deceased, and ought to be administered by the court accordingly."

"And it is ordered that the following enquiries be made, that is to say:—

(1) An enquiry whether there is any debt of the said Tuan Kundor remaining unpaid;

(2) An enquiry whether the said Tuan Kundor disposed of the mine now held under the said lease by will or died intestate in respect thereof;

(3) If the said Tuan Kundor disposed of the said mine by will, an enquiry as to the terms and effect by Siamese Law of the said will and who are now entitled thereunder to the said mine;

(4) If the said Tuan Kundor died intestate as to the said mine, an enquiry as to who by Siamese Law became

entitled to the said mine on the death of the said Tuan Kundor, and if any of such persons have since died, who are their respective legal personal representatives or otherwise entitled to their respective shares.

"And it is orderd that an account be taken (making all just allowances) of the rents and profits of the said mine come to the hands of the defendants-respondents or any of them or to the hands of any other person or persons by the order or for the use of the said defendants-respondents or any of them as from the 21st day of September, 1921.

"And it is ordered that the said enquiries and the said account be held and taken before the Registrar of the Court and that he do certify to the court of first instance the result of such enquiries and account.

"And it is ordered that the defendants-respondents do pay to the plaintiffs-appellants the taxed costs of the suit down to and including the hearing before Burton J. and the taxed costs of this Appeal including in such taxed costs the fees of two Advocates both at the original hearing and in the Court of Appeal. And it is ordered that the further consideration of the suit be adjourned.

"And all parties are to be at liberty to apply."

"Liberty to apply to the court of first instance for the appointment of a Receiver of the rents and profits and generally as the parties may by advised.

"And lastly that the plaintiffs-appellants be at liberty to lead further evidence under s. 27 of the Courts Enactment No. 14 of 1918 by calling the witness, Haji Che Soh *bin* Che Nik (*Kathi*) or by calling other expert evidence, as to the effect of Ex. 'C' by Siamese Law. In the event of the plaintiffs-appellants availing themselves of this liberty they shall notify the Registrar and the defendants-respondents at least fourteen days before the opening of the sittings of the Court of Appeal at Ipoh on the 24th day of September, 1929, in which case this appeal shall be set down for further hearing at the sittings aforesaid, and the defendants-respondents shall be at liberty to lead evidence on the same issue, and shall be entitled to their costs of such further hearing in any event."

This appears to their Lordships to be an unusual order the terms of which need careful consideration.

Certain cross-appeals by the defendants were dismissed. Upon the main appeal the judgment of the trial Judge is reversed, the result of which is that the action no longer stands dismissed. It is then ordered that the suit do stand over for a period to enable the plaintiffs to remedy the defect caused by the legal personal representative of Tuan Kundor not being a party to the suit. If the defect is not remedied within the period the defendants may apply to the trial Judge for an order dismissing the suit. If the defect is remedied the plaintiffs may apply to the trial Judge for an order to be made by him in terms set forth by the Court of Appeal. It is hardly in accordance with precedent that a court of Appeal should, after sending a case back to the trial Judge for the purpose of having a necessary party brought before the Court, proceed (before the new party has been joined or heard, and without considering what defences may be available against him) to indicate the order which the trial Judge should make when he tries the case in the presence of the proper parties.

This order cannot, in their Lordships' opinion, stand. Its only operative effect is to send the case back to the trial Judge for the purpose of dismissing the action if Tuan Kundor's legal personal representative is not added as a party, or (if he is added) for the purpose of making a cut and-dried order. But this addition of the legal personal representative as a party is not, in their Lordships' view, the mere curing of some technical defect not affecting the substance of the dispute between the original parties to the action. In their opinion, the matter goes to the substance of the plaintiff's action

Their Lordships, as before stated, are satisfied that the case of the plaintiffs is and has been throughout that the mine formed and still forms part of Tuan Kundor's estate. They seek to recover possession of that asset from the defendants and to have that asset administered when recovered. The suggestion (faintly raised at one stage before the Board) that the letter is their root of title, cannot prevail in view of the fact that not only was no evidence given of the effect of the letter according to Siamese Law, but the opportunity of giving such evidence was declined.

The twofold relief sought by the appellants finds no foundation for either branch. The only proper plaintiff to recover the asset is (in default of evidence to the contrary) the legal personal representative of Tuan Kundor, and even if a beneficiary could sue in his own right, making the legal personal representative a defendant, his only claim would be an order for transfer of the asset to the legal personal representative to which claim all defences available against the legal personal representative would be open to the present defendants. The letter could not be used (as Kalumpang might perhaps personally use it) to ground an estoppel in favour of the legal personal representative, even though Kalumpang himself became such legal personal representative. It might be used as an admission, *i.e*, as a piece of evidence, and if no other evidence was given, it might be sufficient foundation for a judgment in favour of the legal personal representative for his recovery of the asset. There remains, however, for consideration the second branch of the relief claimed. No

foundation has been laid for this at all. There is no shred of evidence in the case to show that any of the plaintiffs is, under Siamese Law or any other law, beneficially interested in the estate of Tuan Kundor. The letter is no such evidence; at the most it is a statement by a third person of her opinion as to the law applicable, and that under that law Kalumpang was entitled to some share.

As to the suggestion that the letter constitutes a root of title as being itself a declaration of trust, such a contention, even if raised by the plaintiffs in the courts below, is equally devoid of any foundation to support it. Whether the letter according to Siamese law creates what in this country would be called a trust, and whether it creates enforceable rights, are questions of fact which should be proved, which were not proved, and which the plaintiffs have declined to prove.

In the circumstances above indicated, their Lordships feel no doubt that the action of the plaintiffs failed, not from some technical defect capable of being remedied without hardship or injustice to the parties, but from matters of real substance, which it was not open to the Judges in the Appeal Court to adjust as they have attempted to do.

Whether a legal personal representative of Tuan Kundor if and when constituted can after all these years successfully assert in fresh proceedings a claim to the mine against the present defendants is a matter upon which their Lordships are not only unwilling, but unable to express any view; but, for the reasons given, they are of opinion that this appeal succeeds. The order of the Court of Appeal should be discharged and the order of the trial Judge restored. The respondents will pay the costs of the appellants both here and in the Court of Appeal. Their Lordships will humbly advise His Majesty accordingly.

A. *Appeal allowed*

Solicitors for the Appellants.—Messrs. *Mayo, Elder & Rutherfords.*

Solicitors for the Respondent.—Messrs *Peacock & Goddard.*

CALCUTTA HIGH COURT.

Civil Appeal No. 1455 of 1929.

March 19, 1931.

PEARSON AND JACK, JJ.

CORPORATION OF CALCUTTA—DEFENDANT—APPELLANT

versus

Srimati SUMERIA BEWA—PLAINTIFF—RESPONDENT.

Calcutta Municipal Act (III of 1923), ss. 175, 179, 386 and 387—Area not excluded under s. 387—Refusal of license under s. 386—Legality—Grant of license under ss. 175, 179, effect of.

Under s 386, Calcutta Municipal Act, the Corporation has absolute power to refuse a license to any particular premises within a particular area even though the Corporation has not excluded generally that area under s. 387. [p. 640, col. 1.]

The granting of a license under the taxing sections such as s. 175 and s. 179 does not preclude the Corporation from refusing to grant a further license under s. 386; *Bepin Behari Ghose* v. *Corporation of Calcutta* (1), referred to [p. 640, col. 2.]

Appeal against the appellate decree of the Second Sub-Judge, Alipur, dated the 19th January, 1929.

Messrs. *Panchanon Ghose* and *Someswar P. Mukerji*, for the Appellant

Messrs. *Hira Lal Chakravarti* and *Nalini Kumar Mukerji*, for the Respondent.

Judgment—The plaintiff in the suit out of which this appeal arises was the owner of certain premises situated within the Municipal limits of Calcutta. She was the owner of certain hackney carriages and horses with which she carried on the business of hire. She desired to use these premises in question as a stable for those horses and carriages and applied to the Corporation for sanction which however was refused. She continued the business nevertheless and was prosecuted before the Municipal Magistrate and fined. It appears that the Chief Executive Officer of the Corporation had refused her a license for which she applied under the terms of s. 386, Calcutta Municipal Act, 1923. From his decision an appeal was preferred to the Corporation which was considered and disposed of by the Health Committee who supported the decision of the Chief Executive Officer in refusing the license. The plaintiff brought the suit against the Corporation asking for a mandatory injunction on the Corporation to grant her license to keep these horses upon the premises in question and secondly for an injunction to restrain the Corporation from prosecuting her under the provisions of s. 488 read with s. 386 and restraining them from interfering with her right to use these premises as

a stable. She also claimed a sum of Rs. 50 as damages.

Both the courts below have granted a decree against the Corporation, at any rate, in regard to the injunction restraining the Corporation from taking action and as to damages. The learned Judge of the lower Appellate Court states amongst other things that it is not disputed that the plaintiff had her stable on the land at the time of the prosecution and had no license for it; and ordinarily, he says, it cannot be denied that an owner who is using premises as a stable without license is liable to prosecution under s 386 of the Act The learned Judge then says after a discussion of certain provisions of the Act that,

"having regard to the facts of the case the Corporation can hardly be said to have properly exercised its discretion in these matters."

He refers to the fact that as it transpired in evidence a license was granted before in 1922-23 for the use of the whole plot under s. 386 and that there was a cow-shed in the northern portion and the owner was permitted to use it as a cow-shed even in 1924. He then goes on to say:

"Plaintiff could rightly complain that the action was taken by the Corporation for the sake of the convenience of the owners of premises No. 18-1 "

He further says that the evidence adduced in the case is sufficient to warrant the finding that the plaintiff was permitted to use the premises for the purpose of s. 386 inasmuch as there are certain exhibits which show that the plaintiff was granted a license for 1923-24 for exercising the profession of a hackney carriage owner at the premises and also a license under the Act with regard to the collection of scavenging tax in relation to her profession as a hackney carriage owner. The learned Judge goes on to say that,

"if the Corporation was unwilling to grant license under s. 386 and if it was found desirable to discontinue the user of the place as a stable, why were the other licenses issued ?"

He thinks therefore that the actions of the Corporation Officers were arbitrary and that the court as a court of equity should interfere against the action of the Corporation in support of the plaintiff to the extent mentioned.

The points that have been argued by the respondent before us are these: It is contended first of all that on a true construction of ss. 386 and 387, Calcutta Municipal Act, the Corporation was not empowered to refuse license.

Section 386, sub-s. (1) runs thus:

"No person shall use or permit to be used any premises for any of the following purposes without or otherwise than in conformity with the terms of a license granted by the Corporation in this behalf, namely (*a*) any of the purposes specified in Sch. XIX; (*b*) any purpose which is, in the opinion of the Corporation, dangerous to life, health or property, or likely to create a nuisance; (*c*) keeping horses, cattle or other fourfooted animals for sale or hire or for sale of the produce thereof, and (*d*) storing for other than his own domestic use or selling timber, firewood, charcoal, coal, coke, ashes, hay, grass, straw or any other combustible thing."

It is argued that the provisions of s. 387 would be unnecessary if the powers of the Corporation under s. 386 amounted to an absolute power to refuse to grant license under s. 386. Section 387 is the section which enables the Corporation to exclude a whole area for using premises for any of the purposes mentioned in s. 386, and specific procedure is laid down in s. 387 by which that exclusion may be attained and given effect to. Once the area has been excluded then of course no business of the character in question can be carried on at all within that area and it is useless to apply for license to that effect. The argument amounts to this: that the Corporation has got no power to refuse license under s. 386 unless the area is excluded under s. 387. We are of opinion on the matter of construction that such a meaning ought not to be attributed to the plain language of s. 386. Even if an area has not been dealt with under s. 387 there is no reason why s. 386 should be utilized as applicable to particular instances. There is nothing to suggest that a license under that section can be claimed as a matter of right; nor is there any such provision as is contained in s. 169 of the Act which makes it obligatory on the Corporation to grant a license of the character dealt with in that section the moment the tax is paid. This is only to be expected when it is considered that s. 386 of this Act comes under Part V of the Act which deals with "the public health, safety and convenience." This would make it all the more necessary that the authorities should have a discretion in granting or refusing license in matters where those subjects are specially concerned.

The second point argued by the learned Advocate for the respondent was that assuming that the true construction of s. 386 of the Act was that the Corporation had a discretion in the matter of granting license, the procedure adopted by the authorities was such that from its arbitrary character and the way in which the respondent had been dealt with, the principles of natural justice had been contravened and therefore the court should interfere in favour of the

plaintiff. Upon this point the learned Judge states as follows:

"The resolution of the Corporation (Health Committee) related to the appeal preferred by the plaintiff when she was refused license under s. 386 and by it the appeal was disallowed as the site was thought to be unsuitable by the Chief Executive Officer, Health Officer and the members of the Health Committee; but it does not appear that the Executive Officer and Health Officer formed their opinion after inspection of the locality. The members of the Health Committee are said to have gone to the locality but they did not go on the date fixed and the plaintiff had no opportunity to be heard if they went in her absence. She also complained that her Pleader was also not given any opportunity to be heard at the time of the appeal and if it was so, such action cannot but be called arbitrary and must be discouraged."

Now there is no finding in the judgment of the lower Appellate Court that the plaintiff's pleader was not in fact given a hearing during the appeal. As a matter of fact from the proceedings themselves to the minutes of which we have been referred, it is clear that the plaintiff's pleader was in fact present and was allowed to make his statement and representations on the case. It can hardly be said therefore that there is any case here of the plaintiff's having been refused a proper hearing; nor is there to be found anywhere in the judgment of the lower Appellate Court anything to suggest that the proceedings at any such meeting of the Corporation were tainted in any way by fraud or corruption or any other thing which, if proved, might have given rise to other considerations

Then again the last contention of the respondent before us is that some kind of estoppel is raised against the Corporation arising out of the fact that the Corporation had in fact granted her licenses under other chapters and sections of the Act, relating also to her business on these premises as the owner of the hackney carriage business. This matter is relied on by the learned Judge when he says that she was being granted license under ss. 175, 176, 179 and 180 of the Act, and also, it appears, under the sections of the former Act corresponding to ss. 165 and 169 of the new Act. The effect of her having been granted license under any or all of those sections, it is contended, is to preclude the Corporation from refusing to give her the further license which is necessary under s. 386. The answer to this contention rests upon the fact that those other licenses were granted to her under sections in an earlier part of the Act, namely, Part IV, which has to do with the subject of taxation, *e. g.*, s. 175 deals with licenses to be taken out annually for fiscal purposes in respect of professions, trades and callings and taxes to be paid thereon: see the case of *Bepin Behari Ghose* v. *Corporation of Calcutta* (1).

There is no reason why the mere fact that she is called upon to take out such a license as is contemplated by s. 175 should excuse her from the necessity of taking out a license under s. 386 or should entitle her to a license under that section for those particular premises. The license under s. 175 is to be taken out by a person who exercises or carries on any of the professions, trades or callings mentioned, that is to say, the tax is payable by a person who *de facto* carries on such a profession, trade or calling as is liable to tax under the Act, There is no implication in the fact of such a license being granted that the licensee is in fact for all purposes legally entitled to carry on the particular profession, trade or calling. Further there is a proviso to s. 175 that the grant of a license under that section shall not be deemed to affect the liability of the licensee to take out a license under any other section of the Act. Similarly as regards the levying of scavenging tax under s. 179, that stands on precisely the same footing, as being a tax levied upon a person who is *de facto* carrying on and who thereby becomes liable in consequence of carrying on a particular profession, trade or calling. It cannot be called in to show that the Corportion is in any way precluded from exercising a discretion which is vested in it as guardian of the public health under an entirely different part of the Act in issuing or refusing other licenses based upon totally different considerations.

The result is that we think the judgment of the lower Appellate Court is erroneous and must be reversed for the reasons given above, and the plaintiff's suit will be dismissed. The appellant will get his costs in all the Courts.

A. *Appeal dismissed.*

(1) 34 C. 913.

OUDH CHIEF COURT.

Criminal Revision Application No. 119 of 1931.

November 5, 1931.

SRIVASTAVA, J.

AHMAD JAN—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 263—Summary trial—Judgment—Contents—Reasons for conviction.

When a Magistrate tries a case summarily, he is not bound to record evidence but he is bound to record his reasons for the conviction and to state them in such a manner that a superior Court acting in revision may be in a position to judge whether there was sufficient material before the Magistrate to support the conviction. *Jagannath* v. *Emperor* (1), referred to.

Criminal Revision against an order of the Sessions Judge, Lucknow, dated the 12th September, 1931.

Messrs. *S. S. Chaudhuri* and *H. D. Chandra*, for the Applicant.

Mr. *Ali Muhammad*, for the Crown.

Judgment.—The applicant was tried summarily by a Magistrate, First Class, of the Lucknow District for the offence of keeping a brothel in his house in breach of r. 2 of the by-laws framed under s. 298-H (*e*), Act II of 1916, prohibiting the residence of prostitutes and the keeping of brothels in specified areas of the Lucknow Municipality. He found the accused guilty and imposed on him a fine of Rs. 30; in default one month's simple imprisonment. The accused made an application for revision to the learned Sessions Judge, but he saw no reason to interfere and dismissed the application.

Unfortunately the learned Magistrate did not make any record of the statements of witnesses examined before him. Of course, when a Magistrate tries a case summarily, he is not bound to record evidence; but, as observed by Mr. (afterwards Sir Benjamin) Lindsay in *Jagannath* v. *Emperor* (1), the Magistrate is bound to record his reasons for the conviction and to state them in such a manner that a superior Court acting in revision may be in a position to judge whether there was sufficient material before the Magistrate to support the conviction. The opening words of the judgment of the Magistrate show that the accused Ahmad Jan was prosecuted on the allegation that he kept a brothel in his house and had engaged one Miss Edna for prostitution. So far as I can see from the judgment of the learned Magistrate, and the reference to the prosecution evidence contained therein, there is no evidence at all to show that the applicant kept a brothel in his house.

All that the evidence shows is that Miss Edna was living in the house of the accused, that on one occasion, namely, on the 17th April, 1931, a man identified as Khurshed Ahmad, son of the accused met one Sergeant Harrison at Valerios and brought him from there to the house in which Miss Edna was living. A woman in the house, whom Sergeant Harrison was not in a position to identify, asked him to pay Rs. 10 in order to have sexual intercourse with her, which he did. This money was handed by the woman to Khurshed Ahmad. This evidence might at best show that Khurshed Ahmad was keeping a brothel, but cannot prove that the accused Ahmad Jan was the person who kept a brothel. There is absolutely no evidence of the house having been used for the purposes of prostitution on any other occasion. Even on the occasion in question there is nothing in the evidence to connect Ahmad Jan, accused, with the transaction between the woman alleged to be Miss Edna and Sergeant Harrison. It has not even been suggested that the accused Ahmad Jan received any share in the earnings of Miss Edna. In my opinion, therefore, the charge laid against the accused of his keeping a brothel was not justified and his conviction for that offence cannot be upheld. The learned Assistant Government Advocate, realizing this difficulty, wanted to bring the case under another part of r. 2 which provides that no person shall let or otherwise grant the use or occupation of any building to a public prostitute. In the first place the judgment of the Magistrate does not show that the accused was charged with this offence. The only charge against him, so far as I can see, was that he himself kept a brothel. In the second place though it is admitted by the accused that he had let the house for residential purposes to Miss Edna, there is no evidence that when he let the house to her he knew her to be a public prostitute. In this connexion it may be pointed out that Miss Edna was prosecuted simultaneously with the accused Ahmad Jan in respect of the offence which took place on the night of the 17th April, 1931. This offence led to two prosecutions: one against

(1) 21 Ind. Cas. 466: 16 O. C. 357: 14 Cr. L. J. 594.

Miss Edna under r. 1 of the aforesaid bye-laws for her being a public prostitute and residing within one of the prohibited areas; and the other against Ahmad Jan for keeping a brothel. The charge against Miss Edna failed and she was acquitted by the learned City Magistrate The accused Ahmad Jan was tried by another Magistrate and convicted as stated above. Under these circumstances the charge against Miss Edna herself having failed, and in the absence of any evidence to prove that she was a public prostitute, it is hardly possible to say that the accused was guilty of letting the house to a public prostitute.

I, therefore, allow the application, set aside the conviction and sentence and direct that the fine if paid be refunded.

A. *Application allowed.*

OUDH CHIEF COURT.

Original Suit No. 11 of 1918.

December 22, 1920.

NANAVUTIY, J.

MOHAMMAD AZIM KHAN AND OTHERS —PLAINTIFFS

versus

Raja Saiyid MOHAMMAD SAADAT ALI KHAN AND OTHERS—DEFENDANTS.

Oudh Estates Act (I of 1869), ss. 3, 22, 29, 13—Will—Construction—Power to widow to adopt in succession—Life-estate and power to adopt—Widow's power to disclaim—Effect of disclaimer—Adoption of daughters or sister's son—Succession to non-taluqdari property, rules governing—Adoption—Ceremonies—Applicability of Hindu Law—Life estate, whether condition for exercising power to adopt—Effect of adoption—Divesting of estate—Will—Power to make disposition contrary to law—Mutation, effect of—Civil Procedure Code (Act XIV of 1882, s. 470—Court of Wards Act (III of 1899), s. 48—Court of Ward—Power to file interpleader suit—Person, meaning of—Evidence Act (I of 1872), ss. 32 (5), (6), (7), 92, 116—Pedigrees—Conditions of admissibility—Evidentary value—Declarations anti litem motam—*Admissibility of—Documents—Cumulative effect—Value of—Petition to Government—Recitals in, admissibility of—Estoppel—Landlord and tenant—Gift—Evidence to prove fictitious nature—Admissibility—Presumption—Religion and status of child—*Benami *Transaction—Proof — Source of purchase-money—Limitation Act (IX of 1908), ss. 6, 7, —Court of Wards Act (IX of 1912), s. 6 (a)—Disqualification under Court of Wards Act—Whether extends limitation—Suit by reversioner—Accrual of cause of action—Adverse possession—Essentials—Independent trespassers—Tacking of possession—Cases under Arts. 142 and 144—Difference between—Onus of proof of possession within twelve years—Practice—Precedents, value of—Will—Power—Effect of disclaimer—Construction — Principles — Muhammadan Law—Gift Delivery of possession—Necessity of—*Khandan, *meaning of.*

A Muhammadan *talukdar* made a will which directed that if no one of his four wives had any issue, then the first wife was to adopt a son within two years of the death of the testator, that the boy to be adopted was to be a Sunni lad under ten years and was not to belong to a particular family; that if the first wife failed to adopt a son within the prescribed period then the second wife was within the space of two years to adopt subject to the "above conditions." If the second wife also failed to adopt then the third was empowered to adopt. If she too failed then the fourth was given power to adopt on the same conditions:

Held, that, on a proper construction of the will, if the first wife died after the death of the testator without making an adoption, then the second wife was at once to come into possession and become entitled to make an adoption within two years of her coming into possession subject to the condition that the boy was a Sunni lad under ten years of age and did not belong to the particular family. *Maharani Indar Kuar* v. *Maharani Jaipal Kuer* (15), followed. [p. 670, col. 1.]

Under s. 470 of the Civil Procedure Code of 1882 a person whose only interest in the property was that of a mere stake-holder and who was ready to render it to the rightful owner, was entitled to bring an interpleader suit to enable the Civil Courts to decide upon the rights of the rival claimants to the same property. The Court of Wards being a trustee for the rightful owner and thus a stake-holder can file such a suit and the mere fact that no such capacity to sue or to be sued has been conferred upon the Court of Wards under s 48 of the old Court of Wards Act does not in any way oust the jurisdiction of the Civil Court to take proceedings under s. 470, upon a plaint filed by the Court of Wards. The word "person" in s. 470 is wide enough to cover a corporate body like Court of Wards. [p 658, col. 2.]

Before a pedigree said to have been prepared by a deceased member of the family can be admitted in evidence under s. 32 (5), Evidence Act, it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence. [p. 661, col 1.]

Declarations as to the existence of relationship by blood, in order to be admissible must be made *ante litem motam* which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy concerning the subject-matter of declaration. [p. 659, col. 1.]

The Limitation Act does not touch disqualification under s. 6 (*a*), Court of Wards Act; and a disqualified proprietor is not exempted from suing so long as the property remains in the hands of the Court of Wards. [p 684, col 2.]

Where a Muhammadan *talukdur* creates under his will a life-estate in favour of his widow with power to adopt, the widow is fully justified in law in refusing the life-estate as well as the power to adopt, and where she so disclaims her right, her estate is lost and the estate of another legatee entitled to succeed under the will is accelerated. [p. 696, col. 1.]

Where according to a deed of gift, a jungle without the exception of any tree is gifted away, and there is no mention of the land upon which the jungle stood, what is gifted away is the timber of the jungle and not also the land upon which the jungle stood [p. 688, col. 1.]

To test whether a gift is fictitious or otherwise the surrounding circumstances contemporaneous with the gift and subsequent conduct of parties concerned is the best guide. [p. 689, col. 2]

Where each of the items of documentary evidence relied upon does not prove a fact in issue and has no evidentiary value in advancing a particular case, the cumulative effect of all the mass of such evidence would be of no evidentiary value *Durga* v. *Lal Bahadur* (3), distinguished. [p. 653, col 2.]

A genuine petition of appeal produced from the Government Secretariat, even though it may not bear the signature or thumb-mark of the party, is admissible in evidence, but a statement made in it by the appellant in his own interest about his alleged relationship with a certain person cannot be admitted as relevant and admissible in evidence unless such statement has been brought home to the appellant as his own. *Shrewsbury Peerage case* (2) and *Jagatpal Singh* v. *Jageshar Bakhsh Singh* (4), referred to [p. 651, col. 2]

A childless widow of a Muhammadan *talukdar* can make an adoption of her daughter's son or sister's son under the provisions of s. 29, Oudh Estates Act, provided she has no natural son born to her from her husband and provided she has not already adopted a son. The expression "for the purposes of this Act" cannot very well be restricted to mean "only for the purposes of intestacy." *Jutteendromohun Tagore* v. *Ganendromohun Tagore* (19) and *Sreemutty Kishormoney Dassee* v. *Maharaja Bahadoor* (21), relied on. [p. 675, col. 1.]

In order to constitute a valid gift under Muhammadan Law it is essential to prove the taking possession of the subject-matter of the gift by the donee and that the donor had a *bona fide* intention of divesting himself *in præsenti* of his proprietary title in the property gifted. [p. 688, col. 2; p. 689, col. 1.]

A tenant who has been let into possession cannot deny his landlord's title however defective it might be, so long as he has not openly restored possession by surrender to his landlord. Similarly a lessee is estopped during the subsistence of lease from questioning the title of his lessor. [p. 686, col. 1.]

Where a husband admits that he executed a deed of gift in favour of his wife but alleges that he had no intention of giving away the property and that in short he had no *animus contra hendi* when he executed the deed of gift, evidence to prove such a defence is admissible and does not violate the provisions of s. 92, Evidence Act. [p. 692, col. 1.]

Where once it is established that the source of a sale transaction flowed from the husband and that the transaction stood in the name of the wife, it follows that the transaction is a *benami* one and the wife was a mere *benamidar*. [p 698, col. 2]

A pedigree which had been subjected to investigation many years prior to the institution of the litigation in which it was questioned and which had been previously relied upon by competent authorities and which is supported by oral evidence can safely be accepted as correct. *Mewa Singh* v. *Basant Singh* (7), *Debi Prasad Chowdhry* v. *Radha Chowdhrain* (6) and *Doddawa* v. *Benneygawada* (8), referred to. [p. 664, col. 2]

Section 22 of the Oudh Estates Act applies only to an "estate" as defined in the Act; and non-*talukdari* property is not an "estate" within the meaning of the definition given in s. 3. The rule of succession to non-*talukdari* property is governed by s. 23 of the Act, that is, by ordinary law, modified by custom, if any, proved in the case. Regarding non-*talukdari* property the presumption that it is governed by the rule of single heir succession in the case of List No. 2 estate is rebuttable; but there is no presumption that the rule of male lineal primogeniture would govern such non-*talukdari* property in the case of List No. 2 estate. [p. 668, col. 1.]

That construction of the will should be adopted, which bespeaks a reasonable and probable intention, rejecting that which would indicate an intention unreasonable, capricious and inconsistent with the testator's view as evidenced by his conduct and by the dispositions of his will which are not open to controversy.

A child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status. *Skinner* v. *Orde* (17), followed. [p. 672, col. 1]

The word "*khandan*" denotes the descendants of one's paternal grand-father. [*ibid*]

Under s. 29, Oudh Estates Act, the widow of a Muhammadan *talukdar* is allowed to make an adoption only in those cases in which it is permissible for a Hindu to do so. The Oudh Estates Act (I of 1869) is a purely secular enactment and has nothing to do with the peculiar notions of Hindus and Muhammadans on the subject of adoption. It merely lays down that in those cases in which a Hindu widow could adopt, a Muhammadan widow of a *talukdar* could also do so It does not touch the question of the qualifications of the boy to be adopted. A childless Hindu widow may, with the authority of her husband, make an adoption and the same power is given to the widow of a Muhammadan *talukdar* by Act I of 1869. A Hindu widow who has a son born to her by her husband cannot legally adopt and similarly a Muhammadan widow if she has a son by her husband could also not adopt under Act I of 1869. Adoption like marriage in Hindu Law, is in the nature of a religious sacrament but no religious ceremony is necessary under Muhammadan Law for the purpose of making an adoption which is unknown to Islamic Law. The only condition of Hindu Law which is imposed upon a widow of a Muhammadan *tatukdar* by Act I of 1869 is that the latter must be a childless widow and authorized by her husband to make an adoption during her widowhood. *Raghuraj Chandra* v. *Subhadra Kunwar* (18), followed. [p. 672, col. 2; p. 673, col 1.]

Section 29, Oudh Estates Act, confers the power of adoption upon every widow of a Muhammadan *talukdar* and it nowhere lays down that it is necessary for the widow to be in possession for life of the estate of her husband before she can make a valid adoption under the Oudh Estates Act. This does not make the possession of a life-estate by a Hindu widow or a Muhammadan widow the *sine qua non* or a prerequisite condition before she can validly exercise the authority conferred upon her by her deceased husband. [p. 674, col. 1]

Ordinarily a life-estate vests in the widow of a Hindu or Muhammadan *talukdar* who dies intestate, but where a childless *talukdar* has executed a valid will giving his widow authority to adopt and making his adopted son the absolute owner of the estate the absolute estate vests in the adopted son from the moment he is adopted but enjoyment of it may be postponed or deferred till the termination of the life-estate of the widow. [p. 674, cols. 1 & 2]

A testator who is a Muhammadan *talukdar* can confer on any widow of his the power to adopt without conferring on her also a life-estate; and if the testator by his will lays down that on the adoption being effect-

ed the adopted son should come into immediate possession of the estate then the life-estate, if any, of the adopted mother would be cut off at once. [p. 674, col. 2]

If the testator is authorized by law to make a testamentary disposition of his property he can exercise that right and legally make a will contrary to the devolution of the estate on intestacy laid down in Act I of 1869, provided his will does not offend against the rule of perpetuity incorporated in that Act [*ibid.*]

A person to whom any power whether coupled with an interest or not, is given may by deed disclaim the power, and after disclaimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer, the power may be exercised by the other person or persons or the survivor or survivors of the other person to whom the power is given unless the contrary is expressed in the instrument creating the power. [p 678, col. 2.]

By the expression "falls into possession" is meant the time when reversioner or a remainderman becomes entitled to the actual possession of the estate. [p. 682, col. 2.]

Unless there is a break in the continuity of possession the true owner would be barred by 12 years' adverse possession even if that continuous adverse possession be of two or more trespassers who did not claim under one another. *Ramayya* v. *Kotamma* (50), referred to [p. 685, col. 1.]

Where the plaintiff alleges his possession over immovable property and dispossession by the defendant, and where it is found that the possession of the plaintiff was discontinued when defendant entered into possession not as tenant of the plaintiff but in his own rights, the article of limitation applicable to such a suit is Art. 142 and not Art. 144, Sch. I, Limitation Act. [p. 687, col. 2.]

In cases falling under Art. 142, the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an enquiry into the question of adverse possession is irrelevant. [*ibid.*]

In cases falling under Art. 144 where the defence is one of title acquired by adverse possession for more than 12 years it is not necessary for the plaintiff to prove his possession within 12 years from the commencement of the suit. [*ibid.*]

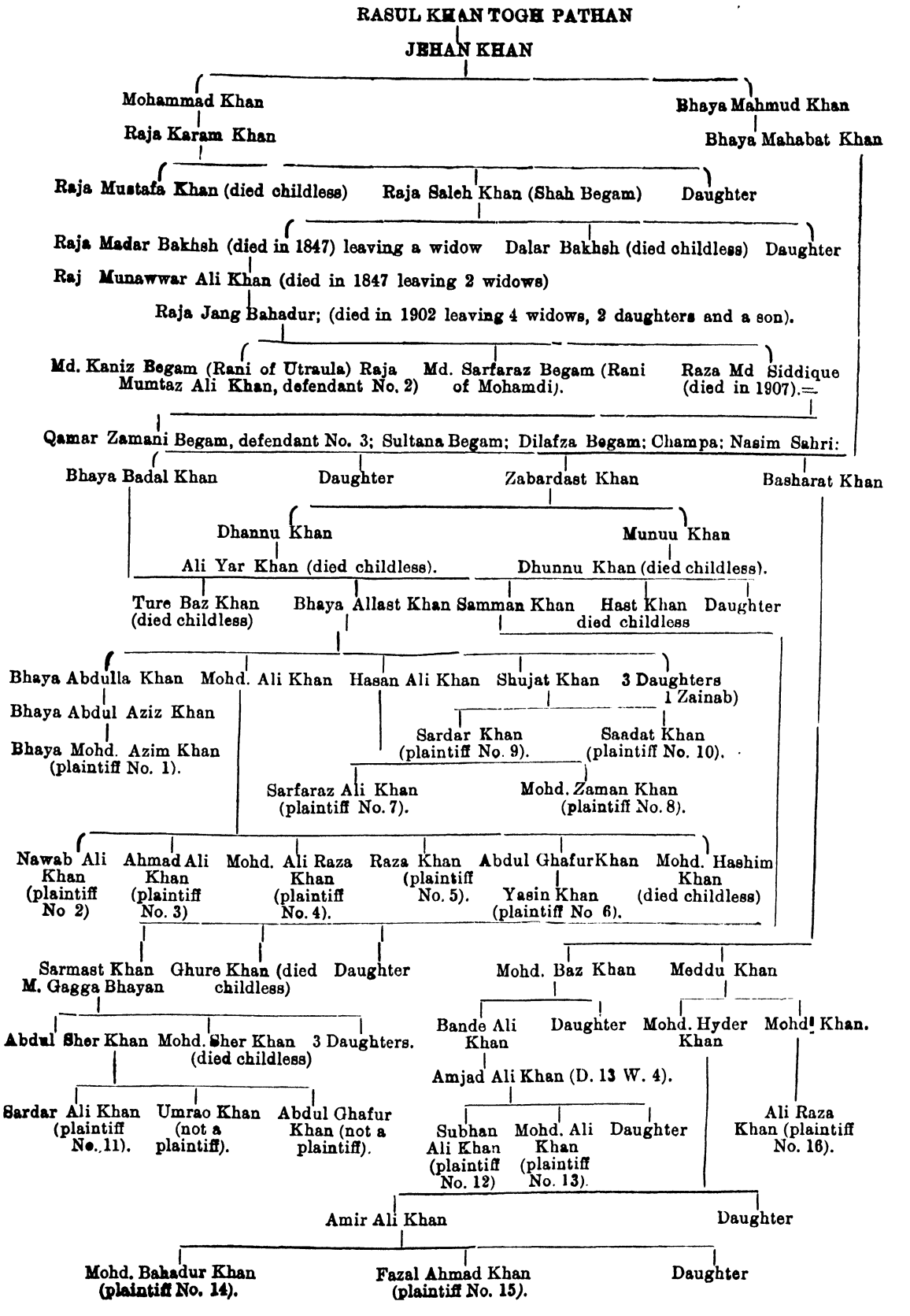
Mutation does not confer title either under the Oudh Estates Act or under the general law.

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. *Quinn* v. *Leathem* (78), followed. [p. 694, col. 2.]

Messrs. *St. G. Jackson* and *Sita Ram*, for the Plaintiff.

Messrs. *M. Wassim*, *Mohammad Khalil Haider Husein*, *M. H Qidwai* and *E. R. Qidwai*, for the Defendants.

Judgment.—Suits Nos 11 and 12 of 1928 are two connected suits filed by Bhaya Mohamad Azim Khan and others against the Raja of Nanpara, the Raja of Utraula and Rani Qamar Zamani Begam since deceased and now represented by her heirs M. Abdul Hasan and others These two suits have been tried together with the consent of both parties. In Suit No. 11 of 1928 the plaintiffs claim the *talukdari* estate of Nanpara as the heirs and nearest agnates of the late Raja Mohamad Siddique Khan, *Talukdar* of Nanpara against Raja Saadat Ali Khan defendant No. 1 in Suit No. 11 and assert that their cause of action against him arose on 3rd November, 1925, when the Court of Wards delivered possession over the estate and the cash in the estate treasury to him. They further allege that in any case the plaintiffs' cause of action arose in January, 1917, when, on the death of Rani Nasim Sabri, the widow of the late Raja Mohamad Siddique Khan, the Nanpara estate "fell into possession" of plaintiff No. 1 as the nearest agnate and reversioner of the late Raja Mohamad Siddique Khan. In Suit No. 11 of 1928 the plaintiffs also claim as against defendant No. 2, the Raja of Utraula, a six annas' share in part of the properties detailed in schedules A and B attached to the plaint, but do not specifically allege in their plaint when their cause of action for this claim against the Raja of Utraula arose. Similarly in Suit No. 11 the plaintiffs also claim against Rani Qamar Zamani Begam the property entered in schedule F attached to the plaint, of which she is said to be in wrongful possession but against her also they do not allege in their plaint when their cause of action first arose. The valuation of Suit No. 11 has been fixed at 4½ crores of rupees. The plaintiffs base their claim upon a pedigree attached to their plaints in these suits. That pedigree is as follows:


RASUL KHAN TOGH PATHAN
JEHAN KHAN
Mohammad Khan
Raja Karam Khan
Bhaya Mahmud Khan
Bhaya Mahabat Khan
Raja Mustafa Khan (died childless)
Raja Saleh Khan (Shah Begam)
Daughter
Raja Madar Bakhsh (died in 1847) leaving a widow
Dalar Bakhsh (died childless)
Daughter
Raj Munawwar Ali Khan (died in 1847 leaving 2 widows)
Raja Jang Bahadur; (died in 1902 leaving 4 widows, 2 daughters and a son).
Md. Kaniz Begam (Rani of Utraula) Raja Mumtaz Ali Khan, defendant No. 2)
Md. Sarfaraz Begam (Rani of Mohamdi).
Raza Md Siddique (died in 1907).=
Qamar Zamani Begam, defendant No. 3; Sultana Begam; Dilafza Begam; Champa; Nasim Sahri:
Bhaya Badal Khan
Daughter
Zabardast Khan
Basharat Khan
Dhannu Khan
Munuu Khan
Ali Yar Khan (died childless).
Dhunnu Khan (died childless).
Ture Baz Khan (died childless)
Bhaya Allast Khan
Samman Khan
Hast Khan died childless
Daughter
Bhaya Abdulla Khan
Mohd. Ali Khan
Hasan Ali Khan
Shujat Khan
3 Daughters 1 Zainab)
Bhaya Abdul Aziz Khan
Bhaya Mohd. Azim Khan (plaintiff No. 1).
Sardar Khan (plaintiff No. 9).
Saadat Khan (plaintiff No. 10).
Sarfaraz Ali Khan (plaintiff No. 7).
Mohd. Zaman Khan (plaintiff No. 8).
Nawab Ali Khan (plaintiff No 2)
Ahmad Ali Khan (plaintiff No. 3)
Mohd. Ali Raza Khan (plaintiff No. 4).
Raza Khan (plaintiff No. 5).
Abdul Ghafur Khan
Yasin Khan (plaintiff No 6).
Mohd. Hashim Khan (died childless)
Sarmast Khan M. Gagga Bhayan
Ghure Khan (died childless)
Daughter
Mohd. Baz Khan
Meddu Khan
Abdul Sher Khan
Mohd. Sher Khan (died childless)
3 Daughters.
Bande Ali Khan
Daughter
Mohd. Hyder Khan
Mohd. Khan.
Amjad Ali Khan (D. 13 W. 4).
Sardar Ali Khan (plaintiff No. 11).
Umrao Khan (not a plaintiff).
Abdul Ghafur Khan (not a plaintiff).
Subhan Ali Khan (plaintiff No. 12)
Mohd. Ali Khan (plaintiff No. 13).
Daughter
Ali Raza Khan (plaintiff No. 16).
Amir Ali Khan
Daughter
Mohd. Bahadur Khan (plaintiff No. 14).
Fazal Ahmad Khan (plaintiff No. 15).
Daughter

Note.

(1) Raja Munawwar Ali Khan died in 1847.

(2) Raja Jang Bahadur Khan died in 1902.

(3) Raja Mohamad Siddique Khan died on 20th December, 1907.

(4) Rani Mohamad Kaniz Begam of Utraula died on 9th August, 1919.

(5) Rani Sarfaraz Begam died in 1921.

(6) Nasim (Rani) died in January, 1917.

Defendant No. 1, Raja Saadat Ali Khan in his written statement in Suit No. 11 denied the pedigree set up by the plaintiffs and asserted that the pedigree upon which the plaintiffs founded their claim was a false and concocted one and that plaintiffs were not the agnates of the late Raja Mohamad Siddique Khan and that the suit was not within limitation. Defendant No. 1 further pleaded that he had been validly adopted by Rani Sultana Begam the widow of Raja Mohamad Siddique Khan in accordance with the will of the late Raja Mohamad Siddique Khan, that Abdul Aziz plaintiff No. 1's father and Mohamad Ali Khan, the father of plaintiffs Nos. 2, 3, 4 and 5 and the grandfather of plaintiff No. 6 had transferred a 12 annas share of their alleged right in the Nanpara estate to one Nazar Ahmad Khan on 20th January, 1913, and that thus plaintiffs could not now maintain their suit in respect of the share sold and that plaintiffs Nos 7 to 16 had on their own showing no right to institute this suit in the presence of plaintiffs Nos. 1 to 6. He further pleaded that plaintiffs' suit as framed was not maintainable because the plaintiffs had not definitely stated who amongst them was entitled to call himself the nearest male agnate of Raja Mohamad Siddique Khan and as such entitled to the Nanpara estate as being the nearest reversioner of the late Raja under the rule of single heir succession. It was further pleaded by defendant No. 1 that Ahmad Ali Khan plaintiff No. 3 and Subhan Ali Khan plaintiff No. 12 having admitted the proprietary right, title and interest of defendant No. 1 by taking leases from him were estopped from setting up their own title or questioning the title of defendant No. 1 to the properties in suit. The Raja of Utraula, defendant No. 2, in his written statement pleaded that the plaintiffs based their claim upon an imaginary pedigree which was totally denied by him and that plaintiffs should have stated which one of them was entitled to the property in suit under the rule of male lineal primogeniture set up by them. He further pleaded that the plaintiffs' cause of action, if any, against him accrued on 20th December, 1907, on the death of Raja Mohamad Siddique and that, therefore, plaintiffs' suit was barred by limitation. He also urged that plaintiffs' suit was barred by Expl. 6 to s. 11, Civil Procedure Code as the decree of 9th November, 1911, in the interpleader suit filed on 28th April, 1908, gave the property in suit to defendant No. 2's wife, that decree being a *bona fide* decree passed between rival claimants.

Defendant No. 3 Rani Qamar Zamani Begam the first lawfully married *ahl-i-biradari* wife of the late Raja Mohamad Siddique Khan also denied the pedigree set up by the plaintiffs and asserted that plaintiffs were not the nearest male agnates of her husband Raja Mohamad Siddique and, therefore, not entitled to the properties in suit, that their claim was barred by limitation, that the will of Raja Mohamad Siddique Khan was neither properly executed nor legally valid, nor was it a testamentary disposition of a free man of sound disposing mind for various reasons, that Raja Mohamad Siddique Khan had died intestate, and that she defendant No. 3, Rani Qamar Zamani Begam as his only *ahl-i biradari* who had not been divorced by him, was entitled to succeed to the estate under the provisions of Act I of 1869 and that in her presence plaintiffs had no right to the property in suit.

In Suit No. 12 of 1928 the plaintiffs sued the Raja of Utraula as the heirs and nearest reversioners of Rani Kaniz Begam the sister of Raja Mohamad Siddique and the wife of defendant No 1, the Raja of Utraula. They impleaded the Raja of Nanpara as defendant No. 2, because he had previously filed in 1918 a suit (Original Suit No. 4 of 1928) against the Raja of Utraula for this very same property: see Ex. 14 of Suit No. 12, sale deed of 17th September, 1928, executed by plaintiffs in favour of Thakur Devindra Bahadur Singh. This sale deed explains the genesis of these two suits. The Raja of Utraula demanded his arrears of profits from his nephew, the Raja of Nanpara. The latter unwisely thought that he would be able to defeat the claim of his uncle if he denied the validity of the decree passed in the interpleader suit of 1908 upon the basis of the compromise filed in that case, and if he set up an absolutely brand new title in himself. Thus Suits Nos. 4, 7, 9 and

10 of 1928 came to be filed in this Court. The plaintiffs of Suits Nos. 11 and 12 thought that they might with advantage fish in troubled waters, and so, in November, 1928, they filed their present suits with the help of a financier and a smart lawyer of Bahraich, B. Sheo Gopal, and his still more smart brother Lalji, the *pairokar* of plaintiffs against the Raja of Nanpara and Utraula hoping to profit by the damaging evidence each Raja would bring against the other in Suits Nos. 4, 7, 9 and 10 of 1928. After a protracted trial before me Suits Nos 4, 7 and 9 were referred by the parties, sobered by the realities of the situtiou, to the arbitration of the Commissioner of Lucknow, Mr. H G. Walton, I. C. S., who had till recently been Commissioner of Fyzabad and within whose revenue jurisdiction lay the estates of Nanpara and Utraula. Decrees in terms of the award given by the arbitrator were passed by me in Suits Nos. 4, 7 and 9 of 1928, and thereafter evidence in these Suits Nos. 11 and 12 of 1928 began to be recorded. The above brief narrative of events not only explains the reason for the filing of these suits but also the delay in their disposal. It also shows that there are power and influeuce in the armoury of both sides, and a strong spirit of speculation and adventure on the side of plaintiffs. Defendant No. 1, the Raja of Utraula in Suit No. 12, denied the pedigree set up by the plaintiffs and asserted that the deeds of gift executed by him in favour of his wife Rani Kaniz Begam, as well as the mortgage-deed of 1890 in her favour, were fictitious and colourable transactions made with a view to prevent the estates and the jungles from being leased by the Deputy Commissioner or being attached in execution of decrees, and that Rani Kaniz Begam never obtained actual possession uncer these deeds of gift, but that possession of all the properties in suit always remained with the Raja and never with the ostensible donee who lost all title, assuming she had any, in consequence of his, the Raja's adverse possession long before her death and that the present suit was barred by limitation. It was further alleged that, Rani Kaniz Begam never claimed title to any of the properties in suit and that even if she was the real owner of the property standing in her name at the time of her death, plaintiffs could lay no claim to any of it because they were no heirs to Rani Kaniz Begam, and that defendant No. 1 as her husband was alone her heir-at-law and that plaintiffs were in no way related to him.

It is not necessary to set forth the substance of the written statement of defendt ant No 2, the Raja of Nanpara, in Sui- No. 12 as his claim in respect of this verf property against the Raja of Utraula in Suit No. 4 of 1921 has already been dismis sed by this Court on the basis of the award filed by the arbitrator and accepted by the parties to the suit.

Upon the pleadings of the parties in Suit No. 11 of 1928 the following issues were framed:

1. Is the pedigree attached to the plaint in Suit No 11 correct, and is any of the plaintiffs of that suit the nearest agnate of Raja Mohamad Siddique, the late Raja of Nanpara, according to the rule of male lineal primogeniture?

2. Is plaintiff No. 1 or any one of the other plaintiffs entitled to the *talukdari* property in suit under cl. (10), s. 22, Oudh Estates Act, and to the non-*talukdari* property under the alleged custom of male lineal primogeniture?

3. (*a*) Is there a family custom of the exclusion of females from succession?

(*b*) Is there a custom of "male lineal primogeniture" in this family?

4. If the custom of single heir succession according to the rule of male lineal primogeniture does not apply to non-*talukdari* property, are the plaintiffs entitled to the same?

5. (*a*) Is the adoption of Raja Saadat Ali Khan, defennant No. 1 by Saltanat Begam invalid in law?

And is it in conformity with the will of Raja Mohamad Siddique Khan?

(*b*) Was Saltanat Begam remarried to Hamid Husain Khan before she adopted defendant No. 1 as her son?

(*c*) Was she before her marrigae to Hamid Husain Khan married in the "*mutah*" form to Mohammad Kazim as alleged by plaintiffs? If so, what is its effect on her right or power to adopt?

6. What are the properties in suit which are *talukdari* and what non-*talukdari*?

7. To what extent is the will of the late Raja Mohamad Siddique Khan invalid in law?

8. Is the claim of plaintiffs in Suit No. 11 of 1928 within limitation?

9. Whether plaintiffs Nos. 3 and 12 are estopped from bringing the present suit as alleged in para. 28 of the written statement of defendant No. 1?

10. Is the suit as framed not maintainable on the grounds alleged in para. 27 of the written statement of defendant No. 1?

11. Did the father of plaintiff No. 1 and that of plaintiffs Nos. 2 to 5 and the grandfather of plaintiff No 6 sell a 12-annas share to Nazar Ahmad Khan on 20th January, 1913? If so, is the present suit maintainable in respect of the share then sold?

12. Are the plaintiff or plaintiffs entitled to mesne profits? If so, to what amount?

13. What is the effect of the forfeiture clause in the will of Raja Mohamad Siddique Khan?

14. Was any sum delivered by the Court of Wards to the defendants Nos. 1 or 3, and if so, are the plaintiffs or any one of them entitled to that sum?

15. Did Nasim Sahri by any deed of relinquishment give up her rights and interest to the property which she obtained under the will from her

husband; and if so, was such a relinquishment valid?

16. Was the will of 8-23rd January, 1906, duly executed by Raja Mohamad Siddique Khan and was he of sound disposing mind at the time of execution?

The issues framed in Suit No. 12 of 1928 are as follows:

1. Is the pedigree attached to the plaint in Suit No. 12 correct, and are plaintiffs the agnates of the late Rani Kaniz Begam?

2. Is plaintiff No. 1 or any one of the plaintiffs entitled to the *talukdari* property in suit under cl. (10), s. 22, Oudh Estates Act and to the non-*talukdari* property under the alleged custom of male lineal primogeniture?

3. (*a*) Is there a family custom of the exclusion of females from succession?

(*b*) Is there a custom of male lineal primogeniture in this family?

4. If the custom of single heir succession according to the rule of male lineal primogeniture does not apply to non-*talukdari* property, are the plaintiffs entitled to the same?

5. Is the claim of plaintiffs in this suit within limitaton?

8. Was the right to the land covered by the jungle in villages Nos. 8 to 12 in List A attached to the plaint in Suit No. 12 of 1928 also included in the deed of gift executed by the defendant Raja of Utraula on 12th April, 1910, in favour of his wife?

7. Had the defendant Raja of Utraula the intention to part with the property gifted by the deed of 12th April, 1910? And was actual delivery of possession made to the donee (the defendant's wife) in consequence of the execution of this deed of gift?

Was this deed of gift a fictitious and colourable transaction and was never intended to be, and was not in fact, given effect to?

8. Did the defendant Raja of Utraula intend to part with the house property entered in the deed of gift of 28th November, 1910? And was actual delivery of possession made over to the donee, that is the defendant's wife, in consequence of the execution of this deed?

or Was this deed of gift a fictitious and colourable transaction which was never intended to be, and was not in fact, given effect to?

9. Are the deeds of gift invalid and ineffectual under s. 13, Oudh Estates Act I of 1869, even if they be assumed to be otherwise valid and operative as alleged in para. 17 of the written statement of the defendant

10. Did the defendant Raja of Utraula make an oral gift of village Katra entered in List A at item No. 1 attached to the plaint in Suit No. 12 of 1928 to his wife in 1900, and has she been in proprietary possession since then till her death in 1919?

11 (*a*). Was the mortgage deed of 7th August, 1890, relating to the property at No. 18 (*a*), (*b*), (*c*), (*d*), and (*e*) entered in List A attached to the plaint in Suit No. 12 of 1928 fictitious?

(*b*). Were the sale deeds relating to the property marked Nos. 1, 2 and 3 of List B and Nos. 14, 15, 16 and 17 List A attached to the plaint in Suit No. 12 of 1928 *benami* and acquired with the money belonging to the defendant?

12. Do the villages marked Nos. 4 and 7 and entered in List A attached to the plaint in suit No. 12 of 1928 constitute part of the Bilaspur estate within the meaning of s. 3, Act I of 1869?

13. Is the suit as framed not maintainable on the ground that the suit is brought collectively by all the plaintiffs?

14. To what relief, if any, are the plaintiffs entitled?

By consent of parties Suit No. 11 has been deemed to be the leading suit and all the oral evidence adduced by parties in both suits has been recorded in that suit. The principal point for determination in both these suits is the question of pedigree. Before the plaintiffs can succeed in their claim they have to show that they come from the same stock as the Rajas of Nanpara and that Mohamad Azim, plaintiff No. 1, is the nearest male agnate of the late Raja Mohamad Siddique Khan, *talukdar* of Nanpara, and of his sister Rani Kaniz Begam, the wife of the present *talukdar* of Utraula The history of the family of the *talukdars* of Nanpara, as gathered from the Gazetteer of the Province of Oudh compiled in 1877 by Mr Bennet (Vol 1, page 223 and the following) the Bahraich Settlement Report (page 37 and the following) and Mr. Nevill's District Gazetteer of Bahraich (Vol. 45, pages 80, 81, 131 and 132) may be summed up as follows:

In 1637 A. D. Rasul Khan Togh Pathan a Risaldar in the service of Shah Jehan, Emperor of Delhi, was appointed keeper of the Fort (*qiladar*) at Bahraich and five villages of very doubtful value in *pargana* Salonabad were assigned to him for the pay of his soldiers. These five hamlets, namely, Nanpara Meharbannangar, Tahpur, Bhopatpur and Siswara were destined to become the nucleus of the Nanpara *taluka*. Rasul Khan lived in Kumaria in Baundi and was buried there. His son was Jehan Khan. Jehan Khan's son was Mohamad Khan who was the first to settle in Nanpara and his son Karam Khan may be said to have founded the Nanpara estate and was the first to have gained amongst the country folk by his victories over the *banjaras* the title of "Raja". He left a son Mustafa Khan. The latter on his refusal to pay the sum demanded by the Oudh Government was carried back to Lucknow where he died in 1777 A D. In Nanpara, Saleh Khan succeeded Mustafa Khan, and in 1790 A. D. left the estate to Madar Bakhsh. Madar Bakhsh died in 1807 and he was succeeded by his infant son Munawwar Ali Khan. The estate was held "*kham*" till 1818. In 1827 Raja Munawwar Ali Khan took the management of the estate into his own hands. In 1847 in an ill-starred moment he married Umrao Begam

a fashionable lady of the Lucknow Court and the daughter of Mehndi Quli Khan and he died in the same year shortly afterwards. The elder Rani Imambandi succeeded to the management of the estate on the death of Raja Munawwar Ali Khan in the name of the infant son Raja Jang Bahadur and for two years ruled peacefully. Afterwards Umrao Begam her co-widow contrived to obtain the support of the Queen mother in Lucknow and for five years waged war against Rani Imambandi. At the time of the annexation of Oudh the rightful heir Raja Jang Bahadur was of course recognized by the British and admitted to engage for the payment of land revenue and Mehndi Quli Khan and his daughter Umrao Begam and her party had to retire into seclusion. It was not long after the re-occupation of Oudh however that they again appeared in Nanpara. The title of K. C. I. E was conferred on Raja Jang Bahadur and he died on 1st May, 1902, and was succeeded by his son Raja Mohamad Siddique Khan who died on 30th December, 1907, in Mecca in Arabia.

The plaintiffs claim to be the nearest agnates of Raja Mohamad Siddique Khan and of his sister Rani Kaniz Begam. Now the first thing to be noticed in this history which is culled from unimpeachable official records is that while the descent of the *talukdars* of Nanpara can be traced from the founder of their family Risaldar Rasul Khan from 1647 A. D. down to the last *taluqdar* who died in December, 1907, there is not a word in this long family record extending over nearly 300 years of any junior or cadet branch of the Raja's family. If Jehan Khan, the son of Rasul Khan, had, as alleged by the plaintiffs, another younger son called Mahmud Khan besides his admitted son Mohamad Khan, there would have been no difficulty in mentioning that fact either in the Settlement Report of Bahraich or in the Oudh Gazetteer or in the Gazetteer of the District of Bahraich compiled by Mr. H. R. Nevill in 1903 or in any of the *wajib ul araiz* of the villages of the Nanpara estate. Nowhere in the Settlement Report nor in these Gazetteers or *wajib ul-araiz* is there the slightest hint of the existence of a cadet branch of the *talukdar* of Nanpara, although if there had been a junior branch of the Raja's family the members of that branch would no doubt have managed to secure at some time or other, either sub-settlement for under-proprietary or *brit* or occupancy or even *muafi* rights in certain villages of the Nanpara *taluka*. The settlement and revenue papers of the Nanpara estate do not show the conferment of any such rights on any member of the junior branch of the Raja's family. On the contrary there is a complete absence of any entry in the revenue or settlement papers showing the undoubted existence of a junior branch of the family of the *talukdars* of Nanpara. The mere fact that certain ancestors of the plaintiffs are shown in the *khataunis* and *jamabandis* as tenants cultivating certain plots without paying rent will not prove the fact of their alleged relationship with the *talukdars* of Nanpara.

The learned Counsel for the plaintiffs Mr. St. George Jackson, has laid stress upon the sentence in the Gazetteer of Oudh Vol. I, page 123, which runs as follows:

"The office of Fort Captain *Qiladar* had probably been relinquished when Mohamad Khan left Bahraich but the family still continued to be *mansabdars* and to hold their *jagir* somewhat increased in extent."

Mr. Jackson would like to read into this sentence that when Mohamad Khan left Bahraich his younger brother Mahmud Khan and his family continued to be *mansabdars* and to hold the five villages originally granted to Rasul Khan for the pay of his company of soldiers This however is in my opinion not the natural meaning of the sentence quoted above. To my way of thinking the sentence merely means that when Mohamad Khan, the son of Jehan Khan, left Bahraich to settle in Nanpara he and his family still continued to be *mansabdars*, and to hold their *jagir* somewhat increased in extent. If Mohamad Khan had a younger brother called Mahmud Khan who with his family members became the *mansabdar* and held the *jagir*, then it would have been very easy and natural, nay imperative, for the historian who is giving this history of Nanpara to state in so many words that when Mohamad Khan left Bahraich his younger brother Mahmud Khan looked after the *jagir* originally granted to Rasul Khan and became *mansabdar*. Again, it is asserted by the historian from whom Mr. Bennett has derived his information for the compilation of the Oudh Gazetteer that these five hamlets granted to Rasul Khan

"were destined to become the nucleus of one of the finest estates in Oudh, that of Nanpara."

It is not easy to reconcile this statement of the historian with the contention advanced by Mr. Jackson that these five villages became the perquisite of the junior branch of the *talukdar* of Nanpara. I have, there-

fore, no hesitation in rejecting this theory advanced by Mr. Jackson as not being founded upon any proved fact or historical *data*. I cannot assume the existence of a cadet branch of the Raja's family and then read into the official history of the Nanpara estate a reference to this assumed junior branch of the *talukdar's* family.

It has also been urged by the learned Counsel for the plaintiffs that as the information about the *talukdar's* family was presumably supplied by the *talukdar's* agents and servants, the latter naturally ignored and failed to mention the junior branch of the *talukdar's* family. This strikes me as a very weak and unconvincing argument. There was no motive and no gain for any *talukdar* of Nanpara or for his agent or servant to conceal the existence of a cadet branch if there had been such a branch in existence. The existence of such a junior branch of the *talukdars* of Nanpara could not remain concealed for nearly 200 years from Revenue Officers and Settlement Officers who are generally admitted to have more or less an intimate knowledge of all the great land-holders residing within their jurisdication. The writers of the Gazetteers of Oudh and Bahraich (Messrs. Bennett and Nevill) had no reason to suppress all mention of the cadet branch of the *talukdars* of Nanpara if such a junior line had been in existence. These considerations weigh heavily with me and incline me to accept the contention of Mr. Wasim the learned Counsel for the Raja of Nanpara that the complete absence of any mention of a cadet branch either in the two Gazetteers referred to above or in the Settlement Report of Bahraich or in the *wajib-ul-arz* of Nanpara or in that of any other village goes far to prove that no such junior branch, as alleged by plaintiffs was ever in existence. Even the *wajib ul araiz* of those villages in which plaintiffs allege that their ancestors had *bhayai* rights do not mention the existence of the junior branch of the family or the grant of *bhayai* rights to them by the *talukdars* of Nanpara. It is significant fact having a direct bearing upon the plaintiff's contention in these two suits, that before the death of Raja Mohamad Siddique Khan in 1907 neither the plaintiff nor anyone else had at any time and at any place broached the subject of the existence of a cadet branch of the Raja of Nanpara's family. No letter of any *talukdar* or any similar document from the time of Raja Mohamad Siddique Khan right up to Risaldar Rasul Khan Togh Pathan, covering a period of nearly three centuries, has been produced by the plaintiffs to show that any *talukdar* had referred directly or indirectly to the existence of a junior branch of his family. This absence of any recognition of the junior branch (if for the sake of argument it be assumed that one was in existence) by the senior *talukdari* branch and of any correspondence between the two branches for over 250 years and more, furnishes a curious commentary on the present contention of the plaintiffs that they come from the same stock as the Raja of Nanpara and are the direct descendants of the junior branch of the *talukdars* of Nanpara.

The pedigree gathered from unimpeachable and trustworthy historical records, while it furnishes a complete line of descent from Rasul Khan in 1647 A. D. down to Raja Mohamad Siddique Khan who died in 1907 A D. entirely negatives the existence of a cadet branch of the *talukdar's* family. The existence of not one member of this alleged junior branch of the *talukdar's* family has been mentioned in these historical records which learned Counsel of both sides have brought to my notice and commented upon at inordinate length. The plaintiffs, therefore, start with this initial heavy handicap that the undoubted pedigree of the *talukdars* of Nanpara, culled from well-known and authoritative and historical records is absolutely silent about the existance of a cadet branch of that Raja's family. Mr. Jackson the learned Counsel for the plaintiffs has laid stress upon family traditions.

Undoubtedly, family traditions, if well-authenticated, are of great importance. The existence of a junior branch of the *talukdars* of Nanpara, if it were a fact, would have been a family tradition, and would have most certainly found a place in historical and official records like the Gazetteers and Settlement Report and *wajib-ul-araiz* of Nanpara and other villages. The absence of any reference to any such alleged junior branch destroys the assumption of a family tradition to that effect. In fact the absence of any mention of the junior branch in the authoritative pedigree of the *talukdars* of Nanpara given in historical and official records places the burden of proof all the more heavily upon the plaintiffs to establish their contention in the teeth of this authoritative pedigree which is admitted in these suits as correct by both parties. That is what I mean when I say that the plaintiffs start with an initial

heavy handicap in their efforts to prove their claim. They have not only to establish that they are "*ek jaddi*" and come from the same stock as the *talukdars* of Nanpara but they have at the same time also to prove by clear and irrefragable evidence that the family pedigree in the historical and official records, though it may be taken as correct as far as it goes, is still incomplete and in that sense incorrect inasmuch as it entirely omits to make any mention whatsoever of the junior branch of the descendants of Rasul Khan and of his son Jehan Khan.

The learned Counsel for the plaintiffs, Mr. Jackson, pointed out the great difficulties under which the plaintiffs had to labour in proving such ancient historical facts as that Jehan Khan, who lived in the middle of the 17th century, had a second son called Mahmud Khan and that the latter had a son Mahabat Khan and that from the latter were descended Badal Khan and Zabardast Khan and Basharat Khan. The lament of the learned Counsel is very genuine and true, but when his clients, the plaintiffs, choose to set up a claim in defiance of the pedigree given in official and authoritative records, then whatever the difficulties in their way, if they wish to succeed in proving their claim they must show by clear and cogent evidence that the pedigree contained in historical and official records of undoubted genuineness is incorrect and incomplete. It is not in my opinion open to the plaintiffs to graft on the genuine pedigree entered in the historical and official records a pedigree of their own family alleging it to be a junior branch of the *talukdar's* family and so to make themselves out to be of the same stock as the *talukdars* of Nanpara, and then glibly to assert that the pedigree set forth in official records had omitted to give the junior branch ot the Raja's family. That is what the plaintiffs seem to me to have done in preparing their own pedigree which is attached to their plaint. The facts that the correctness of the pedigree in respect of the Raja's branch of the family as shown in the pedigree attached to the plaint is not disputed by the defendants does not in my opinion add to the weight or the evidentiary value to be attached to the pedigree prepared by the plaintiffs as the basis of their claim to the *taluka* of Nanpara and to the property standing in the name of Rani Kaniz Begam at the time of her death.

The plaintiffs have failed to prove by any evidence that the authoritative pedigree of the *talukdars* of Nanpara as given in official records was incomplete. They have given no reason as to why such an incomplete pedigree should have been prepared by the Settlement Officer in his Settlement Report and in the *wajib-ul-arz* of Nanpara and by the learned and disinterested writers of the Gazetteers of Oudh and Bahraich. The fact that the accuracy of this pedigree, as given by these official writers, is not questioned by the plaintiff or the defendants in any particular is another reason, it seems to me, for rejecting the purely gratuitious assumption made by the plaintiffs (without any foundation of fact that this pedigree deliberately or unwittingly omitted to mention the junior branch of the *talukdars'* family. So much for the historical records and the pedigree of the *talukdars* of Nanpara contained therein against which the plaintiffs have to contend from the very outset.

In face of this pedigree which ignores (if it does not negative) the existence of the junior branch of the *talukdar's* family the plaintiffs' contention that they are descended from Rasul Khan Togh Pathan who was the ancestor of the *talukdars* of Nanpara becomes all the more difficult to prove. This initial improbability in the contention of the plaintiffs must never be lost sight of until they have proved themselves to be of the same stock as the *talukdars* of Nanpara by clear, cogent and convincing evidence.

I will now proceed to discuss in detail the documentary evidence produced by the plaintiffs on the question of pedigree. In this connexion at the outset Mr. Jackson the learned Counsel for the plaintiffs, pointed out that the defendants had admitted the correctness of the plaintiff's branch of the pedigree given by them from Badal Khan downwards, although the defendants had stated that they did not know whether Badal Khan was senior to Zabardast Khan or *vice versa* or as to whose sons they were. The defendants further maintain that Hast Khan had children and that his descendants did not join the plaintiffs in these suits. The mere fact 'that the defendants' Counsel partially admitted the correctness of the plaintiffs' branch of the pedigree from plaintiffs up to Badal Khan is not tantamount to their admitting that the plaintiffs are related to the *talukdars* of Nanpara. The plaintiffs have got to prove by good and reliable evidence that Badal

Khan and Zabardast Khan and Basharat Khan were the sons of Mahabat Khan and that Mahabat Khan was the son of Mahmud Khan and that Mahmud Khan was the son of Jehan Khan. Until they prove these three essential links in the pedigree connecting them with the family of the *Talukdars* of Nanpara they have failed to establish their claim on the basis of the pedigree attached to their plaints. The admission of Mr. Wasim, the learned Counsel of defendant No. 1, that plaintiffs are descended from Badal Khan and Zabardast Khan does not in any way help the plaintiffs to establish their contention that they come from the same stock as the *talukdars* of Nanpara and that their common ancestor was also Risaldar Rasul Khan Togh Pathan.

[The learned Judge referred to certain documents and proceeded:]

The next piece of evidence upon which the plaintiffs rely is Ex 91, p. 336. This is a copy of a deposition of Mohamad Husain Quli Khan, brother of Rani Umrao Begam recorded on 28th February, 1878, by Mr. F. Lincoln, Civil Judge of Lucknow, in Original Suit No. 821 of 1877. The plaintiffs seek to prove from this deposition of Husain Quli Khan that the infant son or nephew of Raja Munawwar Ali Khan whom Rani Umrao Begam is said to have set up as the rival of Raja Jang Bahadur was Abdul Ali son of Bhaya Allast Khan. The learned Counsel for the Raja of Nanpara has argued that the statement in this deposition Ex. 91, page 339 to the effect that "Umrao Begam wanted Abdul Ali" is not admissible in evidence under s. 32, cl (5), Evidence Act. Mr. St. George Jackson, the learned Counsel for the plaintiffs has on the other hand contended that this statement of Husain Quli that his sister Umrao Begam wanted Abdul Ali to be placed on the *riasat* or estate of Nanpara is admissible in evidence He has invited my attention to the observations of King, J., *Krishnapal Singh* v. *Sri Raj Kuar* (1), in which that learned Judge pleaded for a liberal interpretation being put upon the provisions of cl. (5), s. 32, Evidence Act, as otherwise much valuable evidence relating to ancient history would be excluded from evidence upon a too narrow construction of the words of that section. The learned Counsel for the plaintiffs also referred me to a decision of the House of Lords in the *Shrewsbury Peerage case* (2), in which Lrod Wenslydale held that a certain document which did not bear the signature of the party

"must be received as the statement of the party making it and being found upon the files of the Court it must be presumed that it got there by proper authority;

and so the document objected to was admitted in evidence in that case. The rulings relied upon by the learned Counsel for the plaintiffs do not in my opinion touch the question raised by the learned Counsel for defendant No (1). The statement which the learned Counsel for the plaintiffs wants to be admitted in evidence under s. 32, cl. (5), Evidence Act, is the statement that "Umrao Begam wanted Abdul Ali." Now this statement which obviously does not relate to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge. This statement of Hussain Quli Khan that "Umrao Begam wented Abdul Ali" cannot be brought within the ambit of s. 32, cl (5), Evidence Act and the ruling of King, J. and the decision of the House of Lords in the *Shrewsbury Peerage case* (2) do not touch the legal question raised as to the admissibility of this statement of Husain Quli Khan to the effect that "Umrao Begam wanted Abdul Ali." I, therefore, uphold the contention of the learned Counsel for defendant No. 1, that this statement of Husain Quli Khan in Ex. 91 that his sister wanted Abdul Ali to be made Raja of Nanapara is not admissible in evidence under s. 32 (5), Evidence Act. There is no other provision of law under which that statement can be admitted in evidence. Even if it were to be admitted in evidence it would not help the plaintiffs' contention because Husain Quli Khan nowhere says in his deposition (ex. 91) that Abdul Ali was an agnate or collateral of Raja Jang Bahadur Khan and unless that was proved, plaintiffs cannot make themselves out to belong to the cadet or junior branch of the *talukdar* of Nanpara. The plaintiffs want to link up Ex. 91 with Exs. 101 and 102. There is however no real causal connexion between the deposition of Husain Quli Khan made in 1878 and the letter and report of Major-General Outram to Lord Dalhousie of 1855 A. D. Major-General Outram does not mention that the boy whom Rani Umrao Begam set up against Raja Jang Bahadur Khan was named Abdul Ali and Husain

(1) 104 Ind. Cas. 299; A. I. R. 1927 Oudh 278; 1 Luck. Cas. 97.

(2) (1857) 7 H. L. Case 1.

Quli does not depose in Ex. 91 that his sister wanted a cousin or nephew of Raja Munawwar Ali Khan to be made Raja of Nanpara, and that Abdul Ali was the name of this cousin or nephew of Raja Munawwar Ali Khan. In the absence of these crucial statements going to support the contention of the plaintiffs I cannot accept their mere *ipse dixit* for the same. Exhibit 91, also therefore, while it may throw a good deal of light upon other relevant matters does not help to prove this particular contention of the plaintiffs that they are descended from Risaldar Rasul Khan and are the agnates of Raja Mohamad Siddique Khan. In this connexion I may also refer to another statement of Husain Quli Khan in Ex. 91 upon which the plaintiffs' learned Counsel relied and founded an argument. Husain Quli deposed in Ex. 91 at page 337 l. 27 that:

"there were quarrels between the members of the family about the Riasat and Raj in which I appeared for the defendant and my sister Umrao Begam."

It was contended on behalf of the plaintiffs by their learned Counsel that the phrase "quarrels between the members of the family" would include Abdul Ali son of Allast Khan and would thereby impliedly make him a member of the family. This contention of Mr. Jackson's is very far-fetched and is proved by unimpeachable documentary evidence to be quite unsound. The historical records relied upon by both parties to this litigation as unimpeachable and authoritative and which I have mentioned above in the earlier part of this judgment make it abundantly clear that on the sudden death of Raja Munawwar Ali Khan in 1847 Rani Imambandi ruled over the Nanpara estate for two years peacefully on behalf of the infant Raja Jang Bahadur and then Rani Umrao Begam the junior Rani of Munawwar Ali Khan challenged her right and authority to rule the estate and with the help of the Queen-mother of the Nawab of Oudh carried on a bloody warfare for five years against Rani Imambandi and destroyed most of the villages of the Nanpara estate, and this sanguinary warfare was one of the principal causes that subsequently led to the annexation of Oudh by the British

It is thus clear from irrefragable documentary evidence "that the quarrels between the members of the family" deposed to by Husain Quli Khan in Ex. 91 at page 337 merely referred to the quarrels between Rani Imambandi and her co-widow Rani Umrao Begam, and if Rani Umrao Begam set up Abdul Ali as a rival claimant to the Nanpara estate (as deposed to by her brother in Ex. 91 at page 339) he was but a pawn in the bloody warfare which Rani Umrao Begam was waging against Rani Imambandi and the rightful heir to the Nanpara estate, Raja Jang Bahadur Khan. Well might Abdul Ali have exclaimed in the words of Prince Arthur, "I am not worth this coil that's made of me." In case of clear historcial records admitted by the plaintiffs themselves it is idle for them to contend that the phrase "quarrels between the members of the family" makes Abdul Ali out to be a member of Raja Jang Bahadur Khan's family. Here I may mention another ingenious argument advanced by the learned Counsel for the plaintiffs. It was contended by him that while each piece of documentary evidence discussed above might not amount to much, the cumulative effect of all this mass of documentary evidence would serve to establish the pedigree which the plaintiffs sought to prove in these suits, and he cited a ruling of a Bench of this Court. In *Durga* v. *Lal Bahadur* (3) to which I was a party, in support of this contention of his. Before the learned Counsel for the plaintiffs can apply that ruling to the facts of these suits he must show that each of the documents relied upon by the plaintiffs does in fact help to prove to some extent, however small, the contention of the plaintiffs concerning the pedigree of their family. If not a single document of the plaintiffs discussed above serves to advance the plaintiffs' contention as to the pedigree attached to the plaint of their suits in the slightest degree then it cannot very well be argued that the cumulative effect of all these documents proves the pedigree upon which the plaintiffs base their claim; for as wittily remarked by the learned Counsel for Utrauls, zero plus zero plus zero, carried on to infinity, would still amount to zero. Since each of the items of documentary evidence relied upon by the plaintiffs has got in my opinion no evidentiary value for the purpose of proving the pedigree filed with the plaints the cumulative effect of all this evidence, useless for the purpose for which it was sought to be utilized, would still be nil.

I next come to discuss another group of documents connected with the claim made by Sarmast for sub-settlement in respect of village Samanpur. These are Exs. 76,

(3) 112 Ind. Cas. 387; A. I. R. 1928 Oudh 509; 5 O. W. N. 992.

page 318, 81 page 320, 82 page 323, 83 page 326, 84 page 328; 85 page 330 and 90 page 334 Ex. 76 page 318 is a copy of an abstract from the register of cases relating to village Anawan Pokhar showing that Sarmast Khan had made a claim for subsettlement in respect of village Samanpur for 1269 *Fasli* (*i.e.* 1862 A D.) Ex 90 is a copy of a copy prepared at the settlement and attached to file No. 17 containing the order of the Deputy Commissioner of Bahraich dated 18th September, 1861, giving the lease of village Samanpur for three years to Ram Din Kurmi on a *jama* of Rs. 400, and containing the statement of Raja Jang Bahadur that Sarmast Khan was at one time in the Raja's service and that during the days of disturbance in Nanpara, Sarmast Khan had sided with the junior Rani and so the Raja was not willing to give him anything. Exhibit 81 page 320 is a copy of the memorandum of appeal filed by Sarmast Khan in the Court of the Commissioner of Bahraich dated 9th October, 1861 against the decision of the Deputy Commissioner of Bahraich dated 18th September, 1861, in which Sarmast Khan alleged himself to be a collateral (*biradar ek jaddi*) of Raja Jang Bahadur Khan. Exhibit 83 is a *rubkar* of the Commissioner's Court dated 14th October, 1861, calling upon the Deputy Commissioner of Bahraich to make enquiries upon three points raised in Sarmast Khan's memorandum of appeal concerning the cutting of the jungle in the village, the lease of the village from 1266 *Fasli* to 1268 *Fasli* and the alleged dispossession of the appellant for eight years. Exhibit 84 is a copy of a copy of the Deputy Commissioner's report dated 23rd October, 1861, giving his finding on the three issues remitted to him on remand and stating that the appellant Sarmast Khan was a connexion of the Raja. Exhibit 82 is the vernacular translation of the appellate order of the Commissioner dated 30th October, 1861, dismissing the appeal of Sarmast Khan and upholding the order of the Deputy Commissioner of Bahraich. Exhibit 85 is a copy of an appeal dated 19th November, 1861, to His Honour the Chief Commissioner of Oudh against the order of the Commissioner of Bahraich Division dismissing the appeal of Sarmast. In this appeal Sarmast Khan again repeats his assertion that he is a *biradar ek jaddi* of the Raja and descended from the same common ancestor. The plaintiffs have not filed a copy of the order of His Honour the Chief Commissioner of Oudh upon this memorandum of appeal of Sarmast Khan to him.

Mr. Wasim the learned Counsel for the defendant Raja of Nanpara objected to Ex. 81 being admitted in evidence as it did not bear the signature or thumb-mark or any other sign or mark made by Sarmast Khan I have carefully examind the original of Ex. 81 and I find that it bears a genuine stamp of Re. 1 prevalent in those days, as also the endorsement of the stamp-vendor Dubar Lal Khazanchi of Sadar Bahraich which is to the effect that Ghure son of Samman Khan (and brother of the appellant Sarmast Khan) purchased the stamp from the Khazanchi Dubar Lal on 23rd September, 1861. Moreover on the back of this memorandum of appeal (copy of which is Ex 81) there is a long order of the Commissioner Mr. D. Simson in his own handwriting showing that this appeal was presented by Sarmast Khan, and that it raised certain points germane to the decision of the appeal which called for a further report from the Deputy Commissioner of Bahraich, and accordingly a vernacular *rubkar*, copy of which is Ex. 83, along with a copy of the English order of the Commissioner was sent to the Deputy Commissioner of Bahraich for a report on the points raised. There cannot, therefore, be any doubt that Ex. 81 is a copy of a genuine document and that it was in fact the petition of appeal of Sarmast Khan. The learned Counsel for the plaintiffs has invited my attention to the *Shrewsbury Peerage case* (2) decided by the House of Lords, which has been quoted above where a similar question as to the admissibility of a certain document in evidence was raised. Following the *ratio decidendi* in that case, I must admit in evidence Ex. 81 but the statement of Sarmast Khan in his memorandum of appeal Ex. 81, that he is a collateral and *ek jaddi* brother of Raja Jang Bahadur Khan is not admissible in evidence because it has not been brought home to Sarmast Khan that it was he and he alone who made that statement. Exbibit 81 does not bear the thumb mark or signature of Sarmast Khan. It only bears the signature of the petition writer. In this connexion the learned Counsel for defendant. No. 1 the Raja of Nanpara invited my attention to a decision of their Lordships of the Privy Council in *Jagatpal Singh* v. *Jageshar Bakhsh Singh* (4) and he quoted

(4) (1903) 25 A. 143; 30 I. A. 27; 7 C. W. N, 209; 8 Sar. 367.

therefrom the following pertinent passage which is fully applicable to the question for consideration in connexion with the admissibility of Ex. 81:

"The other document stands in a different position. Its alleged author, Rai Gurdat Singh, had died before the trial. But the exhibit in question is merely a genealogical table filed on behalf of Gurdat in a claim made by him for certain villages. The object of Gurdat in those proceedings was to make himself out to be of the eldest branch of his family and this admittedly was untrue. But the fatal objection to the admissibity of the document is that it is in no way brought home to Gurdat except as being an exhibit binding on him for the purposes of that suit. His relation to the document is, therefore, something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceassed person which is admissible in evidence. For aught that appears the genealogical table in question might never have been seen or heard of by Gurdat personally but have been entirely the work of his Pleader."

On the same analogy and on the same reasoning the learned Counsel for defendant No. 1 has argued that this Ex. 81 may, for aught he knows to the contrary, be merely the statement of the petition-writer purporting to make Sarmast Khan out to be a collateral of Raja Jang Bahadur and that it is nowhere made clear that the statement in Ex. 81 was the statement of Sarmast Khan himself, and, that being the case, I must support the contention of the learned Counsel for the Raja of Nanpara and hold that the statement in Ex. 81 to the effect that Sarmast Khan is a collateral (*biradar ek jaddi*) of Raja Jang Bahadur Khan is not admissible in evidence because it has not been brought home to Sarmast Khan himself. Another contention of the learned Counsel for the Raja of Nanpara was that this statement of Sarmast Khan that he was a collateral of Raja Jang Bahadur Khan was a most interested statement made by him *post litem motam*, and, therefore, it is not admissible in evidence under s. 32, cl. (5), Evidence Act. Obviously Sarmast Khan in his petition of appeal (Ex. 81) asserted his relationship with Raja Jang Bahadur Khan as furnishing a ground for the Commissioner of Bahraich reversing the decision of the Deputy Commissioner of Bahraich and giving him (Sarmast) the lease of village Samanpur. In other words, when the statement as to the existence of relationship was asserted by Sarmast Khan, the question in dispute had been raised, and as such the statement contained in Ex. 81 relating to the alleged relationship of Sarmast Khan with Raja Jang Bahadur Khan is inadmissible in evidence. At best it is a most interested statement of Sarmast Khan even if it be admitted in evidence and plaintiffs, some of whom are the descendants of Sarmast Khan, cannot take advantage of this interested statement of their ancestor. Once this statement of Sarmast Khan that he is a collateral of Raja Jang Bahadur Khan is held to be inadmissible evidence and not relevant, the other statements in Ex. 81 are of no use to the plaintiffs so far as proof of the pedigree attached to the plaint is concerned. Exhibit 81, therefore in my opinion does not help the plaintiffs in proving the correctness of their pedigree attached to the plaints in these two suits, nor in establishing their connexion with the *talukdars* of Nanpara.

Exhibit 84 is a copy of the order of the Deputy Commissioner of Bahraich giving his findings on the issues remanded to him by the Commissioner of Bahraich. It certainly contains a statement that Sarmast is a connexion of the Raja, and it is contended on behalf of the defendant Raja of Nanpara that this statement in the remand finding of the Deputy Commissioner of Bahraich is not admissible in evidence because it is only a remark by way of *obiter dictum* and not a finding on any of the issues framed by the Commissioner of Bahraich and in respect of which an enquiry had to be made by the Deputy Commissioner; and moreover this remark of the Deputy Commissioner was not given effect to in the order passed by the Commissioner of Bahraich on the appeal of Sarmast Khan. On the other hand the learned Counsel for the plaintiffs argued that this statement of the Deputy Commissioner of Bahraich must have been based upon evidence adduced by the appellant Sarmast Khan before that officer. The file of this case has unfortunately been weeded out, so it is not permissible for the plaintiffs to speculate as to what evidence, if any, Sarmast Khan produced as to his alleged relationship with Raja Jang Bahadur Khan. The issues framed by the Commissioner of Bahraich in his order remanding the case for further enquiry to the Deputy Commissioner, as can be seen from a perusal of Ex. 83, did not raise the question of Sarmast Khan's relationship with Raja Jang Bahadur Khan although such an issue on the question of relationship might very well have been raised by the Commissioner upon the grounds taken by Sarmast

Khan is his memorandum of appeal (Ex. 81).

The fact that it was not so raised seems to me to raise the presumption that the Commissioner did not think this question of relationship to be vital or necessary for the determination of the appeal and he struck three issues on the points which he thought had a special bearing on the decision of the appeal. The documentary evidence filed by parties does not show that Raja Jang Bahadur either admitted or denied the contention of Sarmast Khan raised in his appeal that he was a collateral of his. It is significant to note that before the Deputy Commissioner (as would appear from Ex. 90) there was no contention raised by Sarmast Khan that he was a relation of Raja Jang Bahadur, and all that Raja Jang Bahadur himself admitted before the Deputy Commissioner was that Sarmast Khan was at one time his servant and that in the fight between Rani Inambandi and Rani Umrao Begam, Sarmast Khan sided with the junior Rani Umrao Begam and that, therefore, Sarmast Khan was not entitled to be shown any consideration at the hand of the Raja. It may be that as Abdul Ali was, according to the evidence of Husain Quli Khan (Ex. 91, page. 339 l. 31), set up as a rival to Raja Jang Bahadur, so Abdul Ali's first cousin Sarmast Khan might be expected naturally to work for Rani Umrao Begam, but that fact would not make either Abdul Ali or his cousin Sarmast Khan relations of Raja Jang Bahadur. Sarmast Khan in his appeal to the Commissioner (Ex. 81) denied having sided with the junior Rani. He stated categorically in Ex. 81: "I was not on the side of the junior Rani."

This false denial merely shows what an utterly unreliable person Sarmast Khan was. He made statements in his memorandum of appeal to suit his convenience and to win his case. This statement of Sarmast Khan is not only proved to be false from the statement of Raja Jang Bahadur to the contrary contained in Ex. 90, but it is also clearly proved to be false out of his own mouth by the report of the Deputy Commisioner of Bahraich (Ex. 84), in which the Deputy Commissioner writes as follows:

"It is moreover clearly proved and admitted by himself (Sarmast) that he (Sarmast Khan) was opposed to and did all in his power to prevent the present Raja (Raja Jang Bahadur Khan) from obtaining his property by fighting on the side of the Choti Rani."

I have mentioned this fact here only to point out that, in the absence of any evidence going to show upon what *data* the Deputy Commissioner was led to say that Sarmast Khan was a connexion of Raja Jang Bahadur, it would be quite unsafe, not to say illegal, for this Court to base any conclusion upon what appears to be a mere *obiter dictum* of the Deputy Commissioner that Sarmast Khan was a connexion of Raja Jang Bahadur Khan. The interested statement of Sarmast Khan that he was a relation of Raja Jang Bahadur Khan in face of the proved fact that one lying statement of his in the same memorandum of appeal has been nailed to the counter, cannot be utilized for the purpose of adding weight to the casual and apparently irrelevant remark of the Deputy Commissioner of Bahraich that Sarmast Khan was a relation of Raja Jang Bahadur Khan. The very context in which this remark appears in the report shows how inapposite and uncalled for it was. The Deputy Commissioner of Bahraich in his report Ex. 84 wrote as follows:

"He (Saramst Khan) is a connexion of the Raja and the village has been leased to Ram Din Kurmi."

The fact of Sarmast Khan being a relation of Raja Jang Bahadur has no causal connexion with the leasing of village Samanpur to Ram Din Kurmi. Exhibit 84 is a copy of a copy and as such inadmissible in evidence. The original of the copy from which Ex. 84 itself has been copied has been destroyed and so there is no guarantee that the copy in the Commissioner's appeal file No. 34 of 1861 is a correct copy of the original, I have after hearing Counsel of both parties admitted in evidence the copy of the Deputy Commissioner's order filed in the Commissioner's Appeal No. 34 of 1861. It may be that the word "not" has been omitted from the copy of the Deputy Commissioner's order in the Commissioner's appeal file No. 84 of 1861. The insertion of the word "not" would make the whole sentence in the Deputy Commissioner's report more intelligible and connect in a natural manner the two parts of the sentence. The sentence would then run:

"He is not a connexion of the Raja and the village has been leased to Ram Din Kurmi."

The fact that Sarmast Khan was not a relation of the Raja would naturally explain and make intelligible why the village had been leased to Ram Din Kurmi. Be that as it may, I am not prepared to attach any weight to the statement concerning the existence of relationship between Sarmast

Khan and Raja Jang Bahadur Khan to be found in Ex. 84 which is a copy of a copy. The original order of the Deputy Commissioner is not before me which alone would justify the contention of the plaintiffs that the Deputy Commissioner stated that Sarmast Khan was a connexion of Raja Jang Bahadur Khan. Exhibit 84, which is a copy of a copy, and the copy in the Commissioner's file from which Ex. 84 has been taken, are both liable to have mistakes made therein, and moreover this statement of the Deputy Commissioner is a mere casual remark and not a judicial finding on any issue after hearing the evidence of both parties, and there is the further consideration that no effect was given to this casual remark of the Deputy Commissioner by the Commissioner of Bahraich in deciding the appeal of Sarmast Khan.

It has been further argued by the learned Counsel for the plaintiffs that this statement of the Deputy Commissioner of Bahraich that Sarmast Khan was a relation of Raja Jang Bahadur was confirmed by the Commissioner in his appellate order of 30th October 1861. This contention of the learned Counsel is I am afraid based upon a misconception founded upon the contents of the vernacular *rubkar* Ex. 82. I have examined the original file No. 34 of 1861 of the Commissioner's Court very carefully and I find that the Commissioner of Bahraich Mr. D. Simson wrote at the foot of a copy of the Deputy Commissioner's report a very brief order consisting of a line and half to the effect that everything was now made clear and the appeal of Sarmast Khan was dismissed. This all too brief judgment or order of the Commissioner Mr. D. Simson dismissing the appeal of Sarmast Khan has been amplified by the reader or Superintendent of the Commissioner's Court into the vernacular order (Ex. 82) embodying not only a translation of three issues framed by the Commissioner, but also giving an abstract of the Deputy Commissioner's report on those issues and paraphrasing in the vernacular the brief order of the Commisioner dismissing the appeal. It is in the abstract of the Deputy Commissioner's report as given in this vernacular *rubkar* (Ex. 82) that we find it stated "that the applicant (Sarmast Khan) is a relation of the *talukdar*."

This is obviously not a finding of the Commissioner but merely a reproduction in Urdu in the language of the clerk of the Commissioner's Court of the substance of the Deputy Commissioner's report to the Commissioner called for on the issues remanded to him for enquiry. Mr. Jackson the learned Counsel for the plaintiffs has argued at great length on the binding character of this *rubkar* Ex. 82 which bears the signature in English of the Commissioner, the entire order being however in Urdu. No one can challenge the validity genuineness of this *rubkar* (Ex 82), but all the same plaintiffs cannot argue in face of the Commissioner's own brief order dismissing the appeal which says absolutely nothing about Sarmast Khan being a relation of Raja Jang Bahadur that the statement in Urdu in this *rubkar* to the effect "that the applicant (Sarmast Khan) is a relation of the *talukdar*" binds the defendants to the present suits and proves that plaintiffs are collaterals of the late Raja Mohammad Siddique Khan. This is not a matter of law and of rulings. It is a pure question of fact. Mr. D. Simson the Commissioner of Bahraich did not, in fact in his order dated 30th October 1861 dismissing the appeal of Sarmast Khan, give any finding to the effect that Sarmast Khan was a relation or collateral of Raja Jang Bahadur Khan. I therefore do not think it necessary to discuss the various rulings cited by learned Counsel of both parties in support of their respective contentions. For the reasons given above Ex. 82 is also of no use to the plaintiffs.

Exhibit 85, Sarmast Khan's appeal to His Honour the Chief Commissioner of Oudh, contains statements about his alleged relationship to Raja Jang Bahadur Khan which must be rejected as inadmissible in evidence for the same reasons as those given by me above in disposing of similar statements of relationship contained in this memorandum of appeal to the Commissioner, Ex. 81. The learned Counsel for the defendant Raja of Nanpara objected to Ex. 85 being even admitted in evidence on the ground that it did not bear the signature or thumb-mark or mark of Sarmast Khan. In view of the decision in the *Shrewsbury Peerage case* (2) quoted above I cannot accept this contention of the learned Counsel for defendant No. 1 and must admit in evidence a document which is produced from the Government Secretariat, and which is obviously the genuine petition of appeal of Sarmast Khan. I cannot however admit as relevant and admissible in evidence the statements made by Sarmast Khan in his own in-

terest about his alleged relationship with Raja Jang Bahadur Khan for the reasons which I have given above in discussing similar statements made by him in his memorandum of appeal, Ex 81.

Thus the entire group of documents connected with Sarmast Khan's fight with Raja Jang Bahadur Khan for securing the lease of Samanpur does not advance the plaintiff's case or help them to prove the pedigree attached to the plaint. It is worth noting that Sarmast Khan, by alleging that he was a collateral of Raja Jang Bahadur merely wanted the lease of one village Samanpur. His descendants, the present plaintiffs, by alleging themselves to be collaterals of the late *Talukdar* of Nanpara Raja Jang Bahadur's son, wish to wrench the entire *taluka* of Nanpara from the present *Talukdar* of Nanpara. (The learned Judge here discussed extracts from various revenue papers proving the existence of various members of the family and the lands and groves held by them, and proceeded): I next come to Ex. 25, page 75, which is a copy of a deposition dated 14th and 15th June 1911 of one Bala Sher Khan recorded by Mr. Kunj Behari Seth, Additional Subordinate Judge of Lucknow in Suit No. 62—3 of 1908. The learned Counsel for the defendants object to the admission of this document on the ground that no evidence had been produced by the plaintiffs to prove that Bala Sher Khan had given that evidence in 1911 in the interpleader suit. Exhibit 87, page 333, is an abstract from the register of deaths of village Narsingh Dih, Police Station Bahraich, for the year 1925 and it shows that Bala Sher Khan son of Kallu Khan died in this village Narsingh Dih on 11th July 1925. I therefore hold under s. 32, Evidence Act, that this deposition of Bala Sher Khan (Ex. 23) is admissible in evidence.

(The learned Judge again referred to evidence and proceeded as follows):

In this connexion I may also discuss another contention made by the learned Counsel for the plaintiffs that the learned Additional Subordinate Judge of Lucknow, Mr. Kunj Behari Seth, who tried the interpleader suit, No 62-3 of 1908, was really incompetent to decide that case because the Deputy Commissioner of Bahraich had no authority to file such an interpleader suit under the old Civil Procedure Code, and the old Court of Wards Act.

His contention was that under s 44 of the old Court of Wards Act (No. 3 of 1899) the Deputy Commissioner of Bahraich was not authorized to file any interpleader suit. He further contended that the Court of Wards of the United Provinces of Agra and Oudh was not "a person" within the meaning of the term as defined by the General Clauses Act either imperial or local. In my opinion this contention of the learned Counsel for the plaintiffs, while it displays great ingenuity and research work on the part of the learned Counsel, is not really sound. Section 470 of the old Civil Procedure Code, does authorize a person whose only interest in the property in suit is that of a mere stake-holder, and who is ready to render it to the rightful owner to bring an interpleader suit to enable the Civil Courts to decide upon the rights of rival claimants to the same property. It is clear that the Deputy Commissioner of Bahraich was a stake-holder of the Nanpara Estate at the time when he filed his plaint in the Court of Mr. Kunj Behari Seth, Subordinate Judge of Lucknow, within the terms of s. 470 of the old Civil Procedure Code, Act, XIV of 1882. The plaintiffs themselves in para. 13 of their plaint of Suit No. 11 of 1928 have stated that the Court of Wards was in possession of the Nanpara Estate as a trustee for the rightful owner and this position, that the Court of Wards was a stake holder for the rightful owner, was admitted before me by the learned Counsel for the plaintiffs at the time when oral pleadings of both parties were recorded. In my opinion the word "person" under s. 470 of the old Civil Procedure Code, Act XIV of 1882, is wide enough to cover a corporate body like the Court of Wards of this Province.

The definition of "person" as given in the General Clauses Act, Imperial Act X of 1897, and United Provinces Act I of 1904, includes a company or association or body of individuals whether incorporated or not. The Board of Revenue of the United Provinces in the Court of Wards Department was thus a juristic person within the meaning of the word "person" as defined in the General Clauses Act; and this juristic person was holding the property of Raja Mohammad Siddique Khan as a stake-holder, and as such it could file under s. 470 of the old Civil Procedure Code an interpleader suit, and it could

sue and be sued as such. It is obvious that if the Court of Wards took wrongful possession of another person's property under pretext of acting under s. 44 of Act III of 1899, a person aggrieved could sue the Court of Wards for recovery of his property. It is true that s 48 of the present Court of Wards Act (IV of 1912) gives the Court of Wards a statutory capacity as a person to sue under s. 88 of the present Civil Procedure Code, but the mere fact that no such statutory capacity to sue or to be sued was conferred upon the Court of Wards by the old Court of Wards Act III of 1899, does not in any way oust the juridiction of the Civil Courts to take proceedings upon a plaint filed by a person holding as a stake-holder under the provisions of s. 470 of the old Civil Procedure Code, Act XIV of 1882. I, therefore, overrule this contention of the plaintiffs that the proceedings in the interpleader suit taken by the learned Subordinate Judge of Lucknow were *ultra vires* and incompetent. The argument of the learned Counsel on this point, though very ingenious, is not really sound. And here, while I am discussing the general contention raised by the learned Counsel for the plaintiffs that the proceedings in the interpleader suit were incompetent. I may also mention another general contention advanced by the learned Counsel for defendant No. 1 that all the depositions in the interpleader suit filed in the present suits, whether on behalf of the plaintiffs or on behalf of the defendants, are really inadmissible in evidence so far as they touch the question of the relationship of the plaintiffs of the peresent suits to the Raja of Nanpara; because all those statements were made *post litem motam* and therefore under cl. 5, s. 32, Evidence Act, those statements relating to the existence of relationship by blood are inadmissible in evidence as having been made after the question in dispute was raised.

It has been urged by the learned Counsel for the plaintiffs in reply to this contention of the learned Counsel for the Raja of Nanpara that the question in dispute raised in the interpleader suit was something different from the question in dispute raised in the present suits so far as the claim of Abdul Hamid was concerned. The point for determination in the interpleader suit, so far as the claim of Abdul Hamid was concerned, only related to his being the son of Raja Jang Bahadur Khan by his alleged lawfully married wife *Musammat* Ramzano. The question in dispute in the present suits is as to the alleged relationship of the plaintiffs as collaterals of Raja Jang Bahadur Khan. In my opinion the contention raised by Mr. Wasim, the learned Counsel for the defendant Raja of Nanpara, is correct, and that all statements occurring in the deposition made by witnesses in the interpleader suit relating to the existence of relationship filed by both parties to the present suits must be ruled out as inadmissible under cl. 5, s. 32, Evidence Act. As pointed out in *Lord Halsbury's Laws of England*, Vol. 13, page 468:

"To obviate bias the declarations are required to have been made *ante litem motam* which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy, concerning the subject-matter of the declarations. So strictly has this requirement been enforced that the fact that such a dispute was unknown to the declarant or was fraudulently begun with a view to shut out his declarations has been held immaterial..... Declarations made in the obvious interest of the declarant will, generally speaking, be rejected."

On the same page the learned author also states:

"Statements by deceased persons as to private rights are not admissible, since such rights are less likely to be commonly known, and more likely to be misrepresented by interested persons."

These observations apply with full force to the particular facts of the present case. The plaintiffs and their fathers, particularly Abdul Aziz, Amjad Ali, Mohammad Ali Khan and Ahmad Ali Khan, were all keen on fighting out their alleged right to the *taluka* of Nanpara from the time of the death of the late *talukdar* Raja Mohamad Siddique Khan in 1907. The pedigree, Ex. W-12, produced in the interpleader suit was the result of this desire on the part of Abdul Aziz Khan and others, to get their claims to the Nanpara Estate recognized in a law Court. Some of the ancestors of the present plaintiffs even consulted an eminent lawyer of Lucknow, Mr Saadiullah Beg, as to their prospects in winning the Nanpara *taluka*. They also approached Nawab Sarwarjang, the uncle of Rani Qamar Zamani Begam, the widow of Raja Mohammad Siddique Khan and asked him to use his influence over his niece and get them a handsome allowance. That astute person Nawab Sarwarjang, on seeing the pedigree Ex. W-12 presented to him by Abdul Aziz, promptly took possession of it and never returned it to Abdul Aziz or Subbhan Ali or Ahmad Ali Khan who had brought it to show it to him, and when Abdul Aziz was giving evidence in the interpleader suit in

support of the false claimant, Abdul Hamid, Nawab Sarwarjang produced this pedigree, Ex. W-12, before the learned Counsel engaged on behalf of his own niece Rani Qamar Zamani Begam and asked him to utilize this pedigree which was in direct conflict with the evidence given by Abdul Aziz in favour of Abdul Hamid, and thus smash the evidence of Abdul Aziz in cross-examination by means of this pedigree, Ex. W-12, which is the same as Ex. 1 and Ex. 15, in the present suits. All these facts clearly show that the plaintiffs or their parents or grand-parents really had, as early as 1908, a genuine intention of claiming the Nanpara Estate for themselves—an intention which has now been realized in 1928 by the plaintiffs filing these present suits Nos 11 and 12 of 1928. It cannot therefore be denied that the controversy in dispute in the present suit had arisen even when the interpleader suit was filed; and, that being the case, I hold that all the depositions relating to the relationship of the plaintiffs with the *talukdar* of Nanpara contained in the file of the interpleader suit are irrelevant and inadmissible in the present suits under s. 32, cl. 5, Evidence Act. They can, however, be utilized by the defendants when it suits them for the purpose of proving them as admissions against the plaintiffs under s. 21, Evidence Act.

The learned Counsel for the plaintiffs has attached immense weight to the worth, value and genuineness of this pedigree, Ex. 1 (same as Ex. W-12 in the interpleader suits), as being the sheet anchor of the plaintiffs' claims in these two suits. Apart from the fact that the original of Ex. 1, namely Ex. W-12 of the interpleader suit, is full of mistakes, and it is not known even now when, where and by whom these mistakes were corrected, and, apart from the fact that the original of the pedigree Ex. 1 was disallowed by Abdul Aziz father of plaintiff No. 1, there is the cardinal consideration to be borne in mind as to how and from whom the unknown author of this pedigree (Ex. W.-12 of the interpleader suit) came to acquire his knowledge of the various branches of this pedigree. The plaintiffs want the Court to believe, on the strength of the evidence of Syed Mazhar Husain, P. W. No. 18, page 117, that this pedigree was dictated by Abdul Aziz father of plaintiff No. 1 to Mazhar Husain although Abdul Aziz himself disowns all knowledge about it. Even if I were to believe that Abdul Aziz, in spite of his denial in the interpleader suit of the authorship of this pedigree, did get this pedigree (Ex. W-12 of the interpleader suit) prepared, that will not bring home to him the personal knowledge and belief that Jahan Khan had two sons Mohamad Khan and Mahmud Khan in view of the fact that Abdul Aziz had deposed in the interpleader suit (Ex. A-14, page 554, line 28) that Mahmud Khan was not the son of Jahan Khan and that Jahan Khan had only one son Mohamad Khan and that the latter had two sons Karam Khan and Mahabat Khan. The learned Counsel for the plaintiffs has tried to overcome this difficulty by saying that what Abdul Aziz Khan deposed to in the interpleader suit on this point was false and that he gave this false evidence to support the claim of Abdul Hamid, and that this pedigree Ex. W-12, the original of Exs 1 and 15 in these suits, was the correct pedigree except for a few mistakes in the *talukdar's* branch of the family which may be corrected with the help of unimpeachable historical records giving the true pedigree of the *talukdars* of Nanpara. This very contention of the learned Counsel for the plaintiffs shows how utterly unreliable and worthless is this pedigree Ex. W-12, the original of Exs. 1 and 15 in these suits.

If Abdul Aziz was capable of giving false evidence in Court to support the false claim of Abdul Hamid and of deposing to a false pedigree in Court on oath, he was equally capable of getting a false pedigree manufactured with the help of Syed Mazhar Husain in order to support his alleged claim to be a collateral of Raja Mohamad Siddique Khan. It is admitted by the learned Counsel for the plaintiffs that this pedigree Ex. W 12, the original of Exs. 1 and 15 in these suits was taken by Abdul Aziz, Amjad Ali and Sarfaraz Ali to Nawab Sarwarjang, the uncle of Rani Qamar Zamani Begam, and shown to him in support of their claim to the Nanpara Estate for maintenance, and that astute Nawab Sarwarjang kept this pedigree in his own possession and made use of it through Rani Qamar Zamani Begam's Counsel for the purpose of cross-examining Abdul Aziz, its suspected author. It is, therefore, not shown from what reliable source and in what manner and from what document, if any, Abdul Aziz was able to prepare Ex. W-12, the original of Exs 1 and 15 of these suits. Syed Mazhar Husain P. W. No. 18, could throw no light on these crucial matters. From the sworn testimony of Abdul Aziz in the interpleader suit (Ex. A-14, page

544) all that I can gather is that he had in fact no real knowledge and belief as to the true pedigree of his family and that the steps, that he showed in the pedigree, which was evolved out of his own mind, marched to the measure of his own self-interest and were shaped after the ratified image of the claim that he advanced to the Nanpara Estate. If Abdul Aziz's statement (Ex. A-14) be believed to be true, the genealogical table in question, the original of Exs. 1 and 15 in these suits had never been seen nor heard of by him and might for aught I know have been the entire work of Mazhar Husain or somebody else. That being so, the *dictum* of their Lordships of the Privy Council in *Jagatpal Singh* v. *Jageshar Bakhsh Singh* (4), which I have already quoted above, becomes peculiarly appropriate to this pedigree, the original of Exs. 1 and 15 in these suits. In the words of their Lordships, Abdul Aziz's relation to the pedigree Ex. W-12 is something entirely different from the personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence.

These remarks of their Lordships of the Privy Council open out a train of thoughts which completely destroy the value of Ex. W-12, the original of Exs. 1 and 15 of these suits. Abdul Aziz never filed this pedigree Ex. W-12 in the interpleader suit. He denied all knowledge about it on oath; he impeached its correctness in various particulars. The plaintiffs themselves have disowned it where it is in conflict with the admitted pedigree of the *talukdar's* family. Nevertheless they wish to have it admitted in evidence as a pedigree prepared by a deceased member of the family. They have, however, failed to prove that it was either prepared by Abdul Aziz or that Abdul Aziz had that personal knowledge and belief which must be found or presumed in any statement of a deceased person which is admissible in evidence. Plaintiff Witness No. 18, Mazhar Hussain, who admits that he prepared the original of Exs. 1 and 15 of these suits, had admittedly no knowledge whatsoever of the pedigree of the plaintiffs' family or of that of the *Talukdars* of Nanpara and Abdul Aziz its alleged author, never owned the reputed child of his own creation. In fact Abdul Aziz swore on oath that he never gave this pedigree Ex. W-12 to Nawab Sarwarjang; that he did not know who wrote it and when shown the pedigree pointed out two mistakes in it and himself deposed to a pedigree directly at variance with the one on which the plaintiffs of these two suits have come to Court and based their claim.

A glance at the pedigree Ex. W-12 the original of Exs. 1 and 15 of these suits shows that the writer of this pedigree Syed Mazhar Husain showed Raja Rasul Khan son of Jahan Khan Togh as the *muris ala* or common ancestor of the family. It is a matter of historical knowledge that Risaldar Rasul Khan never had the title of Raja conferred on him. His parentage is also clearly wrong for Jahan Khan was not the father of Rasul Khan but he was the son of Rasul Khan. Again Rasul Khan son of Jahan Khan is shown in this pedigree W-12 as having a son Raja Karam Khan; this is also obviously wrong. The word "*karam*" has been subsequently struck off by somebody and the word "*jehan*" inserted on top of it by some unknown person at some unknown date and in some unknown place. Raja Mohamad Khan is shown as the son of Jahan Khan in this pedigree Ex. W. 12. Raja Mohamad Khan and Mustafa Khan are shown as the sons of Jahan Khan. The title of Raja was never conferred upon Mohamad Khan and Mustafa Khan was not the brother of Mohamad Khan but was the grandson of Mohamad Khan as is clear from the pedigree (given in the Gazetteer and in the *wajib-ul-arz* of Nanpara) which is now accepted as the correct pedigree of the *talukdar's* family by both parties. The name of Raja Karam Khan who was the first descendant of Risaldar Rasul Khan to obtain the title of Raja is not even shown in the pedigree Ex. W-12. If Abdul Aziz its reputed author had any real knowledge of the pedigree of his family he would not have omitted the name of his important ancestor of his family who first secured for himself the title of Raja. The Urdu note at the foot of this pedigree Ex. 12 contains clear historical anachronisms. It is alleged in this note that the title of Raja was conferred upon Rasul Khan in the time of Nawab Shujaud Daulah Bahadur It is a matter of historical record admitted by both parties that Risaldar Rasul Khan lived in the time of Shahjahan in the middle of the seventeenth century whereas Nawab Shujaud-Daulah lived and flourished in Oudh a hundred years later. The place Elaj Bhandair said to be in this note in Kabul has not been

identified by both parties or their learned Counsel. The expression *'qilabardari'* used in this note is also another absurdity on the part of the writer of this note at the foot of Ex. W-12. The historical record shows that Rasul Khan was given the title of *kiledar'* holder of the fort of Bahraich. The expression "*qilabardari*" is meaningless. This note further shows that Rasul Khan constructed the fort at Bahraich. This interesting historical statement receives no corroboration from the authentic records produced by both parties. There is another note on the top of this pedigree to the effect that five villages were given to *Bhaya* Mahabat Khan in *bhaiyayi* rights namely Bilwa Baz Khan Kalpipara, Tahapur Bhopatpur and Samangor. This note is clearly made for the purpose of proving that Abdul Aziz was entitled to maintenance allowance as the descendant of the junior branch of the *talukdar's* family. There is no mention in the revenue papers or in other historical records of the alleged grant of *bhayayi* rights to anybody in this Nanpara Estate.

The village Kalpipara which is mentioned as having been given in *bhayayi* rights to Mahabat Khan was at that time a part of Gurjigani *elaqa* which had not become part of the Nanpara Estate until the time of Raja Mudar Bux in 1807 long after the alleged existence of Mahabat Khan: see Ex. 6 *wajib-ul-arz* of Kalpipara page 19, Ex. 8, *wajib-ul-arz* of Nanpara page 27 the Bahraich Settlement Report page 39 and the Gazetteer of Bahraich page 134 Madar Bux was the grandson of Raja Karam Khan and Mahabat Khan according to the plaintiffs, was the contemporary of Raja Karam Khan. It is, therefore, clear that whoever made that note on this pedigree Ex. W-12 had absolutely no knowledge of historical facts. It is alleged by the plaintiffs that Bilwa Baz Khan and Samangaon were founded by the descendants of Mahabat Khan bearing the names of Baz Khan and Saman Khan. If these villages were founded by the grandsons of Mahabat Khan they could not possibly have been given to the grandfather in *bhayayi* rights; according to the plaintiffs themselves these villages were not even in existence at the time of Mahabat Khan, since Baz Khan and Saman Khan, who are said to have founded these villages, are, according to the plaintiffs' pedigree the grandsons of Mahabat Khan. Tahapur and Boopatpur were two of the original five villages granted to Rasul Khan by Shahjahan, the Emperor of Delhi. It is not likely that these ancestral villages would have been given away to the alleged younger branch of the *talukdar's* family in *bhayayi* rights.

In this state of things the only conclusion that I can come to is to hold that Ex. W.-12 the original of Exs. 1 and 15 in the present suits, is not proved to be the work of Abdul Aziz nor is Abdul Aziz proved to have that personal knowledge and belief in the truth of this pedigree which must be found or presumed in any statement of a deceased person which is admissible in evidence. I, therefore, reject as not proved the pedigrees Exs. 1 and 15 of these suits, the original of which is Ex. W-12 of the interpleader suit which was also rejected as unproved by the learned Subordinate Judge of Lucknow in the interpleader suit of 1908.

I have thus far discussed all the documentary evidence adduced by the plaintiffs in support of their pedigree. All that they have succeeded in proving by this mass of documentary evidence is that they are the descendants of Mahabat Khan; but who was the father of Mahabat Khan and what connexion Mahabat Khan had with Risaldar Rasul Khan Togh Pathan, the admitted and proved ancestor of the Rajas of Nanpara, are matters which plaintiffs have failed to prove and, therefore, their contention that they are the collaterals of the late *talukdar* of Nanpara Raja Mohamad Siddique Khan, remains unproved.

I will now turn to discuss the oral evidence adduced by the plaintiffs to prove the pedigree set up by them and to show their connexion with the *Talukdars* of Nanpara. But before I do so I would like to give an illuminating picture of the manner in which these witnesses are generally secured so that one may be in a position to know how to appraise their evidence and to understand in a measure the inner workings of their minds and the springs of their conduct. In this connexion I cannot do better than quote a very apposite passage from the judgment of the learned Judges of the late Court of the Judicial Commissioner of Oudh who decided First Civil Appeal No. 152 of 191 (Ex. A 5 at pages 168 and 169) which is as follows:

"It is a peculiarity in the conduct of cases, relating to landed estates in Oudh that the prosecution of the claims is usually neither retained in the hands of the principal party nor deputed to a recognized legal adviser. The conduct of these important cases is almost invariably left in the

hands of a person who is called in the vernacular "*pairokar*." It is difficult to translate the word into English or to explain exactly what the *pariokar* does or does not do. He ostensibly collects and advises on evidence, watches the progress of the case gives instructions to Counsel, and performs the functions which would be performed by a solicitor in England. But in many cases (and it is to be feared the majority), his actions are more questionable. He manufactures evidence. He bribes witnesses with the money for the conduct of the case that passes through his hands. He enters into negotiations with witnessss on the other side discusses with his own witnesses the evidence that they are going to give, frequently puts into their mouths what they are to say in examination-in-chief, and tutors them as to the answer to be given to meet possible questions in cross examination. In the present case the "*pairokar*" has undoubtedy been the real person responsible for the statements of the various claimants, and for the production of the evidence."

These remarks of the late Hon'ble Chief Justice of this Court apply with great force and with peculiar appropriateness to the all too smart *pairokar* Lalji who, along with his brother Babu Sheo Gopal, a Pleader of Bahraich, has supplied all the brains to the plaintiffs of the present suit to work up their case and to present it in a decent plausible light. The plaintiffs themselves and their witnesses by the evidence, which they have themselves given, fully bear out the truth of these observations of a most damaging character. (The learned Judge then discussed the oral evidence and continued): This is all the oral evidence adduced by the plaintiffs in proof of the pedigree set up by them. It completely fails to establish the contention of the plaintiff that they are related to the *Talukdars* of Nanpara inasmuch as their ancestor Badal Khan was the son of Mahabat Khan and the latter was the son of Mahmud Khan who was the younger son of Jahan Khan, the son of the common ancestor Rasul Khan The documentary evidence adduced by the plaintiffs (Exs. 23 and 24) establishes the fact that Badal Khan was the son of Mahabat Khan but the two further essential links in the pedigree upon which the plaintiffs found their claim, namely that Mahabat Khan was the son of Mahmud Khan and the latter was the son of Jahan Khan, the son of Rasul Khan, have not been proved by any documentary evidence nor by oral evidence which is for the most part absolutely partisan and unreliable.

In connexion with this question of pedigree the learned Counsel for the plaintiffs has invited my attention to the ruling of their Lordships of the Privy Council reported as *Sabz Ali Khan* v. *Khair Muhammad Khan* (5), in which their Lordships make the following observation:

"It must be remembered that the persons in relation to whom this question arises are not people amongst whom there are accessible records of births and deaths nor with whom these events are preserved in written family memorials. It is therefore necessary to depend upon oral tradition, and this requires close scrutiny, but their Lordships see no reason why in such circumstances this tradition should be regarded as weak and unsatisfactory merely because it may in one or two respects fail to satisfy the strict conditions that would be necessary for proving a pedigree where records and documents could be used."

I have discussed the oral evidence of the plaintiffs in these two suits at great length, and it seems to me that oral tradition "which alters when it alteration finds, or bends with the remover to remove" can hardly be dignified with the name of family tradition and certainly cannot in my opinion form the basis and foundation of a judicial pronouncement whereby property to the tune of five crores of rupees and more is to be taken away from two Rajas who are in *bona fide* and quiet enjoyment of the same and given to plaintiffs who claim it on such flimsy evidence as to their being the collaterals of the late Raja of Nanpara, Raja Mohammad Siddique Khan.

Their Lordships themselves say in this *Sabz Ali Khan's case* (5) that they

"are much impressed with the importance of showing that claims of this character which disturb a *bona fide* purchases in the quiet possession of his property should not based on untrustworthy evidence."

We in India know how readily pedigrees like horoscopes, are manufactured to suit the particular needs of the moment of the party which files them and sets up a claim on the strength of such pedigrees and horoscopes. No owner of property in India would be safe if upon mere flimsy oral tesimony as to pedigree the title of such owner to his property could be challenged by any person or body of persons claiming to be the nearest agnate or agnates of the last male holder of the property in suit.

In the present suits so uncertain are the plaintiffs themselves as to the correctness and accuracy of the pedigree upon which they found their claim that they have left it to the Court to decide (as if it were a question of law and not a pure question of fact) as to which of them is the nearest agnate of the late *Talukdar* of Nanpara, Raja Mohamad Siddique Khan. They have given an air of verisimilitude to the pedigree filed with their plaint by incorporating into

(5) 67 Ind. Cas. 264; A. I. R. 1922 P. C. 139; 49 I. A 74; 3 Lah. 48 P. C.; 30 M. L. T. 237; 20 A. L. J. 427; 7 P. W. R. 1922 P. C.; 35 C. L. J. 514; 43 M. L. J. 49; 4 U. P. L. R. (P. C.) 39; 1 P. L. R. 1922 (P. C).

it the true pedigree of the Raja of Nanpara's family and taking on to it the pedigree of their own family and thereby showing that they are the junior branch of the Raja's family. I may also point out that in these two suits we have got a written pedigree of the Raja of Nanpara and the pedigree is admitted by both parties to be correct; it is taken from unimpeachable historical records. This was not the case in the ruling in *Sabz Ali Khan's case* (5) mentioned above, and their Lordships of the Privy Council were obliged in that case of Sabz Ali Khan to decide the question as to the pedigree purely upon oral tradition and oral testimony in the absence of any written record. The observations of their Lordships therefore in that case cannot well be made to apply to a suit in which there is an admittedly correct written pedigree of the *Talukdars* of Nanpara, culled from historical records and accepted by both sides; and all that plaintiffs desire is to graft on to that pedigree the genealogical table of their own family and so make themselves out to be the junior or cadet branch of the *Talukdars* of Nanpara.

The learned Counsel for the plaintiffs also invited my attention to another ruling of their Lordships of the Privy Council reported as *Debi Prasad Chowdhry* v. *Radha Chowdhrain* (6) in which it was held that evidence of witnesses who heard the names of ancestors recited by members of the plaintiff's family on ceremonial and other occasions was admissible in evidence in support of the pedigree upon which the plaintiff based his claim and that such evidence was not open to criticism on the ground that witnesses were relatives. In the course of their judgment in this case their Lordships said:

"They do not think that the relationship of one class of the witnesses is a consideration which should inspire more than the ordinary caution with which testimony is sifted where sympathy with one side is to be taken for granted."

In this case their Lordships were influenced by the weighty considerations advanced by the learned Subordinate Judge as to why a Hindu plaintiff should be believed when he stated that he had learnt the pedigree of his family by heart because the duty of performing *sradh* annually was imposed upon him by his religion and on that occasion he had to offer libations of water and rice-balls to the souls of his ancestors up to the seventh degree in ascent at the least, and thus had occasion to repeat and to remember the names of his ancestors. In the suits before me plaintiffs Nos. 1 to 16 are Sunni Muhammadans of the Hanafi sect and there is no similar religious duty imposed upon them by Islam to recite the names of their dead ancestors once a year during a particular fortnight. To anyone who has lived in this country and knows the ways and habits of Muhammadans, the childish attempt on the part of the plaintiffs to make the *fatihas* (or prayers for the repose of the dead said on *Bakra Id* and *Giarhwin sharif*) the occasion for reciting the pedigree of the family analogous to the Hindu *sradh*, only raises a smile on one's lip and shows to what lengths plaintiffs are prepared to go for the sake of proving their claim. I am therefore not prepared to hold that in the suits before me the fact that the witnesses of the plaintiffs prove the pedigree are plaintiffs themselves is

"a consideration which should not inspire more than the ordinary caution with which testimony is sifted where sympathy with one side is taken for granted."

In the present suits the oral evidence as to the pedigree is to be viewed with the gravest suspicion not merely because the witnesses are plaintiffs themselves, or their partisans, but also because they have not one of them shown how and from what reliable and unimpeachable source they came to learn that Mohamad Khan, *Talukdar* of Nanpara, and Mahmud Khan were brothers and that Mahmud Khan was the father of Mahabat Khan. The statements of Abdul Aziz (plaintiff No. 1's father) and of Amjad Ali Khan (father of plaintiff No. 12) and of Ahmad Ali Khan plaintiff No. 3 on this point in the interpleader suit and in the mutation case, are in strange conflict with one another. Plaintiff No. 3 in these suits, Ahmad Ali Khan, has wisely refrained from coming into the witness-box to try to explain away these contradictions. Abdul Aziz and Amjad Ali are dead, but their evidence gives the lie direct to the pedigree now set up by the plaintiffs. Plaintiffs have therefore failed to satisfy me on these cardinal links in the pedigree attached to the plaint; and the ruling of their Lordships of the Privy Council in *Debi Prasad's case* (6) will not help them to supply this hiatus.

If the family traditions had been correctly preserved in the memory of the members of the plaintiffs' family, then there would not have been so many conflicting pedigrees deposed to by Abdul Aziz, Ahmad Ali, Amjad Ali and others. The plaintiffs have failed to prove the link which, they say,

(6) 32 C. 84; 31 I. A. 160; 8 Sar. 708; 9 C. W. N. 161 (P. C.).

unites their family with that of the Raja of Nanpara and to quote the words of their Lordships of the Privy Council in *Mewa Singh* v. *Basant Singh* (7).

"It is the weakness of this link which is the weakness of that claim."

The learned Counsel for the plaintiffs also relied upon another ruling of their Lordships of the Privy Council in *Doddawa* v. *Benneygawada* (8) in which their Lordships make the following pronouncement:

"It will be always be a matter of great difficulty to prepare pedigrees in a country like India where there is no official register of births and deaths, where records of a family may be few and where it is essential to depend for information upon the uncertain testimony of family traditions; men's lives are swiftly forgotten and the memory of survivors often fails. It is therefore not a matter of surprise to find that pedigrees prepared in India and which may be accepted as honestly prepared are none the less not in actual agreement in every detail."

The learned Counsel for the plaintiffs Mr. St. George Jackson, has strongly relied upon this observation of their Lordships to explain away the glaring discrepancies in the pedigree deposed to by the father of plaintiff No. 1 and of plaintiff No. 12 and by Ahmad Ali Khan plaintiff No. 3, in the interpleader suit and also in the pedigree Ex. W-12 which is the original of Exs. 1 and 15 of the present suit. The learned Counsel for the plaintiff has however overlooked one important clause in these observations of their Lordships.

Their Lordships had in their mind pedigrees "honestly prepared in India" They were considering the case of genuine pedigrees honestly prepared which yet differed as to minor details They had in their mind the great difficulty of preparing an honest genuine pedigree in a country like India where there are no official registers of births and deaths and where records of a family are few and far between. These very conditions which make the preparation of an honest pedigree in India so difficult themselves facilitate the preparation of false pedigrees: for the perjurer cannot be confronted with entries in official registers of births and deaths, and in the absence of family records it is impossible to adduce proof in support of a mere negative. In the case of such a false pedigree the position of the forger and the perjurer is particularly impregnable. It is true that

"men's lives are swiftly forgotten and the memory of survivors often fails."

Their Lordships however never intended that their truthful and pregnant observation should be used as a means for putting a premium upon perjury and forgery. It was laid down by their Lordships in this ruling that a pedigree which had been subjected to investigation many years prior to the institution of the litigation in which it was questioned and which had been previously relied upon by competent authorities and which was supported by oral evidence might safely be accepted as correct. None of the conditions upon which their Lordships were able to hold that the pedigree in that case was proved exist in the present suits. The pedigree upon which the plaintiffs found their claim in the present suits was never subjected to investigation in any previous litigation nor was it relied upon by any competent authority. In fact Ex. W-12 of the interpleader suit which is the original of Exs. 1 and 15 of the present suits was rejected by the learned Subordinate Judge of Lucknow in the interpleader suit as not proved So this ruling of their Lordships of the Privy Council really does not help the plaintiffs in any way.

The learned Counsel for the plaintiffs also cited an old English ruling of 1806, *Vowles* v. *Young* (9), in which it was held that the law resorts to hearsay of relation upon the principle of interest in the person from whom a descent is to be made out, and it is not necessary that evidence of consanguinity should have the correctness required as to other facts. This may be a sound proposition of English Law but in a pedigree case in India it was laid down by the Calcutta High Court in *Kedarnath Doss* v. *Protab Chunder Doss* (10), that it was incumbent upon plaintiffs claiming as collateral heirs to show who the common ancestor was from whom they derived title; and the Madras High Court in *M Jagannadham* v. *M. Venkata Subbha Rao* (11), modified this ruling of the Calcutta High Court and held that although a person claiming as heir must show all the stages of relationship from a common ancestor, it was not the law that if the names of the common ancestors were not known it must be held that the relationship was not proved. It was held by the late Court of the Judicial Commissioner of Oudh in 21 Ind Cas. 274 *Bhabuti Singh* v. *Khetal Singh* (12) that

(7) 48 Ind. Cas. 540; A.I.R. 1918 P. C. 49; 24 M. L. T. 429; 28 C. L. J. 530; 1 P. W. R. 1919; 21 Bom. L. R. 232; 28 P. L. R. 1919; 9 L. W. 416 (P. C.).

(8) 86 Ind. Cas. 326; A. I. R. 1925 P. C. 199 (P. C.)

(9) (1806) 33 Ch. 247.

(10) 6 C. 626; 8 C. L. R. 238.

(11) 104 Ind. Cas. 468; A. I. R. 1927 Mad. 844; 50 M. 877; 26 L. W. 115; 53 M. L. J. 864.

(12) 21 Ind. Cas. 274.

plaintiffs must prove their own title and legitimacy to the satisfaction of the Court before the defendants could be called upon to do so, and that plaintiffs were bound to prove not only that they were the reversioners of the last male holder but that they were the only nearest reversioners living at the time when succession opened. These principles must guide Courts in India in deciding claims based upon pedigrees set up by the plaintiffs and it is in the light of these principles that the plaintiffs' claim in the present suits has been envisaged.

As the plaintiffs have failed to prove the pedigrees relied upon by them it is unnecessary for me to discuss the evidence adduced by the defendants on the question of plaintiffs' pedigree. For the reasons given above I decide Issue No. 1 in Suits Nos. 11 and 12 against the plaintiffs and hold that the pedigree attached to both plaints of these suits is not proved and that the plaintiffs are not the collaterals or agnates of the late Raja Mohamad Siddique Khan of Nanpara and of his sister Rani Kaniz Begam.

In view of my finding on Issue No. 1, Issue No. 2 in both suits must also be decided against the plaintiffs and I find that no plaintiff in both these suits is entitled to the *talukdari* property under the Oudh Estates Act or to the non-*talukdari* property under the alleged custom of male lineal primogeniture. Not only have plaintiffs failed to prove their pedigree attached to the plaint upon which they found their claim in both these suits but they have produced evidence which makes it very doubtful as to who amongst them is in the seniormost branch of the family. The depositions of Bala Sher Khan (Ex 23 page 75 and of Karam Sher Khan Ex. 24, page 84) make it clear that Zabardast Khan and Basalat Khan were the sons of Mahabat Khan by his first wife and Badal Khan and *Musammat* Sakru Begam were his children by his second wife From this it would seem to follow that Subhan Khan plaintiff No. 12 would be in the seniormost branch and entitled to succeed in preference to Mohamad Azim Khan plaintiff No. 1. The deposition of Amjad Ali Khan (Ex. 25, page 98) which is inadmissible in evidence under s. 32, cl. 5, Evidence Act, as having been made *post litem motam* though great stress was laid upon it by the Counsel for the plaintiffs shows that Amjad Ali Khan belonged to the senior branch being a descendant of Zabardast Khan. If the original of Ex. 1 which is another inadmissible document for the same reason, be for the sake of argument accepted as correct, then Samman Khan's descendants Sardar Ali Khan and his two brothers who are not even plaintiffs in these suits would be in the seniormost branch. Thus plaintiffs themselves have really no knowledge about the senior or junior branches of their own family. Hast Khan's children have been proved to be in existence by the evidence of the defendants' witnesses and this statement receives corroboration from the statement of Amjad Ali Khan (in Ex. 25, page 107, line 20) that

"Samman Khan, Alast Khan and Hast Khan have left sons whom I called Mamun."

This statement of Amjad Ali Khan who is father of Subhan Ali Khan plaintiff No. 12 is admissible in evidence against the plaintiffs as an admission under s. 21, Evidence Act. The statement in the pedigree that Hast Khan died childless is thus proved to be false. The same conclusion must be drawn from the statement of Karan Sher Khan (Ex. 24, page 85, line 5). He states that "Hast Khan's and Kadi Khan's aforesaid wives are dead." This statement is also admissible against the plaintiffs under s. 21, Evidence Act. Until, therefore, the plaintiffs prove beyond all reasonable doubt that Hast Khan was junior to Alast Khan they cannot succeed in their claim. This they have not done. They have taken the very short cut of ignoring the descendants of Hast Khan and of showing in their pedigree attached to the plaint that Hast Khan died childless. Upon this question of seniority there is no reliable data to enable the Court to come to any clear and decisive finding. The oral evidence of the plaintiffs on this point is quite worthless being obviously most partisan and based upon complete ignorance of events that happened generations ago. There is no material produced by the plaintiffs to test the evidence of their witnesses, and such documentary evidence as they have produced shatters my faith in the oral testimony of their witnesses. Before the rule or custom of male lineal primogeniture can be applied to the plaintiffs' claim the plaintiffs must show who exactly is the person entitled to the *talukdari* property under cl. 10, s. 22, Oudh Estates Act, and to the non-*talukdari* property under the custom of male lineal primogeniture.

On this question of seniority the plaint-

iffs have left everything in a flux; the pedigree of the plaintiffs' family becomes in their hands a very flexible genealogical tree so much so that any branch of this tree may be made to be the senior branch. Such a pedigree is pure guesswork and nothing else. In the words of Lord Sumner who delivered the judgment of their Lordships of the Privy Council in *Mewa Singh* v. *Basant Sidgh* (7):

"It may do for those who pronounce the verdict of history, but an action of ejectment is a serious matter."

In another case decided by their Lordships of the Privy Council 18 Ind. Cas. 13 *Prathivadi Bhayankaram Govinda Charyulu* v. *Rangayya Appa Rao Bahadur* (13) it was held that where a plaintiff claimed to recover possession of a village on the allegation that he was the nearest reversioner of the last male owner thereof and it was in evidence that a number of persons claimed to be the descendants from the same last male owner, his suit must be dismissed and the decree of the Madras High Court affirmed. Similarly it was held in 30 Ind. Cas. 220, *Chandan Singh* v. *Bhabhuti Singh* (14) that a person claiming as the nearest reversioner must establish that there was no intermediate heir with a better claim to succeed to the property of the deceased than he asserted and that he was bound to prove his descent and legitimacy as a necessary element for the establishing of his claim. On the strength of this ruling I must hold that no decree can be passed in favour of the plaintiffs when it is a matter of doubt as to whether plaintiff No. 1 or plaintiff No. 11 or plaintiff No. 12 is in the seniormost line of the plaintiffs' pedigree. In fact I find it impossible to say who upon this elastic and changeable pedigree set up by the plaintiffs is entitled to the property in suit; as I find that the pedigree attached to the plaint is not proved, I must also decide Issue No. 3 against the plaintiffs and hold that no plaintiff is entitled either to the *talukdari* property, or non-*talukdari* property in suit.

Issues No. 3 (*a*) and 3 (*b*). Now I come to Issue No. 3 (*a*) and 3 (*b*) which are as follows:

3 (*a*). "Is there a custom of the exclusion of females from succession?"

3 (*b*). "Is there a custom of male lineal primogeniture?"

So far as as recorded history goes, the family history of the *Talukdars* of Nanpara affords no instance of the existence of such customs. The Nanpara estate is entered at No. 58 in list No. 2 and at No. 151 in list No. 1 of the lists prepared under s. 8, Oudh Estates Act. According to s. 10 of the said Act read with s. 8 the presumption is that the estate devolved on a single heir to be determined not necessarily according to the rule of male lineal primogeniture. The primogeniture *sanad* was granted to the *Talukdar* of Nanpara in 1860-61 and from that time the Nanpara Estate would descend according to the provisions of the *sanad* except in so far as the applicability of the *sanad* was expressly excluded by the Act. The *sanad* would not apply to non-*talukdari* property. If the rule of male lineal primogeniture had obtained in the Nanpara Estate from of old, then there would have been no occasion for the grant of a primogeniture *sanad* in 1860-61, and the Nanpara Estate would have been entered in list No 3 and not in list No. 2 of the lists prepared under s. 8, Oudh Estates Act. Moreover there is no entry as to the custom of male lineal primogeniture in the *wajib-u larz* of Nanpara or of other villages of the estate and there is also no mention of the custom of the exclusion of females in these *wajib-ul-araiz*. In fact there is no documentary evidence of these alleged customs set up by the plaintiffs. (The learned Judge here discussed the evidence and came to the conclusion that there was no family custom of the exclusion of females from succession and no custom of male lineal primogeniture in this family has been proved by the plaintiffs).

Issue No. 4. Issue No. 4 runs as follows:

"If the custom of single heir succession according to the rule of male lineal primogeniture does not apply to non-*talukdari* property, are the plaintiffs entitled to the same?"

The plaintiffs are not the legal heirs of Raja Mohamad Siddique Khan under Muhammadan Law, and if they fail to prove the custom set up by them they can have no legal claim to any non-*talukdari* property. Schedule E attached to the plaint is the list of the property purchased by the Court of Wards in 1911. It includes property not descended from Raja Mohamad Siddique Khan. The acquisition made by the Court of Wards on behalf of persons who, according to the plaintiffs, were mere trespassers cannot be claimed by them. This property in Sch. E was purchased by the Court of Wards for the benefit of Rani Kaniz Begam and Rani Sarfaraz Begam who were then

(13) 18 Ind. Cas. 13; 13 M. L. T. 198; (1913) M. W. N 191; 17 C. L. J. 295; 15 Bom. L. R. 463 (P. C.).

(14) 30 Ind. Cas. 220; 2 O. L. J. 246.

holding the estate under the compromise of 1910 in the interpleader suit. They were acquired with the intention that they should descend like the rest of the Nanpara Estate according to the terms of the compromise. There can therefore, be no question of the plaintiffs succeeding to this property.

Plaintiffs can only if successful in their suits, have mesne profits for three years; they cannot have the income of the estate invested in purchasing *zemindari* property or given to Rani Kaniz Begam in cash. The plaintiffs are not entitled to succeed to the property in Schedule E as it is not the heritable asset of Raja Mohamad Siddique Khan. Plaintiffs in Suit No. 11 of 1928 do not set up in that case the plea that they are the heirs of Rani Kaniz Begam but they sue in Suit No 11 only as the heirs of the late Raja Mohamad Siddique Khan of Nanpara.

Then again it is not proved that Raja Mohamad Siddique Khan left any property besides what he had inherited from his father, The Nanpara *taluka* is entered in list No. 2 of the lists prepared under s. 8, Oudh Estates Act, so the rule of single heir succession would apply. The primogeniture *sanad* conferred on Raja Jang Bahadur Khan would not apply to *non-talukdari* property purchased since the date of the *sanad*. It would only apply to property conferred on the Raja by the *sanad* given by the Crown nor would s. 22, Act I of 1869, apply to this kind of property because s. 22 of the Act applies only to an "estate" as defined in the Act; and non-*talukdari* property is not an 'estate" within the meaning of the definition given in s. 3, Act I of 1869. The rule of succession to non *talukdari* property is governed by s, 23 of the Act that is, by ordinary law (in this case by Mhuammadan Law) modified by custom, if any proved in the case. Regarding non-*talukdari* property the presumption that it is governed by the rule of single heir succession in the case of list No 2 estate is rebuttable; but there is no presumption that the rule of male lineal primogeniture would govern such non-*talukdari* property in the case of list No. 2 estate and in the present suits no plaintiff has proved that he is entitled to the property under the rule of single heir succession.

The *sanad* being not applicable the ordinary law referred to in s. 23, Act I of 1869, in the present suits would mean the Hanafi Law of the Sunnis except in so far as it has been modified or affected by any custom set up and proved by the plaintiffs in these suits. Non-*talukdari* property would, therefore, in these suits go to the single heir recognized by Hanafi Law. This single heir under the Hanafi Law would be one of the sisters of Raja Mohamad Siddique Khan or one of his widows. No plaintiff of these suits can possibly be the heir of Raja Mohamad Siddique Khan under Muhammadan Law. The non-*talukdari* property, therefore, not being governed by the *sanad* or by the custom of male lineal primogeniture, must go to a single heir discovered in accordance with the rules of ordinary Muhammadan Law. The plaintiffs do not rely upon any custom of male lineal primogeniture as having obtained in the Nanpara estate prior to the annexation of Oudh by the British nor have they proved any such custom. Non *talukdari* property must, therefore, be presumed to descend to a single heir according to a family custom of single heir succession as the Nanpara Estate is entered in list No. 2. That single heir must be discovered according to the personal law of the party modified by custom, if any proved According to Muhammadan Law plaintiffs are no heirs in the presence of sisters and widows in Suit No. 11 and in the presence of a sister and a husband in Suit No. 12. In this connexion I may also note that the nearest collateral in degree and not in line would succeed to the non-*talukdari* property; but it has not been shown in the present suit who that collateral is. I, therefore, find Issue No. 4 against the plaintiffs and hold that they are not entitled to the non-*talukdari* property.

Issue No. 5 (*a*). I next come to Issue No. 5 (*a*) which runs as follows:

"Is the adoption of Raja Saadat Ali Khan defendant No. 1 by Saltanat Begam invalid in law."

It is admitted by the plaintiffs that Rani Nasim Sahri widow of Raja Mohamad Siddique Khan married Nawab Mohammad Sultan Khan on 9th May 1903, her first husband Raja Mohamad Siddique Khan having died on 30th December 1907. Her *nikanama* (Ex. A-1, page 1) is admitted. The fact of the re marriage of Rani Nasim Sahri on 9th May 1903 is also admitted. It is further admitted that Rani Saltanat Begam, the second widow of Raja Mohamad Siddique Khan, adopted defendant No. 1, Raja Saadat Ali Khan the son of Raja Mohamad Saddique Khan's sister Rani Sarfaraz Begam on 9th March 1909. Exhibit A-8 (page 558), which is the deed of

adoption and which evidences the *factum* of adoption is admitted by the plaintiffs.

The questions raised by the plaintiffs in connexion with this fact of adoption of defendant No. 1 are stated in paras. 10-A, 10-B, 10-C and 10-D, of the plaint in Suit No. 11 of 1928. The first contention of the plaintiffs is that as certain fixed periods were prescribed under the will during which each Rani had to adopt a son and as Rani Saltanat Begam adopted defendant No. 1, Saadat Ali Khan before her time, that, therefore, the adoption of defendant No. 1 is void. The second contention of the plaintiffs is that the estate cannot be given to an adopted son because a gift to an adopted son is unknown to the Oudh Estates Act. The third contention of the plaintiffs is that unless the adopted mother Rani Saltanat Begam had been given a life-estate she could not legally adopt and her adopted son, defendant No 1, could not legally take the estate under a deed of adoption. It was also argued that under Muhammadan Law in respect of non-*talukdari* property, there could be no bequest of a life-estate to Rani Nasim Sahri and so there could be no bequest to an adopted son to take after her. The fourth contention of the plaintiffs in this connexion is that the adopted son is not a *persona designata* and, therefore, the bequest in his favour failed for want of certainty.

In the oral pleadings advanced by Mr. A. P. Sen, Counsel for the plaintiffs, on 5th April 1929, it was further urged that Rani Saltanat Begam and her relatives exercised undue influence over the mind of Rani Nasim Sahri and so constrained her to marry the brother of Rani Saltanat Begam by making her (Rani Nasim Sahri) believe that she was not an *ahlibiradri* wife of Raja Mohamad Saddique Khan and could never get the estate of her husband and that it would be to her advantage to marry the brother of Rani Saltanat Begam. The plaintiffs gave no particulars of this alleged exercise of undue influence and coercion and they did not give any evidence on this point nor did they press for an issue being framed about it.

Another contention of the plaintiffs in respect of the adoption of defendant No 1 is that as Rani Saltanat Begam remarried before she adopted defendant No. 1 Raja Saadat Ali Khan, therefore, she lost her right to adopt under the will.

Mr. Ali Mohammad, another learned Counsel for the plaintiffs, urged in his opening address that as defendant No, 1 Raja Saadat Ali Khan belonged to the Quli family he could not, as such be adopted under the terms of the will. This contention is not set forth in the plaint nor in the oral pleadings recorded by me at the commencement of the trial of these suits and Counsel is not, therefore, really justified in introducing this question in his opening address. I will however, discuss this point in the course of my judgment in connexion with this Issue No. 5 (*a*).

The will of Raja Mohamad Siddique Khan is Ex. 50 (page 211 of the printed record). It was written out on 8th January 1906. It was really executed on 23rd January 1906. The valid execution and registration of this will, Ex. 53, are admitted by Counsel for defendant No. 1, the Raja of Nanpara but denied by Counsel for defendant No. 2 the Raja of Utraula, as well as by the heirs of Rani Kumar Zamani Begam original defendant No 3. The will (Ex. 50, page 211) sets forth that Raja Mohamad Siddique Khan had four wives, namely Rani Kaniz Begam, Rani Saltanat Begam, Rani Dilafza and Rani Champa, that Rani Kaniz Begam was divorced by the Raja and after her divorce marriage with Rani Nasim Sahri took place and she was given the place of the first Rani. The will then proceeds to give a life-estate to Rani Nasim Sahri with power of alienation. On the death of Rani Nasim Sahri, and on the termination of her life-estate the full estate was to devolve on the son born to her, or, in default to a son born to Rani Saltanat Begam or in default to a son born to Rani Dilafza or in default to a son born to Rani Champa. In case no Rani had any issue then the first Rani, that is Rani Nasim Sahri, was permitted to adopt a son within two years of the Raja's death, the boy to be adopted must be a Sunni lad under ten years and must not belong to the Quli family or to the family of Rani Kaniz Begam. If Rani Nasim Sahri failed to adopt a son within the prescribed period then the second Rani, Rani Saltanat Begam was authorized within the space of two years to adopt subject to the conditions laid down concerning the boy to be adopted; if the second Rani also failed to adopt a son then the third Rani, Rani Dilafza, was empowered to adopt a son on similar conditions; and if she too failed to adopt a son then the fourth Rani Champa, was given the power to adopt a son on the conditions given above. Till the termination

of the life-estate of Rani Nasim Sahri the adopted son was to get an allowance of Rs. 50,000 a year. If Rani Nasim Sahri died in the life-time of the Raja then the second Rani, Rani Saltanat Begam, was to get possession of the estate for two years within which she was to adopt a son on the conditions laid down above and she was to remain in possession without power of transfer. Similarly, if the second Rani, Rani Saltanat Begam, died in life-time of the Raja or after his death without making an adoption then the third Rani, Rani Dilafza, was to get possession of the estate for two years within which she was to adopt a son on the conditions set fourth above and so again if the third Rani died in the life-time of the Raja or after his death without making an adoption, the fourth Rani, Rani Champa, was to be put in possession of the estate for two years within which she was to adopt a son on the conditions given above. No Rani was however to have the power of alienation. At the end of the will there is an important clause that if any of the Ranis contracted a second marriage after the death of the Raja then she would not be entitled to reap any benefit under any of the paragraphs of the will (*kisi dafaiwasiyatnama haza sefayedat whaneki mustahiq na hogi.*)

It seems to me clear upon a careful perusal of the terms of this will (Ex. 50, page 211), that if Rani Nasim Sahri died after the death of Raja Mohammad Siddique Khan without making an adoption, then the second Rani, that is Rani Saltanat Begam, was at once to come into possession and become entitled to make an adoption within two years of her coming into possession subject to the conditions that the boy to be adopted must be a Sunni, under ten years of age, and must not belong to the Quli family or to the family of Rani Qamar Zamani Begam. The phrase "*sharayatebala*" does not, in my opinion, include, as contended for by the plaintiffs, also the condition as to the time during which the second Rani was to wait before she could make an adoption. If the contentions of the plaintiffs on this point were to be accepted as correct, then very anomalous results would flow from such an interpreation of the will. It was laid down by their Lordships of the Privy Council in *Maharani Indar Kuar* v. *Maharani Jaipal Kuer* (15) that that construction of the will should be adopted.

(15) 15 C.725; 15 I. A. 127; 5 Sar. 150; 12 Ind. Jur. 77 (P. C.).

"which bespeaks a reasonable and probable intention and rejecting that which would indicate an intention unreasonable, capricious and inconsistent with the testator's view as evidenced by his conduct and by the dispositions of his will which are not open to controversy."

According to the contention advanced by Mr. Jackson the learned Counsel for the plaintiffs, Rani Saltanat Begam could not have and should not have taken in adoption Raja Saadat Ali Khan until after the expiry of two years after the death of Raja Mohamad Siddique Khan. As Rani Nasim Sahri remarried and relinquished her rights under the will of Raja Mohamad Siddique Khan, the estate would have been left without a successor or even a temporary owner for over a year if the interpretation contended for by the plaintiffs be accepted as correct To avoid the anomaly it has been argued on behalf of the plaintiffs that if it be considered that Rani Nasim Sahri remarried and her deed of relinquishment resulted in her losing her right to adopt a son to Raja Mohamad Siddique Khan then Rani Saltanat Begam may be deemed to have come into possession of the Raja's estate immediately when Rani Nasim Sahri's right to adopt ceased, but that Rani Saltanat Begam under the terms of her husband's will had to wait for the expiry of two years after the death of Raja Mohamad Siddique Khan before she could validity adopt a son under the terms of her husband's will. This construcsion of the will entirely overlooks the other important clause in the will which lays down that each of the second, third and fourth Ranis immediately on her coming into possession of the estate, must within two years of her so coming into possession, adopt, and if she fails to do so, then she vacates her possession over the estate and loses her right to make an adoption. Therefore it follows logically from the terms of the will that the second Rani from the moment she came into possession of the estate had the right and power to make an adoption within two years from the date of her coming into possession of the estate; for her power to make an adoption only subsisted during the two years of possession she was allowed to have over the estate on the failure of Rani Nasim Sahri to make an adoption and on her forfeiture of her right to adopt and of her life-estate by reason of her remarriage and her deed of relinquishment.

The construction sought to be put upon the will of Raja Mohamad Siddique Khan

by the learned Counsel for the plaintiffs would necessarily give rise to a conflict between the provisions of cl. 5 and cl. 6 of the will, for upon this interpretation of the will as contended for by the plaintiffs, the 2nd, 3rd and 4th wife of Raja Mohamad Siddique Khan, though succeeding under cl. 6 of the Raja's will and authorized to adopt only within the period of two years of her obtaining possession to the estate would have to wait till the period of time prescribed in cl. 5, for the previously mentioned wife had expired before she herself could make a valid adoption. It seems to me therefore that the phrase "*sharayatebala*" in cl. 6 of the will cannot possibly include the condition as to the time period laid down in cl. 5 of the will for each of the four Ranis. The only reference to the conditions laid down in cl. 4 of the will related to the kind of boy who was to be adopted, namely that he must be a Sunni lad, under 10 years of age, and must not belong to the Quli family or to the family of Rani Qamar Zamani Begam. To hold otherwise would lead to absurd results was never dreamt of by the testator. In delivering the judgment of their Lordships of the Privy Council in the Balrampur case *Maharani Indar Kuar* v. *Maharani Jaipal Kuar* (15) quoted above, Lord Macnaghten quoted with approval the following rule of construction laid down by Lord Cranworth in *Abbatt* v. *Middleton* (16):

"When by acting on one interpretation of the words used we are driven to the conclusion that the person using them is acting capriciously, without any intelligible motive, contrary to the ordinary mode in which men in general act in similar cases, then, if the language admits of two constructions, we may reasonably and properly adopt that which avoids these anomalies, even though the construction adopted is not the most grammatically accurate."

Applying this golden rule I hold that though it is possible to argue with some show of reason that the phrase "*sharayatebala*" in cl. 6 of the will also includes the condition as to the time limit during which each Rani had to adopt after the expiry of the time limit prescribed for the previous Rani as laid down in cls. 5 and 6, still the more reasonable and sane construction of the will seems to me to be to interpret this phrase "*sharayatebala*" in cl. 6 of the will to include only the conditions laid down in cl. 4 of the will relating to the qualifications of the boy who could be adopted by each of the Ranis. This construction appears to me to be in conformity with the intention of the testator, whereas the other construction pressed upon me by the learned Counsel for the plaintiffs leads to very anomalous results which would in fact tend to defeat the real object of the testator.

Mr. Wasim the learned Counsel for the Raja of Nanpara defendant No. 1, invited my attention in this connexion to the judgment of the late Misra, J., in Original Suit No. 8 of 1926 (Ex. A-6 at page 420 etc.) and argued before me the question of the alleged invalidity of the adoption of Raja Saadat Ali Khan by Rani Saltanat Begam on the ground of its not having been made at the right time on lines similar to those which found favour with that learned Judge in that case. Independently of the reasoning embodied in this judgment (Ex. A-6) of my late-lamented colleague I too have come to the same conclusion. The fact of remarriage of Rani Nasim Sahri in May, 1908, having been admitted by the plaintiffs and the execution of the deed of relinquishment by Rani Nasim Sahri in favour of Rani Saltanat Begam (Ex, A-56, page 1053) having been proved by D. W. No. 12, Mansur Ali Khan and the loss of the original of this deed of relinquishment having been proved to my satisfaction by D. W. No. 16, Chhote Khan, it follows that according to the terms of cl 10 of the will Rani Nasim Sahri forefeited her right make an adoption as also to the life-estate she had under the will and consequently Rani Saltanat Begam came into possession of the estate at once and could validly exercise her rights to adopt a son to Raja Mohamad Siddique Khan immediately on her obtaining possession over the estate without waiting for the termination of the unexpired period of two years allowed to Rani Nasim Sahri to make the adoption had she remained unmarried and had she not renounced her rights under the will of the Raja. I therefore reject as unsound the contention of the plaintiffs that defendant No. 1, Raja Saadat Ali Khan, was not validly adopted because he was not adopted after the expiry of the period of two years allotted to Rani Nasim Sahri under the terms of her husband's will.

I will now take up the contention on behalf of the plaintiffs urged before me by Mr. Ali Mohammad the learned Counsel for the plaintiffs that Raja Saadat Ali Khan belonged to the Quli family and as such he was not qualified under the terms of the will, Ex. 50, to be adopted as a son of Raja Mohamad Siddique Khan. It is true that Rani Sultan Shan Begam the

(16) (1857) 7 H. L. C. 89.

wife of Raja Jang Bahadur Khan was a member of the Quli family being the daughter of Nawab Mehdi Quli Khan. She was the mother of Rani Sarfaraz Begam, Rani Kaniz Begam and Raja Mohamad Siddique Khan. Her Quli blood was thus extinguished in Raja Mohamad Siddique Khan the testator and his two sisters who were the children of a Togh Pathan *talukdar* Raja Jang Bahadur Khan. Rani Sarfaraz Begam the natural mother of Raja Saadat Ali Khan defendant No. 1 was married to a Syed *talukdar* Raja Syed Ashfaq Ali Khan; see evidence of D W. No. 12, Mansur Ali Khan, page 290. Defendant No. 1, Raja Saadat Ali Khan is thus the natural son of a Syed *talukdar* and as such has nothing to do with the Quli family of Nawab Mehdi Quli Khan. His own natural mother was the daughter of a Togh Pathan *talukdar*. In fact Raja Saadat Ali Khan defendant No. 1 has got less Quli blood in him than even the testator Raja Mohamad Siddique Khan who detested the members of the Quli family.

As has been laid down by their Lordships of the Privy Council in *Skinner* v. *Orde* (17), a child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status. Defendant No. 1, Raja Saadat Ali Khan must therefore be admitted to have, on the strength of this ruling, the status of a Syed being born of a Syed father. This effectually disposes of the contention urged on behalf of the plaintiff that Raja Saadat Ali Khan was a member of the Quli family. Plaintiff's own witnesses Sarfaraz Ali Khan, P. W. No. 6, (page 28, line 26) and P. W. No. 7 Nawab Ali Khan (page 43, line 22) have admitted that a son of a daughter cannot be said to belong to his maternal grandfather's family. The Headmaster of the Arabic School in Mohalla Farangi Mahal in the City of Lucknow, Maulana Inayatullah as D. W. No. 21 has given on oath the meaning of the word *khandan* as denoting the descendants of one's paternal grandfather. I accept that meaning of the word "*khandan*" as correct. The *Fatawa Alamgiri* and the *Hidaya* support the evidence of this learned and respectable witness Maulana Inayatullah. His evidence has not been shaken in cross-examination and commands the assent of my intellect. The phrase "*khandan Quli*" used by Raja Mohamad Siddique Khan in his will is used by him in the ordinary sense in which a Muhammdan would use that expression and in construing a will, the race and religion of the testator have to be borne in mind. For the reasons given above I have no hesitation in holding that defendant No. 1 Raja Saadat Ali Khan, does not belong to the Quli family. In support of the view I am taking I may also quote the observations of the late learned Chief Judge of this Court in F. O. A. No. 162 of 1911 (Ex. A-5 at page 260) which runs as follows:

"I interpret the provisons of the will in question to mean that no descendant on the male side of Mehdi Quli Khan's family is to be adopted, and I find that Saadat Ali Khan is not a member of the family of Mehdi Quli Khan on the male side."

The same view was expressed by Sir Louis Stuart's colleague Kanhaiya Lal, J., in his judgment in that appeal. His finding on this point was that

'the boy adopted did not belong to the family *khandan* of Mehdi Quli Khan no more than Raja Mohammad Siddique Khan did, for in India a boy is known by the family of his father or paternal grandfather rather than by the family in which his father or paternal grandfather was married."

For these reasons I reject the contention of the plaintiffs that the adoption of defendant No. 1, Raja Saadat Ali Khan, was invalid on the ground that he belonged to the family of Mehdi Quli Khan.

The next attack made on the validity of the adoption of Raja Saadat Ali Khan by Rani Saltanat Begam is founded on the contention that a sister's son cannot be validly adopted by a Muhammadan *talukdar*. It is true that according to Hindu Law a widow belonging to one of the twice born caste cannot validly adopt a boy whose mother her husband could not legally marry and therefore the son of a sister or a daughter cannot be adopted by such a Hindu. Adoption under Hindu Law is a religious act. On the other hand, adoption is unknown to Muhammdan Law and the history of Islam shows that definite attempts were made to make fosterage and adoption impossible. From the Muhammadan point of view the notion of adoption is abhorrent to Muhammadan ideals and Muhammadan sentiments see Wilson's Digest of Muhammadan Law, pages 156-157. Under s. 29, Act I of 1869, however the widow of a Muhammdan *talukdar* is allowed to make an adoption only in those cases in which it is permissible for a Hindu to do so. The Oudh Estates Act (Act I of 1869) is a purely secular enactment and has nothing to do with the peculiar notions of Hindus and. Muhammadans on the subject of adoption It merely lays down that in those cases in

(17) 14 M. I. A. 309; 17 W. R. 77; 3 Sar. 34 (P. C.)

which a Hindu widow could adopt, a Muhammadan widow of a *talukdar* could also do so. It dose not touch the question of the qualifications of the boy to be adopted. A childless Hindu widow may, with the authority of her husband, make an adoption and the same power is given to the widow of a Muhammadan *talukdar* by Act I of 1869. A Hindu widow who has a son born to her by her husband cannot legally adopt and similarly a Muhammadan widow if she has a son by her husband could also not adopt under Act I of 1869 Adoption, like marriage in Hindu Law, is in the nature of a religious sacrament, but no religious ceremony is necessary under Muhammadan Law for the purpose of making an adoption which is unknown to Islamic Law.

The only condition of Hindu Law which is imposed upon a widow of a Muhammadan *talukdar* by Act I of 1869 is that the latter must be a childless widow and authorized by her husband to make an adoption during her widowhood. The ruling of their Lordships of the Privy Council reported as *Raghuraj Chandra* v. *Subhadra Kunwar* (18) relied upon by the learned Counsel for the plaintiffs in his opening address seems to me to be not relevant or pertinent to the present discussion. It is obvious that the framers of Act I of 1869 under British guidance had no intention by introducing the highly technical and archaic notions of Hindu Law in the matter of an adoption by a widow of a Muhammadan *talukdar* who obviously would not know and could not be compelled to go through all the religious ceremonies enjoined by the Hindu Shastras upon the widow of a twice born Hindu taking in adoption a son to her late husband. It is true that under the *Mitakshara* a Hindu belonging to a twice born caste could not adopt a daughter's son or a sister's son but in the Punjab and in Madras and amongst *Sudras* throughout the whole of India a sister's son can be validly adopted by a Hindu: see Trevelyan's Hindu Law, pages 108, 141 etc. Under the provisions of s. 29, Act I of 1869 the widow of a Muhammadan *talukdar* can make an adoption provided she has no natural son born to her from her husband and provided she has not already adopted a son.

The view which I have taken in this matter has also found favour with Kanhaiya Lal, J., in his judgment in F. C. A. No. 162 of 1911 dated 28th May 1914 (Ex. A-5 at page 234, line 40) in which that learned Judge delivered himself as follows:

"The adoption of Saadat Ali Khan is valid under the will and under s. 29, Oudh Estates Act. The circumstances under which an adoption can be made by Hindus or Muhammadans under that Act are identical, but the restrictions imposed on adoption by the personal law of the Hindus are not applicable to the Muhammadans."

I entirely concur in these observations, and it seems to me that the plaintiffs, who are Sunni Muhammadans like defendant No. 1, Raja Saadat Ali Khan, are not right in arguing that Rani Saltanat Begam, the widow of Raja Mohamad Siddique Khan was bound by all the restrictions imposed by the personal law of the Hindus in the matter of making an adoption. Section 29, Act I of 1869, does not lay down any restrictions as to the qualifications of the boy to be adopted; and it seems to me that the plaintiffs have raised this frivolous plea merely to defeat the claim of defendant No. 1 founded on his adoption by Rani Saltanat Begam. I reject this contention of the plaintiffs as worthless and hold that Rani Saltanat Begam was legally entitled under Act I of 1869 to adopt the natural born son of Rani Sarfaraz Begam the sister of Raja Mohamad Siddique Khan.

The next attack made upon the validity of the adoption of Raja Saadat Ali Khan by Rani Saltanant Begam is based upon the allegations of the plaintiffs that Rani Saltanat Begam had remarried before she adopted Raja Saadat Ali Khan. This contention of the plaintiffs is embodied in Issues Nos. 5 (*b*) and 5 (*c*) of Suit No. 11 of 1928.

[The learned Judge referred to the evidence and continued:—]

I therefore decide Issue Nos. 5 (*b*) and 5 (*c*) of Suit No. 11 against the plaintiffs and hold that Saltanat Begam had not remarried either Hamid Hussain Khan or Mohamad Kazim before she adopted defendant No. 1 Raja Saadat Ali Khan and that the adoption of defendant No. 1 by her was therefore valid.

The last ground upon which the validity of the adoption is impugned is even more pretentious and hollow than the one discussed above.

[The learned Judge referred to the evidnce in the point and found as follows:]

For the reasons given above this contention of the plaintiffs must also fail and indeed it was never seriously pressed before me.

(18) 108 Ind. Cas. 673; A. I. R. 1928 P. C. 87; 55 I. A. 139; 3 Luck 76; 5 O. W. N. 443; 26 A. L. J. 609; 30 Bom. L. R. 829; 32 C. W. N. 1009 (P. C.).

Other objections to the validity of the adoption were also raised. It was asserted on behalf of the plaintiffs that non-*talukdari* property could not go to the adopted son unless the adopting mother was in possession of a life-estate. All the learned Counsel for the plaintiffs, Mr. Sen, Mr. Ali Mohamad and Mr. Jackson, laid stress upon this contention of the plaintiffs. This contention is embodied in para. 10 (*c*) of the plaint where it was asserted that the will of Raja Mohammad Siddique Khan prescribed "a course of devolution unknown to Act I of 1869" and was void under Muhammadan Law so far as the succession to the non-*talukdari* property by the adopted son was concerned.

This contention too is not well founded. Under Muhammadan Law pure and simple, adoption is unknown; but the right to adopt has been for secular reasons conferred upon the widow of a Muhammadan *talukdar* by Act I of 1869. Under cl. 5 of s. 22 unamended Act I of 1869 the adopted son succeeded in the absence of a son and of a daughter's son treated by a *talukdar* as his own son and under cl. 6 of that section of the Act a brother succeeded in the absence of an adopted son and under cl. 8 a son adopted by the widow succeeded. It has been strenuously argued before me that a widow, unless she had been conferred a life-estate and was in possession of the *taluka*, could not legally make a valid adoption. There is, in my opinion, authority in law for this proposition which has been propounded before me with great emphasis and at great length by the learned Counsel for the plaintiffs. Section 29, Oudh Estates Act I of 1869, confers the power of adoption upon every widow of a Muhammadan *talukdar* and itnowhere lays down that it is necessary for the widow to be in possession for life of the estate of her husband before she can make a valid adoption under the Oudh Estates Act. This Act does not make the possession of a life-estate by a Hindu widow or a Muhammadan widow the *sine qua non* or a pre-requisite condition before she can validly exercise the authority conferred upon her by her deceased husband. Ordinarily a life-estate does vest in the widow of a Hindu or Muhammadan *talukdar* who dies intestate, but where a childless *talukdar* has executed a valid will giving his widow authority to adopt and making his adopted son the absolute owner of the estate the absolute estate vests in the adopted son from the moment he is adopted; but enjoyment of it may be postponed or deferred, as in the present case, till the termination of the life-estate of the widow. That however is a very different thing from saying that every widow of a Muhammadan *talukdar* must be conferred a life-estate by her husband in his will before she can be given by him the power to make an adoption. For this broad proposition no authority has been cited before me and it cannot, be defended on any gound of reason, justice or of equity or even convenience. Act I of 1869 does in fact contemplate the succession of an adopted son and no question of the widow of the testator being given the enjoyment of a life-estate arises.

Akin to this contention is the other argument seriously pressed before me by the learned Counsel for the plaintiffs that Rani Nasim Sahri's life estate, conferred upon her by the will of Raja Mohammad Siddique Khan, was indestructible and that she could not by any act of hers divest herself of that life-estate, and that such a life-estate could only be terminated by her death. In support of this contention Mr. Jackson has cited certain observations of King, J., reported as *Krishnapal Singh* v. *Sri Raj Kunwar* (1). The observations of that learned Judge referred to a life-estate which vested in a childless Hindu widow on intestacy and have no applicability whatsoever to the grant of a life-estate conferred upon Rani Nasim Sahri by the will of the testator Raja Mohammad Siddique Khan. There is so far as I know nothing in law to prevent a testator who is a Muhammadan *talukdar* from conferring on any widow of his the power to adopt without conferring on her also a life-estate; and if the testator by his will lays down that on the adoption being effected the adopted son should come into immediate possession of the estate then the life estate, if any, of the adopted mother would be cut off at once. It is clear that if the testator is authorized by law to make a testamentary disposition of his property he can exercise that right and legally make a will contrary to the devolution of the estate on intestacy laid down in Act I of 1869, provided his will does not offend against the rule of perpetuity incorporated in that Act.

The ruling in the well-known *Jutteendromhun Tagore* v. *Gnanedromohun Tagore* (19) lays down that a testator cannot prescribe for his legatee a rule of succession unknown to law, for then he is legislating but the will of Raja Mohammad Siddique Khan in the present suits (Ex. 50, page 211 does not in any way offend against the princi-

ple laid down in the *Tagore case* (19). In this will (Ex. 50) the power or authority to adopt conferred on each of the four widows of the testator is a perfectly valid power, and the bequest to the adopted son is also a good bequest for it does bequeath the estate of Nanpara to a person who would have succeeded to the estate on the death of the four widows. Section 29, Act I of 1869 authorizes every widow of a Hindu or Muhammadan *talukdar* to make an adoption "for the purposes of this Act" This phrase "for the purposes of this Act" cannot very well be restricted to mean "only for the purposes of intestacy": see *Jutteendromohun Tagore* v. *Gnanendromohun Tagore* (19) and *Mata Prasad* v. *Nageshar Sahai* (20). The rulings of their Lordships of the Privy Council reported as *Sreemutty Krishoromoney Dossee* v. *Maharaja Bahadoor* (21) and in *Rabidat Singh* v. *Maharani Indar Kunwar* (22) are authorities for the proposition that any etate conferred on a widow may be defeated by an adoption taking place. It seems to me therefore, that the granting of the estate for two years to Rani Saltanant Begam pending adoption and to the adopted son on his adoption was a bequest valid in law.

Section 11, Act I of 1869, authorized Raja Mohammad Siddique Khan to make a bequest in favour of any person who may or may not be in existence at the time of his death but who may have been in existence within a life in being and 18 years thereafter. Section 12 of the Act deals with the vesting of an estate and the vesting is not postponed by Raja Mohammad Siddique Khan further than what is laid down in that section. In construing the will of Raja Mohammad Siddique Khan with reference to the power of adoption conferred on each widow, Mr. Jackson the learned Counsel for the plaintiffs, laid enormous stress upon the indestructibility of the life estate conferred on Rani Nasim Sahri and he invited my attention to the ruling of King, J., reported as *Krishnappal Singh* v. *Sri Raj Kunwar* (1). In view of the emphasis laid upon this ruling by the learned Counsel for the plaintiffs and in deference to his argument on this point I think it is necessary to give briefly the facts of that case to show exactly what was decided by the learned Judge in that case. The facts are as under.

Diwan Har Mangal Singh was the owner of the estate. He died leaving a son Rudrapartab Singh. The latter died on 11th March, 1908 leaving a widow Shahjadi. His son Lal Banketeshwar had predeceased his father on 5th October 1899 leaving a widow Thakurain Sri Rai Kunwar. On 21st August, 1890 Rudrapartab Singh made a gift to his minor son Lal Banketeshwar, and on Lal Bankateshwar's death Sri Raj Kunwar his widow, relinquished, on 13th April 1901, the estate in favour of her father-in-law Rudrapartab Singh. The latter then made a will on 19th April 1901 by which he gave a life-estate to his widow Shahjadi, and on her death or failure to adopt a son to him he gave a full estate to Sri Raj Kunwar. A reversioner sued Thakurain Sri Raj Kunwar and her donees for a declaration that the alienation would not bind him on the death of Thakurain Sri Raj Kunwar. The defence was that Thakurain Sri Raj Kunwar was full owner of the property in suit. This was a case of intestacy so far as the surrender of the life-estate by Thakurain Sri Raj Kunwar in favour of her father-in-law was concerned. In these circumstances it was held that surrender by Thakurain Sri Kunwar of her life-estate was invalid.

This case has to my mind no possible bearing on the plea raised by the plaintiffs in the present suits. In a case of intestacy the law thrusts upon the heir an estate whether he likes to take it or not. This is in all systems of law. In the case of succession under a will the heir takes the property under the bounty of another; and he can if he likes refuse to take the bounty and then the property goes to the next person indicated by the testator in his will or to the heir-at-law, (see Ameer Ali's Muhammadan Law, Vol. 1, pages 644 and 645).

In *Peacock* v. *Eastland* (23) Lord Romily, M. R., in the course of his judgment delivered himself thus:

"The real question seems to me to be this. Whether by grant at common law any man can confer upon another, against his will and without his consent any estate whatever in any property.. ..."

"In the case of *Thompson* v. *Leach* (24) it was expressly held that the estate surrendered did not pass to the surrenderee unless he accepted it. The only difference that existed between the Judges was this, that Ventris, J., admitting the principle, thought that

(19) I. A. Sup. Vol. 47; 10 W. R. 359; 3 Sar. 82.

(20) 91 Ind. Cas. 370; A. I. R. 1925 P. C. 272; 52 I. A. 398; 28 O. C 352; 47 A. 883; 3 O. W. N. 1; L. R. 6 A. (P. C) 195; 24 A. L. J. 1; 43 C. L. J. 51; (1926) M. W. N. 83; 50 M. L. J. 18; 13 O. L. J. 19; 30 C. W. N. 626; 28 Bom. L. R 1110 (P. C.).

(21) 16 C. 383; 16 I. A. 29; 8 Sar. 285; 13 Ind. Jur. 90 (P. C.).

(22) 16 C. 556; 16 I. A. 53; 5 Sar. 505; 13 Ind. Jur. (P. C.).

(23) (1870) 10 Eq. 17; 39 L. J. Ch. 534; 22 L. T. 706; 18 W. R. 856.

(24) 2 Vent. 198.

in the absence of evidence acceptance must be implied because it must be supposed to be for the benefit of the surrenderee to accept and that therefore his assent must be implied.... .."

Lord Tenterden in *Townson* v. *Tickell* (25) said:

"The law certainly is not so absurd as to force a man to take an estate against his will. *Prima facie* every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that however he is the best Judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly by some mode or other allow him to renounce or refuse the gift."

Rani Nasim Sahri had a life estate under the terms of the will of her husband Raja Mohammad Siddique Khan but the moment she surrendered that life estate it ceased to exist. The effect of disclaimer is clearly stated in Sheppard's Touchstone at page 285 where it is stated:

"The law presumes that every grant is for the benefit of the grantee and therefore till the contrary is shown supposes an agreement to the grant. From the moment there is evidence of disagreement, then in construction of law the grant is void *ab initio* as if no grant had been made."

Thus the effect of Rani Nasim Sahri's disclaimer of the life-estate granted to her under the terms of her husband's will was to make the grant of her void *ab initio* see *Townson* v. *Tickell* (25). The same proposition is propounded at length in Jarman's Treatise on Wills, Vol. 1, page 556 and also at pages 718 and 719. The same rule is laid down in Lord Halsbury's Laws of England, Vol. 28, page 599, para. 1174, where it is said:

"The donee need not accept the gift, but unless by the will the duty of doing some act to show his election is put upon him, his acceptance of the gift is presumed and the property vests in him unless and until he disclaims,"

and in para. 1175 of the same volume this eminent authority lays down as follows:

"A disclaimer puts a donee, as regards his liabilities, burdens, and rights, in the same position as if no gift had been made to him, but it does not necessarily render the gift void in regard to all persons and for all purposes, as for example, where the donee is a trustee."

As regard the effect of a disclaimer of a life interest Lord Halsbury, in para. 1188 of the same volume, lays down that the effect of failure of a prior life-interest, or other particular interest through revocation by codicil, disclaimer, forfeiture or lapse, is to accelerate the subsequent interests which are limited to take effect on the regular determination of that prior interest:

"The Court construes gifts of such interests as intended to take effect on the failure or determination of the prior interest in any manner. This rule applies both to real and to personal estate."

The principle of English law enunciated above is also to be found in Muhammadan law. In the well-known work on Muhammadan Law by Mr. Ameer Ali (Vol. 1, page 644) it is said that

"the validity of a *wasiyat* is submitted to another formality namely the implied or express acceptance of the *wasiyat* by the legatees."

According to the Hanafi Law which binds the parties of the present suits a legatee does not enter upon the possession of bequeathed property without acceptance: see Ameer Ali's Muhammadan Law, Vol. 1, pages 645 and 646 If he were to reject the bequest, it would be cancelled. In the present case Rani Nasim Sahri never at any time after the death of Raja Mohammad Siddique Khan expressed her acceptance of the life-estate conferred upon her by her husband, and the possession of the estate was with the Court of Wards, and by her deed of relinquishment dated 29th May 1908, (Ex. A 56, page 1053) she expressly renounced all rights accruing to her under the will. The original of Ex A 56 was filed in the interpleader suit and was taken away by Chhote Khan, D. W. No. 16, who deposes before me that he sent it to the Court of Wards' office, but in fact no entry of this document is to be found in the register in which all such documents were noted: see the evidence of P. W. No. 19, pages 125 and 126. On 13th April 1929, defendant No. 1 applied to this Court that the District Registrar of Gonda might be directed to supply this copy Ex A 56, from the copy of the deed in the registration office. No objection was raised on behalf of the plaintiffs by their learned Counsel Mr. Naimullah who appeared on that date and the application was therefore granted by me on 15th April 1929 as I was satisfied that the original of Ex. A-56 had somehow got lost either through the carelessness or dishonesty of Chhote Khan or of someone else. The execution of the deed of relinquishment by Rani Nasim Sahri was proved by the evidence of Mansur Ali Khan D W No. 12, who was a marginal witness to this deed. By this deed of relinquishment Rani Nasim Sahri divested herself both under Muhammadan Law as well as under English Law of all her rights and privileges under the terms of the will of her husband Raja Mohammad Siddique Khan and I therefore hold that the contention urged on behalf of the plaintiffs by their learned Counsel that Rani Nasim Sahri's life estate was indestructible is not proved to be well founded.

The view that I am taking of the legal effect of Rani Nasim Sahri's disclaimer of the life-estate conferred upon her by her

25) (1819) 3 B. & Ald. 31; 22 R. R. 291.

husband's will, a copy of which is Ex. A-56, page 1053, is supported by the judgment of their Lordships of the Privy Council reported as *Ajudhia Bakhsh* v. *Rukmin Kunwar* (26). In this case it was held that the gift in remainder expectant upon the termination of a life-estate was accelerated and not destroyed by reason of the gift of the life-estate being void, and their Lordships of the Privy Council quoted with approval the principle laid down by Turner, L. J., in the case of *Lainson* v. *Lainson* (27). In *Lainson* v. *Lainson* (27) the facts were that a testator by his will gave his real and personal estate to trustees and directed them, subject to certain payments thereout, to pay the rents to his son John Lainson for life, and from and after the decease of his son he gave the estate to his first and other sons in tail male. By a third codicil the testator revoked the bequest in favour of his son and in lieu of it he gave him an annuity but he did not by that or by another codicil dispose of the rents of the estate during the life-time of John Lainson, his son. The question was whether this created an intestacy or an acceleration of the estate to the son of John Lainson. The Master of the Rolls, Sir John Romilly, was of opinion that this was an acceleration of the estate to the son and not an intestacy and that the expression "from and after John Lainson" meant "from and after the determination of his estate by death or otherwise," and that in deciding thus he was fulfilling the intention of the testator. This decision of the Master of the Rolls was affirmed by the Lords Justices on 10th November 1854 in *Lainson* v *Lainson* (28) who held that the words "from and immediately after his decease" following a limitation for life in general point out the order of limitation merely and that where therefore the testator revoked a limitation for life which was followed by those words introducing subsequent limitation, the remainders were accelerated. The decision of the Master of the Rolls to the effect that the codicils operated as an acceleration of the estate of the grandson and did not create an intestacy was upheld. Turner, L. J., was of opinion that it made no difference whether the previous estate was removed by death or by revocation, and Knight-Bruce, L. J., held that the testator's real meaning was that the previous life-estate given to his son should be abolished in favour of those who had come after, subject only to the express provision made by the codicil for his son's benefit.

In *Mallot* v. *Wilson* (29) Byrne, J., quoted with approval a passage from Mr. Preston's seventh edition of Sheppard's Touchstone at p. 285 which runs as follows:

"The law presumed that every grant etc., is for the benefit of the grantee etc, and therefore till the contrary is shown supposes on agreement to the grant. From the moment there is evidence of disagreement then in construction of law the grant is void *ab initio* as if no grant had been made, and in intendment of law the freehold never passed from the grantor,"

and the learned Judge explained this passage by saying:

"The true meaning is that not in regard to all persons and for all purposes is the case to be treated as though the legal estate had never passed, but that as regards the trustee of the person to whom the grant was made, he is, in respect of his liabilities, his burdens and his rights, in exactly the same position as though no conveyance had ever been made to him."

In *Scott* v *Scott* (30), Warrington, J., held that

"there is no question that as a general rule the effect of a disclaimer or other destruction of the particular estate is to accelerate the estate in remainder."

In *Fraser* v. *Young* (31) it was held that the refusal of the plaintiff to receive the trust income could not be treated on the footing of a disclaimer of the legacy, and that, as neither the trustees nor the residuary legatees had changed their position on the faith of that refusal of the plaintiff it could be retracted so far as future income was concerned.

Not only have their Lordships of the Privy Council applied the English Law on the subject of disclaimer and consequent acceleration of subsequent estate to cases coming up for decision before them from India but they have also had no hesitation in applying the doctrine of Court of Equity in England relating to the execution of powers of appointment to documents executed by Indians in India. In *Jajendra Prasad Bose* v *Gopal Prasad Sen* (32), decided as recently as 26th June, 1930, their

(26) 10 C. 482: 11 I. A. 1; 4 Sar. 497; 8 Ind. Jur. 163 (P. C.).

(27) (1854) 5 De. G. M. & G. 754; 24 L. J. Ch 46; 1 Jur. (N. S.) 49; 3 W. R. 31; 3 Eq. 43.

(28) (1854) 43 E. R. 1063; 18 Beav. 7; 23 L. J. Ch 170; 17 Jur. 1044; 2 W. R. 82; 104 R. R. 350.

(29) (1903) 2 Ch. D. 491; 72 L. J. Ch. 664; 89 L. T. 522.

(30) (1911) 2 Ch. D. 371; 80 L. J. Ch. 750; 105 L. T. 577.

(31) (1913) 1 Ch. 272; 82 L. J. Ch. 171; 108 L. T. 292; 57 S. J. 265; 29 L. T. 224.

(32) 127 Ind. Cas. 743; A. I. R. 1930 P. C. 242; 57 I. A. 296; 10 Pat. 187; 32 Bom. L. R. 1588; (1930) A. L. J. 1184; 11 P. L. T. 587; 32 L. W. 321; Ind. Rul (1930) P. C. 359; 52 C. L. J. 287; 34 C. W. N. 1161; 59 M. L. J. 615; (1931) M. W. N. 189; 7 O. W. N. 1062 (P. C.).

Lordships of the Privy Council delivered themselves of the following pronouncement:

"It is well-established law in England that when a power is given to be executed with the consent of a person and that person died before the power is executed, the power comes to an end. Their Lordships see no reason why, subject to what they have said, the ordinary rule as to construction of powers which prevails in England should not be applicable to the construction of an *anumatipatra* executed in India. Their Lordships are fortified in their view by the observations of the Board in the case of *Amritolal Dutt* v. *Surnomoye Dasi* (33)."

Similarly in *Bhaya Rabidat Singh* v. *Maharani Indra Kunwar* (22), their Lordships considered the contention of Mr. Arathoon, Counsel for the appellants that the analogy presented by the doctrine of Courts of Equity in England relating to the execution of powers of appointment might be applied to his client's case, and their Lordships held that even in that case the adoption would have been valid.

In *Bai Motivahoo* v. *Bai Mamoo Bai* (34) their Lordships of the Privy Council while deprecating the general application of the English Law of powers of appointment to Hindu wills still held on the analogy furnished by the power of adoption that a Hindu testator could, by his will, legally authorize his daughter to give the absolute estate by her will to such persons as were actually or in contemplation of law in existence at the time of the testator's death.

It would thus appear that the contention so vehemently urged by Mr. Jackson the learned Counsel for the plaintiffs that authority to adopt conferred by Raja Mohammad Siddique Khan on his widow must not be looked upon as a power of appointment as understood in English Law is unsound, and that the late Misra, J., had the weighty authority of the Judicial Committee when in discussing the power of adoption given by Raja Mohammad Siddique Khan's will he referred in his judgment (Ex. A-6 at pages 428 to 432) to Farwell on Powers and cited English cases in the course of his reasoning on this question of adoption.

In my opinion for the reasons given above Rani Nasim Sahri by her deed of surrender not only disclaimed her life-estate but also gave up the power to adopt a son to her husband conferred upon her by the will (Ex. 50, page 211). The result of her deed of relinquishment was not only to destroy her own life-estate but also to take away her authority or right to adopt a son.

In Carson's Real Property Statutes (Edn. 3 by Mr. W. H. Law, 1927) para. 155 (at page. 750) runs as follows:

"A person to whom any power, whether coupled with an interest or not, is given may by deed release or contract not to exercise the power."

The next paragraph is to the effect that

"a person to whom any power whether coupled with an interest or not, is given may by deed disclaim power, and after disclaimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer, the power may be exercised by the other person or persons or the survivor or survivors of the other person to whom the power is given unless the contrary is expressed, in the instrument creating the power."

These principles of English Law have a peculiar appropriateness to the provisions of the will of Raja Mohammad Siddique Khan. Rani Nasim Sahri as a donee was fully justified in law in refusing the life-estate as well as the power to adopt, and therefore her estate by reason of disclaimer was lost, and the estate of Rani Saltanat Begam the second widow was accelerated. In the interpleader suit and in the appeal from the decree passed in that interpleader suit Rani Nasim Sahri never set up any rights under the will of her husband (Ex. 50 page 211); she only claimed her dower debt in both Courts: she never retracted the deed of relinquishment (Ex. A-56, page 1053). Exhibit 93, p. 344 merely set forth the claim made on behalf of Rani Nasim Sahri by her agent that in case Rani Saltanat Begam is not found to be entitled to get the property in dispute under the will of Raja Muhammad Siddique Khan and under the deed of release executed by her, then she Rani Nasim Sahri, if her deed of release is held to be void by the Court may be given the property in suit if found entitled to it under the terms of her husband's will. This does not amount to any repudiation or retraction of her deed of surrender.

The terms of the will of Raja Mohamman Siddique Khan make no distinctiod between his four Ranis as regards the forfeiture in consequence of the remarriage of his widows. This forfeiture clause contained in cl. 10 of the will is very clear and definite, and is to the effect that

"should any of my Ranis after my death re-marry, then she will not be entitled to take advantage of, or benefit by, any of the provisions of this will of mine."

It is contended on behalf of the plaintiff that this forfeiture clause does not apply to Rani Nasim Sahri. Except the bare assertion of the learned Counsel for

(33) 27 C. 996; 27 I. A. 128; 7 Sar. 633; 4 C. W. N. 549 (P. C.).

(34) 21 B. 709; 24 I. A. 93; 7 Sar. 140 (P. C.).

the plaintiffs I have not been referred to any provisions in this will of Raja Mohammad Siddique Khan which would go to show that when the Raja used the words "should any of my Ranis remarry" he did not include Rani Nasim Sahri amongst his Ranis and did not intend that the forfeiture clause should apply to her. As a matter of fact Rani Nasim Sahri being the Raja's most favourite wife, any act of faithlessness to his memory committed by her marrying again another man would have aroused his bitterest ire, and she would have been the first to be deprived of all benefits under his will, could he have foreseen the shadow of coming events. There is to my mind absolutely no force in the contention of the plaintiffs that this forfeiture clause in the will did not apply to Rani Nasim Sahri. On her remarriage with Nawab Hamid Husain Khan Rani Nasim Sahri ceased to be widow of Raja Mohammad Siddique Khan and forfeited her life-estate and the power to adopt a son and all other rights conferred upon her by the Raja's will.

It has been further argued on behalf of the plaintiffs that s. 135 (old s. 121), Succession Act, which provides for conditional bequests has not been made applicable to *talukdars* under s. 19, Act I of 1869. Under ss. 28 and 31, Transfer of Property Act, a conditional bequest by a deed operating *inter vivos* is held to be valid. Sections 28 and 32, Transfer of Property Act, correspond with old ss. 118 and 182 of the old Succession Act. They embody principles of general law and these principles have been made applicable to *talukdars*. In *Ahmad Azim* v. *Safi Jan* (35), in which both parties were Sunni Muhammadans as in the present suits it was held by the Hon'ble Chief Judge and the late Misra, J., that a condition defeating the absolute estate on the happening of a particular contingency was not unknown to law and even recognised as valid both under English and Indian Law. The same principle was authoritatively laid down by their Lordships of the Privy Council in the case of Hindu in *Kristoromoney Dossee* v. *Maharaja Bahadoor* (21), in which it was held that a Hindu could not create an estate of inheritance unknown to the Hindu Law but that he might create an absolute estate subject to be defeated by a subsequent event provided first, that the event must happen if at all immediately on the close of a life in being at the time of the gift; and further that the gift over must be in favour of somebody in existence at the time of the gift: see also *Sreemutty Siriheemoney Dossey* v. *Denebundoo Mullick* (36). In 95 Ind. Cas. 113 *Wahibunnissa* v. *Mushraf Husain* (37), it was held that among Shia Muhammadans the creation of life-estate was perfectly valid and under Hindu Law an estate given to a particular individual may be defeasible on the happening of a particular event and that the provisions of the Transfer of Property Act and the Succession Act would apply to a Muhammadan *talukdar* unless there was anything in the Oudh Estates Act or in Muhammadan Law to the contrary.

It was held by their Lordships of the Privy Council in *Amjad Khan* v. *Ashraf Khan* (38) that a Sunni Muhammadan could validly make a gift of a life-estate together with a a power to alienate a third part. The view so ably propounded by the present Hon'ble Chief Judge in his judgment reported as *Amjad Khan* v. *Ashraf Khan* (39), found favour with their Lordships of the Privy Council and it is now settled law that a Sunni Muhammadan like a Shia Muhammadan could also validly create a life-estate by the terms of his will if he be so minded.

Mr. Ameer Ali in his standard work on Muhammadan Law, Vol. I, page 646 points out that

"the Muhammadan Law distinctly recognizes perpetuities. So long as commencement is made in the case of a settlement or device, with a life in being, it is not necessary that the person who takes the remainder should be in existence."

The creation of a life-estate in favour of Rani Nasim Sahri by the will of Raja Muhammad Siddique Khan (Ex. 50, page 211) was, therefore, valid in law and her disclaimer of that life-estate was also good in law. The contention on the part of the plaintiffs that Rani Nasim Sahri retracted her disclaimer is neither sound in law nor based on facts. A gift once unequivocally disclaimed cannot afterwards be claimed: see Preston's Edition of Sheppard's Touchstone, pages 10 and 285, and

(35) 97 Ind. Cas. 897; A. I. R. 1926 Oudh 561; 3 O. W. N. 110 Sup.

(36) 9 M. I. A. 123; 1 Sar. P. C. J. 837; 19 E. R. 688.

(37) 95 Ind. Cas. 113; 3 O. W. N. 434; 13 O. L. J. 278.

(38) 116 Ind. Cas. 405; A. I. R. 1929 P. C. 149; 56 I. A. 213; 4 Luck. 305; 33 C. W. N. 753; 31 Bom. L. R. 809; (1929) A. L. J. 571; 30 L. W. 91; 57 M. L. J. 439 (P. C.).

(39) 87 Ind. Cas. 445; A. I. R. 1925 Oudh 568; 28 O. C. 265.

Halsbury's Laws of England, Vol. I page 601. Moreover there was in fact no retraction of her disclaimer by Rani Nasim Sahri. Exhibit 93, page 344, does not support that contention of the plaintiffs which I therefore reject as frivolous.

It was further contended on behalf of the plaintiffs that the condition in restraint of marraige embodied in cl. 10 of the Raja's will was purely in *terrorem* and was therefore void. The English doctrine of "*in terrorem*" has no applicability to the facts of this case and to the clause of the will of Raja Mohammad Siddique Khan Conditions made 'in *terrorem*" are mere idle threats to induce the donee to comply with the condition, but not to affect the bequest unless the testator shows that his intention was not merely to threaten or enjoin the donee by the condition but to make a different disposition of the subject of the gift in the event of noncompliance with the condition: see Halsbury's Laws of England, Vol. 28, page 588, para 1172.

Mr. Jarman in his standard treatise on Wills, has stated the rule of Civil Law in England as follows:

"All conditions in wills restraining marriage whether precedent or subsequent, whether there was any gift over or not, and however qualified were absolutely void.....but this doctrine did not apply to widows..... . . . . A condition that a widow shall not marry is not unlawful:" see Jarman on Wills, Vol. II, pages 1525 and 1526

In *Barton* v. *Barton* (40), it was held that a gift by a testator to his widow on condition of her not marrying again was good and the same has been extended to a gift to a married woman by a testator who was not her husband: see *Newton* v. *Marsden* (41).

It was held by Christian, L. J., in *Duddy* v. *Gresham* (42) that " the *in terrorem* doctrine did not apply to a devise of real estate."

This contention of the plaintiffs that the Raja's prohibition to his widows to remarry was a mere idle threat and void in law is also proved to be without any force. The Raja was absolutely in deadly earnest when he prohibited his widows to remarry on pain of forfeiting all their rights under the will. As Mr. Jarman points out:—

"It seems clear that as a general rule a clause of cessor or forfeiture is good and takes effect on the happening of the event provided for even if there is no gift over;"

(See Jarman on Wills, Vol. 2d, page 1442.)

It is true that the distinction between real and personal property which prevails in England does not exist in India, but the principle enunciated in *Jull* v. *Jacobs* (43) is applicable to the present case. Malins, V. C. in that case laid down the law in the following words:—

"A gift to *A* for life and from and after the decease of *A* to *B*, *C* and *D* or anybody else, means from and after the determination of the estate and whether the estate is determined by revocation or by death or by the incapacity of the devisee to take, or by any other circumstance the life-estate being out of the way, the remainder takes effect, having only been postponed in order that the life estate may be given to *A*. *Lainson* v. *Lainson* (27) was affirmed by those two eminent Judges Lords Justices Knight, Bruce and Turner and affirmed on the broadest principles. And therefore, without going further it is sufficient to say that that case based as it is upon the authorities from the earliest periods downwards decides the point which I have now to decide, that the life-estate being out of the way as it is here by the incapacity of the tenant for life the remainder takes effect as if there had been no life-estate."

I quote these golden words merely to show their applicability to the facts and circumstances connected with the will of Raja Mohammad Siddique Khan. As in that case so in this, the effect of the destruction of the life estate of Rani Nasim Sahri by her disclaimer was to accelerate the remainder and the Naupara estate vested immediately in Rani Saltanat Begam on the disclaimer of Rani Nasim Sahri. Rani Saltanat Begam's power to adopt a a son was also accelerated and, therefore, she could validly adopt Raja Saadat Ali Khan in May, 1908. It follows from what I have said above that the adoption of defendant No. 1, Raja Saadat Ali Khan by Rani Saltanat Begam was valid in law and it was also in conformity with the will of Raja Mohammad Siddique Khan. (Exhibit 50 page 211.) I therefore decide Issue No. 5 (*a*) in favour of defendant No. 1 and against the plaintiffs. After discussing certain issues, the learned Judge proceeded with Issue No. 7 as follows.

Issue No 7 runs as follows:—

"To what extent is the will of the late Raja Mohammad Siddique Khan invalid in law;

This issue is distinct from Issue No. 16 which has been framed upon the basis of the contentions raised by Rani Kamar Zamani Begam original defendant No. 3 in the suit No. 11 of 1928. The present Issue No. 7 is limited to the contention of the plaintiffs that as Raja Mohammad Siddique Khan did not confer a life-estate upon Rani Saltanat Begam, so the latter could not exercise the power to adopt a son to her late husband as she had not been given a life-estate. There is to my mind no force

(40) 2 Ves. 308.

(41) (1862) 2 J. & H. 356; 31 L. J. Ch. 690; 8 Jur. (N. S.) 1034; 6 L. T. 155; 10 W. R. 438.

(42) (1894) 2 I. R. 442.

(43) (1876) 3 Ch. D. 703; 35 L. T. 153; 24 W. R. 947.

in this argument on behalf of the plaintiffs. It is only in case of intestacy that the enjoyment of a life-estate by a widow is inevitable before she can exercise the power to adopt a son. Section 29, Act I of 1869, authorizes a *talukdar* to give the power to any widow of his to make an adoption. She need not necessarily be a widow in possession of a life-estate. The phrase "for the purposes of this Act" occurring in s. 29, Act I of 1869, is not per force restricted to mean "for the purpose of intestacy" as contended for by the plaintiffs. It seems to me that Raja Mohammad Siddique Khan was not violating the provisions of s 29, Act I of 1869 when he conferred upon his three widows Rani Saltanat Begam, Rani Champa and Rani Dilafza the power to make an adoption without giving each of them a life-estate. The plaintiffs in para. 10 (*c*) of their plaint in Suit No. 11 of 1928 declared that Raja Mohammad Siddique in his will prescribed "a course of devolution unknown to Act I of 1869." I confess it is difficult to follow the train of reasoning of the plaintiffs and of their legal advisers on this point. So far as Rani Nasim Sahri is concerned the plaintiffs themselves admit that the will of Raja Mohammad Siddique Khan is valid and they further admit that if Rani Nasim Sahri had herself adopted a son within two years of her husband's death, then that son would have succeeded to the Nanpara Estate as an absolute owner and would have excluded the plaintiffs. The argument of the plaintiff so far as I have been able to grasp it, appears to be that as Rani Saltanat Begam was not given a life-estate by her husband the latter was also incompetent to give Rani Saltanat Begam the power to make an adoption. For this proposition the plaintiffs have adduced no authority. The provisions of s. 29, Act I of 1869 do not justify them in raising this contention. The rule against perpetuity has not been infringed by the Raja's will. The adopted son is by a fiction of law considered to have been in existence at the time of the death of the testator: see *Jutteendramohan Tagore* v. *Ganendramohan Tagore* (19) and *Mata Prasad's case* (20).

The plaintiffs have also contended that the gift to the adopted son is void under the terms of the will and that the will itself is void in law. According to the plaintiffs a *talukdar* cannot give his property to an adopted son because he is not a *persona designata*, *i. e*, a person who can be found out with certainty. The answer of the defendants to this contention is that even if the grant to an adopted son be presumed to be void yet if the authority to adopt had been validly conferred and validly executed (if Rani Saltanat Begam did really make an adoption as desired by the testator) it was immaterial to consider the question whether the gift of the estate to the adopted son was valid or invalid, because in any event the adopted son would succeed even on intestacy as he would be a nearer heir than the plaintiffs under Act I of 1869, even if I were to assume plaintiff No 1 to be the nearest collateral of Raja Mohammad Siddique Khan. In that event it would be no concern of the plaintiffs whether the estate conferred on the adopted son by the Raja's will would be good or bad in law. The authority for this proposition is to be found in the case of *Rabidat Singh* v. *Maharani Indar Kunwar* (22)

It is also pointed out on behalf of the defendants that the testator had laid a definite scheme for ascertaining the boy to be adopted and when that boy to be adopted he was an ascertained person (*persona designata*). A gift *inter vivos* cannot be made in favour of a person not in existence on the date of the death of the testator, but there is an exception in the case of a son to be born or a son to be adopted: see *Tagore case* (19). Sections 11 and 12, Act I of 1869 clearly lay down that subject to the rule of perpetuity a person who is to get an estate on the happening of a particular contingency may be ascertained for the first time when that contingency occurs and he need not be in existence on the death of the testator This rule of English law has been extended to Oudh *talukdars*. A gift to the adopted son is good also under Muhammadan Law: see Ameer Ali's Muhammadan Law Vol. I, page 646. I therefore decide Issue No. 7 in favour of defendant No. 1 and against the plaintiffs and hold that the provisions in the will giving an estate to the adopted son are perfectly valid and the contention of the plaintiffs that the adopting mother must be in the enjoyment of her life estate before she can exercise her power to make an adoption conferred upon her by the terms of her husband's will is not legally sound.

Issue No. 8 relates to limitation and is as follows: —

"Is the claim of plaintiffs in Suit No. 11 within limitation."

This question of limitation can only be argued on the assumption that the question

of pedigree and the question of adoption embodied in Issues No. 1 and 5 (a) are decided in favour of the plaintiffs. As I have decided both these issues against the plaintiffs, it is really a work of supererogation on my part to decide this issue. But as parties and their Counsel desire that I should decide all the issues framed in these two suits, I proceed in defence to their wishes to give my finding on this question of limitation. The plaintiffs' case on this point as set forth in their plaint in Suit No. 11 is that the life-estate of the property in suit vested in Rani Nasim Sahri to the exclusion of her four other co-widows and the absolute estate vested in the plaintiffs at the time of the death of the testator Raja Mohammad Siddique Khan, see para. 11 of the plaint. The plaintiffs in para. 17 of their plaint in Suit No. 11 allege that their cause of action for this suit arose in January 1917 "when the estate fell into possession by reason of the death of Rani Nasim Sahri." Thus it is clear from the plaintiffs' own plaint that Art. 140, Sch. 1, Limitation Act was to be applied to the case. The primary question to be decided therefore is: "When did the Nanpara estate fall into possession?"

Before an answer can be given to this question it is necessary to decide the question of forfeiture embodied in Issue No. 13 and the question of disclaimer in Issue No. 15. If Rani Nasim Sahri forfeited her life-estate by reason of the forfeiture clause in the will of her husband by her re-marriage on 9th May 1908 and by reason of her executing the deed of surrender dated 28th May 1908, then the estate fell into possession on the date of her incurring the forfeiture and making her disclaimer. The plaintiffs allege that plaintiff No. 1, Mohammad Azim Khan, had a vested interest in the Nanpara Estate from the death of Raja Mohammad Siddique Khan subject to the life-estate of Rani Nasim Sahri. If the adoption of defendant No. 1 by Rani Saltanat Begam be deemed to be void for the purposes of deciding this issue of limitation then the remainder would not vest in him but it must vest in someone and that someone could only be the heir-at-law, that is to say, plaintiff No. 1 who *ex hypothesi* is deemed to be the nearest collateral of Raja Mohammad Siddique Khan. If the adoption of defendant No. 1 be found to be good in law and made in conformity with the terms of the will of Raja Mohammad Siddique Khan then in that event defendant No. 1 would be the heir-at-law to the exclusion of all the plaintiffs whether the disposal of the remainder by the terms of the Raja's will in favour of the adopted son be held to be good or bad in law.

According to the plaintiffs the estate vested in them from the time of the death of Raja Mohammad Siddique Khan because the creation of the remainder was bad by reason of the fact that the adoption was void. Plaintiffs however contend that limitation only began to run against them from the date of the death of Rani Nasim Sahri. If however the life-tenant Rani Nasim Sahri passed out then limitation must count from the time that she disclaimed the estate or from the time that she forfeited the estate by her remarriage. The learned Counsel for defendant No. 1 Raja Saadat Ali Khan has cited Fearn on Contingent Remainder, Vol. 1, page 363 for the exposition of the meaning of the terms "remainderman" and "reversion" and has applied this English authority to the facts of this case. He has also relied upon Jarman on Wills, Vol. 1, page 704 in support of the contention that if there was no valid adoption the reversionary interest fell into possession on the death of Raja Mohammad Siddique Khan and that if plaintiff No. 1, Mohammad Azim Khan, be held to be the heir-at-law then his suit was obviously barred by limitation.

Plaintiffs allege that all the widows with the sole exception of Rani Nasim Sahri, forfeited their estate by reason of remarriage. By the expression "falls into possession" is meant the time when a reversioner or a remainderman becomes entitled to the actual possession of the estate. In the present case, as I have held that Rani Nasim Sahri forfeited her life-estate by reason of her remarriage and her disclaimer, the reversioner plaintiff No. 1 became entitled to possession from May 1908, and as the present Suit No 11 was filed in November 1928 it is obviously time-barred, not having been filed within 12 years of 1908. For the reason given above I hold that applying Art. 140, Limitation Act, to the facts of this case, the plaintiffs' Suit No. 11 is time-barred. Article 140 is the article of the Limitation Act which the plaintiffs themselves would like to apply to their case as is clear from their own plaint.

Under Art. 143, Limitation Act, also the plaintiffs' suit stands barred. This article would apply equally in the case of disclaimer or forfeiture. In the present Suit No. 11 there is the forfeiture and disclaimer of her life-estate by Rani Nasim Sahri. In his oral pleadings (page 8 of the Court'

proceedings) Mr. Sen the learned Counsel for the plaintiffs urged that plaintiff No. 1. Mohammad Azim Khan could waive his rights under the clause of forfeiture in the will till the determination of the life-estate of Rani Nasim Sahri. This contention of his may hold good in English Law, but Art. 143, Limitation Act, does not confer any such right of waiver on the reversioner entitled to succeed on the date when the forfeiture or disclaimer took place. The Nanpara Estate fell into possession of plaintiff No. 1, Mohammad Azim Khan immediately the forfeiture took place in May 1908, and the present suit is therefore clearly time barred also under Art. 143, Limitation Act. It has also been pointed out by the learned Counsel for defendant No 1 Raja Saadat Ali Khan, that as a matter of fact there was no waiver of their rights by plaintiffs and their fathers. In this connexion a reference may be made to the sale-deed of 20th January 1913 (Ex. A-19, page 602) in favour of Nazar Ahmad Khan by Abdul Aziz father of plaintiff No. 1 at a time when Rani Nasim Sahri was alive, as also to the statement in this sale deed to the effect that Nazar Ahmad Khan should file a suit immediately and obtain possession at once of the Nanpara Estate. There is also the evidence of P. W. No. 7 Nawab Ali Khan at page 46 line 18 who deposes that plaintiffs never waived their rights to the Nanpara Estate during the life-time of Rani Nasim Sahri. There is thus no question of any waiver, there was in fact no waiver on the part of the plaintiffs as wrongly alleged by their learned Counsel Mr. Sen.

Even under Art. 144, Limitation Act, plaintiffs' Suit No. 11 is also time-barred. Article. 144 is a residuary article and will be applied only if no other article is deemed to be applicable to the facts of the case. Raja Mohammad Siddique Khan died on 30th December 1907 but the Court of Wards was already in possession of his estate since 1905. On the death of Raja Mohammad Siddique Khan the Court of Wards assumed charge of his estate under s. 44, Courts of Wards Act of 1899 as a stake-holder. This position is conceded by both parties. On 18th April 1908, the interpleader suit was filed (Ex. 26, page 122, paras. 1, 2, and 4). In para. 5, Ex. 26 all the claimants known to the Court of Wards were set forth. The plaintiffs then never came forward as claimants to the Nanpara Estate; in fact plaintiff No. 1's father supported the claim of Abdul Hamid to the Estate of Nanpara, so did Ahmad Ali and other *bhayyas* of Tahpur. Defendant No. 1 Raja Saadat Ali Khan was found by the Court of the Subordinate Judge of Lucknow in the interpleader suit to be the person best entitled to the Nanpara Estate, but as he had voluntarily by a compromise on his behalf, agreed to the disposition of the property in suit in a particular way the Court passed a decree in terms of the compromise arrived at by the Raja of Nanpara and other claimants. The object of the compromise was to give an absolute estate to Raja Saadat Ali Khan defendant No. 1 subject to two life-estates. The date of the compromise is 7th September 1910, the decree on the basis of the compromise was dated 4th November 1911. The result of the judgment in that interpleader suit was that the will of Raja Mohammad Siddique Khan was held to be valid and binding. It was also held that Rani Nasim Sahri by her remarriage and disclaimer relinquished her life-estate and that Rani Saltanat Begam succeeded to her rights to the estate under the will. It was further held that Rani Saltanat Begam had validly adopted defendant No. 1 who was found entitled to actual possession to the whole of the estate. Thus the title of defendant No. 1 was declared by the Subordinate Judge of Lucknow on 4th November 1911. This judgment of the Subordinate Judge of Lucknow was upheld in appeal by the Court of the Judicial Commissioner of Oudh which pronounced its appellate judgment on 20th May 1914.

Exhibit A-16, page 598 and Ex. A-17, page 599 are copies of two U. P. Gazette Notifications of June 1914 announcing the title of defendant No. 1 and stating that the Court of Wards was holding the Nanpara Estate for him and on his behalf. The present suit is thus equally barred also under Art. 144, Limitation Act, whether limitation be calculated from 15th June 1914 or 27th June 1914. The possession of the Court of Wards from the date of this notification must be deemed to be possession on behalf of the rightful owner or owners as declared by the Civil Court, see also Ex. A-18, page 600 dated 1st December 1915. The Court of Wards ceased to be a trustee directly the decree was passed in terms of the compromise, and the possession of the Court of Wards from that date must be held to be adverse to the plaintiffs, for the Court of Wards' possession must be from that date considered to be possession on behalf of the person who was declared entitled to the estate; see s 88 Civil Procedure Code, and O. XXXV, r. 2, Civil Procedure Code.

The possession of the Court of Wards was on behalf of the persons whom the Civil Court declared entitled to the property, and consequently when the decree was passed and the rightful claimant ascertained, the possession of the Court of Wards from that date must be for the persons who were declared so entitled. In this connexion the learned Counsel for defendant No. 1, Raja Saadat Ali Khan relied upon a ruling of their Lordships of the Privy Council reported as *Administrator General of Bengal* v. *Prem Lal Mullick* (44) and also on a ruling of the Madras High Court in *Orr* v. *Muthia Chetti* (45) and referred to Halsbury's Laws of England, Vol. 24, page 375 at 385.

The plaintiffs contend that the Court of Wards was a trustee for them till 1925 when it handed over the estate wrongly to defendant No 2, Raja Saadat Ali Khan. This position is not tenable; three of the plaintiffs have themselves in the witness box admitted that the Court of Wards was not holding as a trustee for them: see for instance P. W. No. 4, page 47 line 34 and P. W. No. 23, page 185. They have admitted that the possession of the Court of Wards was on behalf of Rani Sarfaraz Begam and Raja Saadat Ali Khan. On behalf of defendant No. 1, it was contended that directly the decree was passed in the interpleader suit and the heir ascertained, the possession of such heir would be made to refer back to the date of the suit and the Court of Wards would in law be considered to have been holding from the date of the interpleader suit on behalf of the person who was declared to be the owner of the estate: see Rustomji's Law of Limitation, page 855. Thus limitation would begin to run against the plaintiffs from 1903. In *Abinash Charan Chowdhury* v. *Tarini Charan Chowdhury* (46) and in *Dwyjendra Narain Roy* v. *Jogesh Chandra De* (47) it was laid down that possession would be deemed to be on behalf of the person who was ultimately declared to be the owner. In *Mani Mandatha* v. *Nawab of Murshidabad* (48) their Lordships of the Privy Council had occasion to discuss the question as to whether time would run against the plaintiff during the period when the Court of Wards was, as it had been termed, in possession of his estate. It was argued in that case that a disqualified proprietor had no right to sue so long as the property remained in charge of the Court of Wards. Their Lordships held that the Limitation Act though it recognized and enumerated certain conditions as legal disabilities entitling the persons affected by them to an extended period of limitation did not touch the plaintiff's disqualification under s. 6 (a), Court of Wards Act, and that there was no case made out which could suspend or modify the ordinary law of limitation as applicable to that case In *Ghisa Singh* v. *Thakur Gajraj Singh* (49) the learned Judges of the Judicial Commissioner's Court had occasion to discuss the nature of the possession of the the Court of Wards as affecting the question of limitation raised in that suit It was held that the possession of the Court of Wards must be deemed to have been the possession of *Musammat* Girraj Kunwar who was declared by the Civil Court to be entitled to the property. The same view of the law was propounded in *Seraj Ahmad* v. *Ibnul Hasan* First Appeal No. 57 of 1920 decided by the late Court of the Judicial Commissioner of Oudh on 23rd May, 1922.

The question of taking possession will not arise in the present suit because defendant No. 1 Raja Saadat Ali Khan came into possession of the Nanpara Estate on his mother's death and the Raja of Utraula came into possession on the death of his wife Rani Kaniz Begam, and Rani Qamar Zamani Begam got her own villages when the estate was released. All these three persons claimed under one another. This is not a case of independent trespassers. In *Ramayya* v. *Kotamma* (50) it was held by their Lordships of the Madras High Court that adverse enjoyment of immovable property for over 12 years whether by a single person or by a number of persons in succession, even though they did not claim from one another, provided their possession was continuous and without a break, would bar the true owner under Art. 142, Limitation Act. The law on this subject is ably propounded in this ruling

(44) 22 C. 1011; 22 I. A. 203; 6 Sar. 660 (P. C.).

(45) 17 M. 501.

(46) 95 Ind. Cas. 117; A. I. R. 1926 Cal. 782; 30 C. W. N. 541.

(47) 79 Ind. Cas. 520; A. I. R. 1924 Cal. 600; 39 C. L. J. 40.

(48) 50 Ind. Cas. 202; A. I. R. 1918 P. C. 180; 46 I. A. 60; 46 C. 694; 36 M. L. J. 210; 17 A. L. J. 202; 23 C. W. N. 531; 29 C. L. J. 355; 25 M. L. T. 341; 21 Bom. L. R. 611; 1 U. P. L. R. (P. C.) 16; (1919) M. W. N. 318 (P. C.).

(49) 33 Ind. Cas. 371; 18 O. C. 289; 3 O. L. J. 45. (P. C.).

(50) 67 Ind. Cas. 246; A. I. R. 1922 Mad. 59; 45 M. 370; (1922) M. W. N. 132; 30 M. L. T. 143; 42 M. L. J. 319.

of the Madras High Court and fully supports the contention of the learned Counsel for defendant No. 1 Raja Saadat Ali Khan. It is now well-established law that unless there is a break in the continuity of possession the true owner would be barred by 12 years' adverse possession even if that continuous adverse possession be of two or more trespassers who did not claim under one another. In the present suits all three alleged trespassers were in possession under a common agreement, namely the compromise and the decree of the Court of the Subordinate Judge of Lucknow. Both the compromise and the decree provided that one would succeed after the other. Apart from the compromise and the decree in the interpleader suit there is also the admitted fact of relationship, namely that defendant No. 1 Raja Saadat Ali Khan is the heir of his natural mother Rani Sarfaraz Begam and that defendant No. 2 the Raja of Utraula is the heir of his wife Rani Kaniz Begam. The plaintiffs therefore cannot argue that, defendants Nos 1 and 2 cannot tack on the possession of one to the other. For the reasons given above the plaintiff's suit in my opinion is also barred under Art. 144, Limitation Act.

In this connexion I may also note that as regards non *talukdari* property plaintiffs are certainly no heirs in respect of the property entered in list "E" attached to the plaint which was purchased by the Court of Wards in 1911. The plaintiffs cannot claim this property even if it was purchased from the profits of the estate. With regard to the non-*talukdari* property left by Raja Mohammad Siddique Khan it has been argued on behalf of the defendants that the will of a Hanafi Muhammadan in favour of an heir must be consented to by all his heirs and, failing such consent, the will is absolutely void No such consent to the will on the part of the plaintiff has been proved on the record. On the contrary the indications are all the other way. If the will be deemed void as being made without the consent of the heirs then the life-estate created by the will in favour of Rani Nasim Sahri must also fail, and it follows therefore that succession to the property opened to the plaintiffs on the death of Raja Mohammad Siddique Khan in December, 1907, and the plaintiffs' claim being made more than 12 years after 1907 is therefore clearly time-barred. If on the other hand the will in respect of non *talukdari* property be also held to be valid under Muhammadan Law, by her remarriage and her disclaimer Rani Nasim Sahri lost her rights to this non-*talukdari* property also, and the right to sue for this non-*talukdari* property accrued to the plaintiffs from the date of Rani Nasim Sahri's remarriage and her disclaimer in May. 1908 and the claim would even then be time-barred.

For the reasons given above I hold that plaintiffs' Suit No 11 of 1928, is time-barred even on the assumption that plaintiff No. 1, Mohammad Azim Khan, is the nearest collateral to the late Raja Mohammad Siddique Khan and on the further assumption that the adoption of Raja Saadat Ali Khan, defendant No. 1, is invalid in law. I have held above that both these assumptions which I have to make while discussing the question of limitation are incorrect. The plaintiffs have failed to prove the pedigree upon which they base their claim in both suits and defendant No. 1, Raja Saadat Ali Khan, has proved to my entire satisfaction that his adoption by Rani Sultanat Begam is valid in law. I decide Issue No 8 against the plaintiffs and in favour of the defendants and hold that the plaintiffs have not filed their Suit No 11 of 1928 within limitation.

The next Issue No. 9 is as follows:

"Whether plaintiffs Nos. 3 and 12 are estopped from bringing the present suit as alleged in para. 28 of the written statement of defendant No. 1."

It is a fact that plaintiff No. 12, Subhan Ali Khan, has executed five *kabuliyats* in favour of defendant No. 1, Raja Saadat Ali Khan, and Ahmad Ali Khan, plaintiff No. 3, has executed one *kabuliyat* in favour of defendant No. 1, Raja Saadat Ali Khan, acknowledging the latter to be the *talukdar* and proprietor of the Nanpara Estate It is therefore legally not open to these two plaintiffs during the continuance of their lease to question the title of their lessor. The *kabuliyat* executed by Ahmad Ali Khan on 4th September, 1927 is Ex. A-37, page 929, and those executed by Subhan Ali Khan, plaintiff No. 12, are Exs. A-35, page 919 of 11th April 1928, Ex. A-38, page 935 of 20th September 1926, Ex A-39, page 941 of 12th April 1928, Ex. A-40 of 26th May 1928. Exhibit A-19 is a lease for the years 1335 *Fasli* to 1338 *Fasli*, Ex A-38 is a lease from 1334 *Fasli* to 1338 *Fasli*, Ex. A-39 is from 1335 *Fasli* to 1339 *Fasli*, Ex. A-40 page 946, of 12th April 1928, and Ex. A 44, page 972, is from 1335 *Fasli* to 1339 *Fasli* and Ex. A 44

is from 1335 *Fasli* to 1338 *Fasli*. It will thus be seen that these leases were in force and did subsist at the time when these suits were filed in my court. As *thekadar* of defendant No. 1 Raja Saadat Ali Khan, plaintiff No. 3 Ahmad Ali Khan and plaintiff No. 12 Subhan Ali Khan, during the continuance of their leases cannot be allowed to deny the title of their lessor. In *Bilas Kunwar* v. *Desrai Ranjit Singh* (51) it was held by their Lordships of the Allahabad High Court that a tenant who had been let into possession could not deny his landlord's title, however, defective it might be, so long as he had not openly restored possession by surrender to his landlord. These plaintiffs are estopped during the subsistence of their lease from questioning the title of their lessor defendant No. 1 under s. 116, Evidence Act. This issue, however, is really of more or less academic interest only, because its effect on the rights of the other plaintiffs to bring these Suits Nos. 11 and 12, is absolutely nil. This matter however has been brought to the notice of the Court by the defendants to show in what a light-hearted and irresponsible mood the present suits have been filed by some of these plaintiffs who wish to run with the hare and hunt with the hounds. I decide this issue against plaintiffs Nos. 3 and 12 and in favour of the defendants.

Issue No. 10 runs as follows:

"Is the suit as framed not maintainable on the grounds as alleged in para. 27 of the written statement of defendant No. 1?"

The contention of defendant No. 1 Raja Saadat Ali Khan, is that plaintiffs cannot sue in a body. The reply on behalf of the plaintiffs is that O. I, r. 1, Civil Procedure Code authorizes them to bring these suits in their present form. Had the plaintiffs a clearer and more accurate notion of their own pedigree, and had plaintiff No. 1 Mohammad Azim Khan, a firmer faith in the justice of his claim, the plaint in Suit No. 11 of 1928, on his behalf, would not have been drafted in that half-hearted and wayward manner that it has been drawn up, leaving it to the Court to discover, if possible, in the confused mass and welter of evidence, who was the nearest collateral of Raja Mohammad Siddique Khan in the nearest male branch of the plaintiffs' family. The sixteen plaintiffs who claim the Nanpara and Utraula *talukas* in these suits could not decide amongst themselves, who was to be selected as the nearest collateral of Raja Mohammad Siddique Khan. Whatever be the weakness of the plaintiffs' claim as evidenced by their attitude in this matter, and, however objectionable and troublesome to the Court and to the defendants the course pursued by the plaintiffs may be, I really cannot hold that the suits as framed are not maintainable. No doubt their Lordships of the Privy Council in *Mewa Singh* v. *Basant Singh* (8), objected to suits being framed in this manner. Their Lordships in this case condemned the plan of an ejectment suit where a large number of persons, more or less akin in blood, had banded themselves together in bringing a suit in the hope of ousting the defendants by a mass attack and afterwards assigning the fruits of victory to the parties entitled either by an amicable settlement amongst themselves or by further litigation *inter se*. Their Lordships observe that by such a procedure

"The Court as well as the opposite party is embarrassed and the issues are obscured."

Nevertheless their Lordships did not dismiss the claim of the plaintiffs on that ground but proceeded to decide the claim on the merits. Similarly, while condemning the proceedings of the plaintiffs in the present Suit I too must decide this Issue No. 10, in favour of the plaintiffs and hold that the suit as framed, though objectionable in form, is yet legally maintainable. (The learned Judge then discussed certain issues of fact and proceeded): On the findings given above on the various issues the plaintiff's Suit No. 11 of 1928 fails and I accordingly dismiss it with costs. Defendant No. 1, the Raja of Nanpara, defendant No. 2, the Raja of Utraula, and the heirs of Rani Qamar Zamani Begam, original defendant No. 3, will each be entitled to separate costs from the plaintiffs as each of these three sets of defendants had to resist separately the attack made by the plaintiffs upon them. (The learned Judge then considered some of the issues in Suit No. 12 of 1929 and proceeded:) The next issue No. 5, runs as follows,

"Is the claim of the plaintiffs in this suit within limitation?"

This question of limitation only arises in case it is held that the transfers in favour of Rani Kaniz Begam are proved to be genuine. If on the other hand these alleged transfers in favour of Rani Kaniz Begam by her husband and others are held to be fictitious, and the Revenue Court proceedings mere paper transactions, then of course

(51) 30 Ind. Cas. 299: A. I. R. 1915 P. C. 96; 42 I. A. 202; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757 (P. C.).

no question of limitation arises. Even if these transfers be found to be really genuine still unless plaintiffs prove their actual possession within twelve years from the date of the suit, their suit must stand dismissed as time-barred

There is no clear evidence on the record that Rani Kaniz Begam was in actual possession of the property in suit in the sense that she had control over the profits of the gifted villages. The proved intention of the Raja of Utraula to the contrary, as manifest from his evidence and from his overt acts rebuts the presumption that might otherwise be raised from entries in revenue papers and from other documents showing mere paper possession. Even as regards this paper possession of Rani Kaniz Begam the plaintiffs have only adduced evidence of such possession on her part in respect of three villages, namely Utraula and Allenpur grant so far as the gifted property is concerned, and village Bairampur included in the sale-deed; the evidence of possession by Rani Kaniz Begam, so far as other villages in suit are concerned, is either wanting or is of a period anterior to twelve years from the date of the filing of the suit and so does not save limitation. There is no evidence at all of the possession of Rani Kaniz Begam over the jungles in suit or over the small acquisitions referred to in Issue No. 2 (*b*) of this suit. In fact the filing of this suit appears to be a mere afterthought on the part of the plaintiffs and their *pairokar*. The plaintiffs relied upon the herculean efforts they imagined that the Raja of Nanpara would make in winning his claim in Suit No. 4 of 1928 against the Raja of Utraula and so did practically nothing to fight out this suit of theirs. But unfortunately for the plaintiffs the Raja of Nanpara and his uncle the Raja of Utraula wisely came to terms and Suit No. 4 of 1928 was decided according to the award of the arbitrator.

Thus at the last moment, when pressed by the Court to file their documentary evidence in this Suit No. 12, plaintiffs got printed copies of the documentary evidence filed by the Raja of Nanpara in Suit No. 4 of 1928 and filed it "*en bloc*" as their own evidence in this suit without troubling to sift it or to produce the necessary oral evidence to make some of the documents filed by them admissible in evidence. The sensible action of the Raja of Nanpara and of the Raja of Utraula in referring their disputes including Suit No. 4 of 1928, to the arbitration of the Commissioner of Lucknow, completely upset all the calculations of the plaintiffs, and where they had expected to glean a rich harvest without a stroke of effort on their part they found but a *tabula rasa* and they had neither the means nor the ability, nor even the inclination, to build their own structure thereon. This explains the gaps or *lacunæ* in the evidence of the plaintiffs even on the question of proving Rani Kaniz Begam's paper possession in respect of the entire property in suit for twelve years prior to the filing of the present Suit No. 12. In *Gur Sahai* v. *Chedi* (52), it was held by a Bench of the late Court of the Judicial Commissioner of Oudh following the rulings of their Lordships of the Privy Council in *Secretary of State* v. *Chelikani Rama Rao* (53) that, where the plaintiffs allege their possession over immovable property and dispossession by the defendants, and where it was found that the possession of the plaintiffs was discontinued when defendants entered into possession not as tenants of the plaintiffs but in their own rights, the article of limitation applicable to such a suit was Art. 142 and not Art. 144, Sch. 1 Limitation Act; and it was further held that in cases falling under Art. 142, Limitation Act, the claimant must prove his possession within twelve years next preceding the date of the institution of the suit and in cases of that nature an enquiry into questions of adverse possession was irrelevant, and in cases falling under Art. 144 where the defence was one of title acquired by adverse possession for more than twelve years it was not necessary for the plaintiff to prove his possession within twelve years from the commencement of the suit.

The article of the Limitation Act applicable to the facts of the present case is clearly Art. 142, Limitation Act and plaintiffs have failed to adduce any evidence of actual possession within twelve years from the date of their suit either by Rani Kaniz Begam or by themselves. Plaintiffs admittedly have not been themselves in possession of any village of Utraula Estate. There could be no presumption as to continuance of possession on the part of Rani Kaniz Begam even if I were to assume the deed of gift to be genuine and possession to have been once

(52) 79 Ind. Cas. 964; A. I. R. 1925 Oudh 42; 27 O. C. 130; 10 O. & A. L. R. 67; 11 O. L. J. 251; 1 O. W. N. 38.

(53) 35 Ind. Cas. 902; A. I. R. 1916 P. C. 21; 43 I. A. 192; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69 (P. C.).

given to Rani Kaniz Begam. For the reasons given above I decide Issue No. 5 against the plaintiffs and hold that the claim of the plaintiff in this Suit No. 12, is not within limitation.

The next issue is Issue No 6 which runs as follows:

"Was the right to the land covered by the jungle in villages Nos. 8 to 12 in List A attached to the plaint in Suit No. 12 of 1928 also included in the deed of gift executed by the defendant Raja of Utraula on 12th April 1910 in favour of his wife?"

The deed of gift of 12th April 1910 is Ex. A-261 (page 526 of Suit No 12), A perusal of this deed itself shows that what was gifted was the timber of the trees of the jungle and not also the land upon which the jungle stood. The phrase in this document Ex. A-261 "without exception of any tree" clearly shows that it was the intention of the donor to give away all the trees of the jungle without exception. If he had also wanted to make a gift of the land upon which the jungle stood he would have used some such phrase as "without exception of any *biswa* of land." Moreover, the land upon which the jungle stood was in no risk of being taken away from the Raja of Utraula. What the latter feared was that the Deputy Commissioner of Bahraich might get his jungle leased out to Government, a course of action which was extremely distasteful to the Raja. The intention therefore of the Raja of gifting his jungles to his wife Rani Kaniz Begam, was to save his jungles from being leased out by the Deputy Commissioner; and the question of gifting the soil upon which the jungle stood never perhaps even crossed his mind, nor is there any expression in this deed of gift from which such an intention can be even remotely gathered. No area of the jungle which would have reference to the land upon which the jungle stood is given. There is no evidence that existing trees have sprouted out of the old trees gifted, or that new trees had been planted in these jungles since the execution of the deed of gift. My finding on Issue No. 6 is therefore that the land covered by the jungle was not included in the deed of gift of April 1910 executed by the defendant Raja of Utraula in favour of his wife Rani Kaniz Begam and I decide this issue accordingly.

Issue No. 7—This is the most important issue in this case and is as follows:

"Had the defendant Raja of Utraula the intention to part with the property gifted by the deed of 12th April 1910? And was actual delivery of possession made to the donee (the defendant's wife) in consequence of the execution of this deed of gift"?

"Was this deed of gift a fictitious and colourable transaction which was never intended to be and was not in fact given effect to?"

The burden of proving the first part of this issue lies upon the plaintiffs and of the latter apart on defendant No. 1. This issue was deliberately framed in the manner set forth above after due consideration of the arguments of the learned Counsel of both parties at the commencement of trial of this suit. It is also in consonance with the pleadings of the parties The plaintiffs came to Court on the basis of a deed of gift, and they must therefore, prove the intention of the donor to gift away his property and also prove the actual possession of the donee over the property gifted to her.

In *Sadik Husain Khan* v. *Hashim Ali Khan* (54) their Lordships of the Privy Council laid down clearly the rule of law governing gift under Muhammadan Law as follows:

"In *Chaudhri Mehdi Hasain* v. *Muhammad Hasan* (55) it is laid down by this Board that, according to Muhammadan Law a holder of property may in his lifetime give away the whole or part of it if he complies with certain forms, but that it is incumbent on those who seek to set up such a transaction to prove that those forms have been complied with, and this will be so whether the gift be made with or without consideration. If the latter, then, unless it be accompained by delivery of the thing given so far as it is capable of delivery, it will be invalid. If the former, delivery of possession is not necessary, but actual payment of the consideration must be proved and the *bona fide* intention of the donor to divest himself in *praesenti* of the property and to confer it upon the donee must also be proved. The case of *Rani Khujooroonissa* v. *Roushan Jehan* (56) supports this statement of the law."

In *Amjad Khan* v. *Ashraf Khan* (38) their Lordships of the Privy Council delivered themselves to the following pronouncement:

"In order therefore to constitute a vaild gift *inter vivos* under the Muhammadan Law applicable to this case, three conditions are necessary: (1) manifestation of the wish to give on the part of the donor; (2) the acceptance of the donee, either impliedly; or expressly (3) the taking possession of the subject-matter of the gift by the donee, either actual or constructively: see also *Mohammad Abdul Ghani* v *Fakar Jahan Begam* (57)."

(54) 36 Ind. Cas 104; A I R. 1916 P. C. 27; 43 I. A 212; 38 A. 627; 31 M. L. J. 607; 14 A. L. J. 1248; 19 O. C. 192; 18 Bom. L. R. 1037; 21 C. W. N. 130; (1916) 2 M. W. N. 577; 21 M. L. T. 40; 1 P. L. W. 157; 4 O. L. J. 22; 25 C. L. J. 363; 6 L. W. 378; 10 Bur. L. T. 140 (P. C.),

(55) 28 A. 439: 9 O. C. 196; 33 I. A. 68; 10 C. W. N 706; 3 A. L. J 405; 8 Bom. L. R. 387; 4 C. L. J. 295; 1 M. L. T. 163 (P. C.).

(56) 2 C. 184; 3 I. A. 291; 3 Suth. 287 (P. C.).

(57) 68 Ind. Cas. 254; A. I. R. 1922 P. C. 281; 49 I A. 195; 25 O. C. 95; 44 A. 301; 31 M. L. T. 21; 9 O. L. J. 369; 43 M. L. J. 453 24 Bom. L. R. 1268; 27 C. W. N. 53; 20 A. L. J. 964; 37 C. L. J. 1 (P. C.).

The first thing the plaintiffs had to prove in this case was, therefore, that the Raja of Utraula had a *bona fide* intention of divesting himself in *præsenti* of his proprietary title in the villages gifted to his wife. The plaintiffs have adduced no evidence of any kind, oral or documentary, to prove that the Raja of Utraula had any such intention of passing the beneficial interest in the property gifted to his wife. On the contrary, defendant No. 1, the Raja of Utraula has not only examined himself as his own witness and subjected himself to a very severe and unpleasant cross-examination, but has also, led evidence to disprove any such intention on his part and to explain the reasons which led him to execute a fictitious deed of gift in favour of his wife.

The Privy Council rulings reported as *Raja Mohammad Mumtaz Ali Khan* v. *Murad Bukksh* (58), *Mohamad Mumtaz Ali Khan* v. *Sakhawat Ali, Khan* (59), *Raja Mohammad Mumtaz Ali Khan* v. *Sheorattangir* (60) and *Ram Autar* v *Raja Muhammad Mumtaz Ali Khan* (61) all go to prove that Raja Mohammad Mumtaz Ali Khan, defendant No. 1 in Suit No 12, was a posthumous son of Raja Raiasat Ali Khan born on 6th October, 1865, and came of age on 6th October, 1886, and that on his attaining majority and after his estate had been released by the Court of Wards, he in 1888 filed several suits challenging the entries in settlement records made during the period of his minority when many claims against him were fraudulently admitted by the agents of the Court of Wards. Some of these claims of the Raja were established to be true by the judgment of their Lordships of the Privy Council; as for example, in the appeal by the [*Raja of Utraula*] *Mohammad Mumtaz Ali Khan* v. *Sakhawat Ali Khan* (59).

(The learned Judge here considered evidence and proceeded:)

Village Mohammadpur Banjraha, another of the gifted villages, was won by the Raja from the Privy Council and this village must have been very dear to the heart of the old *talukdar* as he had fought hard and paid dearly for winning back this village: see *Ram Autar* v. *Raja Mohammad Mumtaz Ali Khan* (61) and the evidence of D. 2, W. 16, page 413, line 40. Villages Masihabad Grant and Allanpur Grant were originally jungle land and the timber of the jungles was very valuable and as the Raja did not desire that he should lease these jungles to Government, as suggested by the Deputy Commissioner in charge of his district, he gifted away these jungles to his wife so as to put it out of his own power to comply with the wishes of his district officer.

In fact the cream of the Raja's estate was included in this deed of gift; the valuable jungles in Tendwa, Mahua, Sonapar, Pipra and Lokia-Bhar were included in this deed of gift (Ex. A-26 (, page 326). It is, therefore, quite clear to me from the direct and circumstantial evidence on the record that the Raja of Utraula had no real intention of passing the beneficial interest in these villages to his wife Rani Kaniz Begam. His whole object in gifting the jungles to his wife was to screen them from the Deputy Commissioner of Gonda. In *Nirmal Chandra Bonnerjee* v. *Mohammad Siddique* (62) their Lordships of the Privy Council held that the probabilities together with the more definite outlines of the evidence, should be followed when details are numerous and complicated; and in *Mariam Bibi* v. *Shaikh Muhammad Ibrahim* (63) Mukerjee, J., of the Calcutta High Court laid down the criterion to be followed in such cases as follows:

> "In the case of a transfer for consideration where the question arises whether the ostensible purchaser is also the real purchaser, it is possible to apply the familiar test, usually conclusive in this class of cases, namely, what is the source of the purchase-money. In a case of gift however, when it is alleged that the transaction was fictitious, this test naturally fails and we have to rely upon other aspects of the matter, namely, the surrounding circumstances contemporaneous with the gift and the subsequent conduct of the parties concerned."

Applying this test I find that the Raja of Utraula treated the gifted property as his own; the management and collection of rent in respect of these gifted villages remained the same as before the execution of the deed of gift; the income from the gifted property was not accounted separately from the income of the rest of the estate. D. W. No. 18, Karm Ahmad, at page 323, deposes that there was no difference in the management of the gifted villages before the deed of gift was executed and after its execution. The income of these gifted villages always went

(58) 29 A. 708; 10 O. C. 318; 34 I. A. 142; 9 Bom. L. R. 851; 11 C. W. N. 913; 6 C. L J. 693; 17 M. L. J. 400; 2 M. L. T. 402 (P. C.).

(59) 23 A. 394; 28 I. A. 190; 8 Sar. 85; 5 C W. N. 881 P.C.).

(60) 23 C. 934; 23 I. A. 75; 7 Sar. 41; 6 M. L. J. 131 P.C.).

(61) 24 C. 853; 24 I. A. 107; 7 Sar. 148; 1 C. W. N. 417 (P. C.).

(62) 26 C. 11; 25 I. A. 225; 7 Sar. 383 (P. C.).

(63) 48 Ind. Cas. 561; 28 C. L. J. 306 at p. 357.

into the Raja's treasury and the land revenue was always paid by the Raja himself. This witness has not been shaken in cross-examination by the learned Counsel for the plaintiffs. This witness was also the attesting witness to the execution of the deed of gift in respect of the residential house of the Raja. Similarly D. 2, W. 12 Zakir Husain at page 388 also gives evidence to the same effect. His evidence too is not shaken in cross-examination. This fact clearly shows that the deed of gift was really fictitious and that the Raja never had any intention of passing the beneficial interest in the property to his wife Kaniz Begam. Another piece of circumstantial evidence which also points inevitably to the same conclusion is that every act of a permanent nature in connexion with these gifted villages was always done by the Raja himself; as for instance, it was the Raja himself who gave permission to tenants to construct wells and not the ostensible owner, his wife Rani Kaniz Begam. D. 2, W. 10 Shafaat Husain, page 384, deposes that in the register of immovable property kept by the notified area of Utraula the Raja's name is entered and the Raja was paid the rent of Rs. 30 although his wife Rani Kaniz Begam was the ostensible owner of the village of Utraula. Again D. 2 W. 11, Tirbeni Prasad, at page 386, deposes that Saffali Bania constructed a well in Utraula with the permission of the Raja of Utraula: see Ex. A-260, page 325. Similarly in Allenpur-Grant, one of the gifted villages, Birtanti Kori was given an advance of Re. 50 by the Raja himself for constructing a well (see Ex. A-256, page 318) and the evidence of Ribai, the marginal witness (D. 2, W. 18, page 418) and of Birtanti himself (D. 2, W. 17, page 417) in proof of this deed of agreement.

Another circumstance which goes to show that the deed of gift was fictitious is the fact that the Raja himself paid the land revenue of his entire estate: (see Ex. A-1 to A-194). There is no rebuttal by the plaintiffs and no evidence to show that the land revenue of the gifted villages was paid by Rani Kaniz Begam, their predecessor-in-interest.

To sum up: therefore, the payment of land revenue by the Raja himself, the treatment and management of collections of rents, etc, in respect of the gifted property remaining the same before as after the execution of the deed of gift, the undisturbed possession of the Raja over the gifted property, the Raja giving compensation to Munshi Abdul Hamid in respect of the construction of the road to Phaguiya, the giving of advances by the Raja to tenants for the construction of wells in the gifted villages, the rent of Utraula being paid by the Chairman of the notified area of Utraulla to the Raja himself—all these are circumstances which go to prove that the Raja of Utraulla had no intention of passing the beneficial interest in the gifted property to his wife Rani Kaniz Begam.

At no time did Rani Kaniz Begam ever assert her possession over the gifted property. Patwari Udai Raj, as D. 2, W. 5 (page 351) deposes that possession over the gifted villages remained as of old with Raja Mohammad Mumtaz Ali Khan. D. 2, W. 8 Neeber Ghosi (page 360) who cultivates land in Utraula deposes that he has always paid rent to the Raja of Utraula and to nobody else. D. 2, W. 13 Chandika Prasad (at page 391) deposes that Bairia-Surjanpur was in the possession of the Raja of Utraula even after the *khewat* stood in the name of Rani Kaniz Begam. D. 2 W. 6 Ram Samajh Kurmi (at page 435), who cultivates land in Bairia Surjanpur deposes that he has all along been paying rent to the Raja of Utraula and to nobody else. D. 2, W. 31 Ujjar Julaha, at page 445, deposes that he cultivates land in Masihabad Grant and has always been paying rent to the Raja of Utraula and to nobody else. Birtanti and Ribai (D. 2, W. 17 and D. 2, W. 18) referred to above, give similar evidence as regards village Allenpur-Grant. Rani Kaniz Begam had no separate rent collecting staff of her own in respect of the property standing in her name. The Raja's old servants, namely, Udit Narain Rameshwar, Mohamad Jaffar, Ali Mirza Karam Ahmad, Mohammad Naqvi and Ali Bahadur managed the property standing in her name as if it were the Raja's own property.

It has been urged on behalf of the plaintiffs that Rani Kaniz Begum executed a power-of-attorney in favour of her husband (Ex. 186, page 347). It must, however, be remembered that this power-of-attorney was executed by the Rani two years before the deed of gift of 1910 in connexion with another matter. This power-of-attorney had no connexion whatsoever with the deed of gift of 1910 or with the mortgage deed of 1890 or with the oral gift of village Katra in 1900.

It is in evidence that both Babu Mano

har Lal and the Ajodhia Bank were paid off in full, so the other contention urged on behalf of the plaintiffs, that the Raja of Utraula attempted to defraud his creditors, and could not now be allowed to take advantage of his fraud, is also shown to be unsound. Exhibit A-231, page 255, is a paper which shows that the general agent of the Ajodhia Bank Ltd., certified in Court that the Bank of Ajodhia had received in full satisfaction of all its dues, the sum of Rs. 22,110-11 9 on 18th May, 1910. The Raja of Utraula, when examined as D. 2, W. 34 (at page 453) himself deposes that he has by now paid off all his creditors including the Benares Bank. There can, therefore, be no estoppel against the Raja, and as a matter of fact no creditor of the Utraula estate is a party to this Suit No. 12 of 1928. It is, therefore, in my opinion, open to the Raja of Utraula to show the true nature of the transaction evidenced by the deed of gift of 1910. In *Smyes* v. *Hughes* (64) it was held by Lord Romilly, Master of the Rolls, that

"the mere intention to effect an illegal object when the assignment was executed does not deprive the assignor of his right to recover the property from the assignee who has given no consideration for it. It is clear in the present case that no harm has been done to any creditor, and, in fact the suit is now being prosecuted for the purpose of enabling the creditors to recover something."

It is equally clear that in the present case too no creditor has been defrauded and the Raja of Utraula being a defendant his position is even stronger. As pointed out by their Lordships of the Privy Council in *Ram Saran Singh* v. *Pran Peary* (65):

"The instrument being relied upon by a person out of possession, seeking to obtain possession through the medium of a foreclosure suit, it appears to their Lordships that there is nothing whatever to prevent the defendant from showing the real truth of the transaction."

The remarks of their Lordships of the Privy Council apply with peculiar appropriateness to the facts of the present case. The Raja of Utraula is a defendant in this case and the plaintiffs who are out of possession are seeking to obtain possession from him and are relying upon a deed of gift executed by him. It is also proved in this case that no creditor and no other person has been defrauded by the act of the defendant *talukdar* of Utraula. In these circumstances it is open to the latter to prove the true nature of the transaction as to the deed of gift and to reveal the real truth about it.

And here I may pause to discuss an interesting argument advanced by the learned Counsel for the plaintiffs that under s. 92, Evidence Act, it was not open to defendant No. 1, the Raja of Utraula, to adduce any evidence to contradict and vary the terms of his own deeds of gift executed by him in favour of his wife. It is contended on behalf of the plaintiffs that the plea raised by the Raja of Utraula that the deeds of gift were fictitious and colourable transactions is barred by s. 92, Evidence Act. I have listened with interest to the elaborate arguments advanced on this point by Mr. Jackson the learned Counsel for the plaintiffs. It seems to me however that this contention of the plaintiffs is not sound. As pointed out by Mr. Ameer Ali in his standard work on the Law of Evidence in India (Edn. 8, page 613):

"this s. (92) was framed in accordance with the current of English decisions upon the question of how far parol evidence can be admitted to affect a contract.....Evidence may be given firstly to show that there was really never any disposition at all; and secondly, to show that the document produced is not the whole disposition ....."

"Firstly—though evidence to vary the terms of an agreement in writing is not admissible, yet evidence to show that there is not an agreement at all is admissible. Notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find upon sufficient evidence that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it."

Taylor in his Treatise on the Law of Evidence administered in England and Ireland (Vol. 2, page 778), para. 1135, Edn. 11, lays down the rules as follows:

"Again, this rule is not infringed by the admission of parol evidence, under proper pleading showing that the instrument is altogether void, or that it never had any legal existence or binding force, either by reason of forgery or fraud, or for the illegality of the subject-matter or for want of due execution and delivery."

In a case decided by the Madras High Court before the passing of Evidence Act (I of 1872) reported as *Guddalur Ruthna Mudaliyar* v. *Kunnaitur Arumuga Mudaliyar* (66), the learned Chief Justice of Madras made the following weighty observations:

"But it is said there is a written contract, the promissory note, and that no addition to, or variation from, its terms can be made by parol. With respect to this, I take the law to be that notwithstanding a paper writing which purports to be a contract may be produced, it is still com

(64) (1870) 9 Eq. 475; 39 L. J. Ch. 804; 22 L. T. 462.

(65) 13 M. I. A. 551; 15 W. R. 14; 3 Suther 386; 2 Sar. 620 (P. C.).

(66) 7 M. H. C. R. 189.

petent to the Court to find upon sufficient evidence that this writing is not really the contract. And the risk of groundless defence does not affect the rule itself, though it suggests caution in acting on it."

In *Pym* v. *Campbell* (67) Erle, J., says:

"The point made is that this is a written agreement absolute on the face of it, and that evidence was admitted to show it was conditional; and if that had been so, it would have been wrong. But I am of opinion that the evidence showed that in fact there was never any agreement at all. The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement, and if in fact he did sign the paper '*animo contrahendi*' the terms contained in it are conclusive and cannot be varied by parol evidence; but in the present case the defence begins one step earlier; the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be set up without ground; and I agree that a Jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible."

Similarly, in the present case the ruling in *Pym* v. *Campbell* (67) is very apposite. Here too the defence of the Raja of Utraula starts one step earlier. He admits that he executed the deed of gift in favour of his wife but he alleges that he had no intention of gifting away the property, that in short he had no *animus contrahendi* (the intention of entering into a contract or gift) when he executed the deeds of gift; and evidence to prove such a defence is admissible and does not violate the provisions of s. 92, Evidence Act. *Pym* v. *Campbell* (67) has been reported as *John Pym* v. *Campbell* (68). In Halsbury's Law of England, Vol. 13, page 567, para 775, are collected a a large number of instances where the rule as to the exclusion of extrinsic evidence does not apply and one of these is that where the document was neither intended by the parties to be an agreement at all, evidence to show the true nature of the transaction was held admissible.

So also in Stephen's Commentaries on the Laws of England (Edn. 19, Vol. 3, page 221) it is laid down that

"written contracts like all other contracts must be made *animo contrahendi*, and parol evidence is always admissible to show that there was no *animus*."

In *Bowes* v. *Foster* (69) decided in 1858 oral evidence was allowed to be given to show that a written agreement for the conveyance of property was only a fictitious sale to avoid execution proceedings against the property. Lord Chief Baron Pollock in delivering the leading judgment in the case said:

"Where goods are professed to be transferred by deed, the deed actually transfers the property; and the moment the deed is executed by law the property ceases to be the property of the person who has executed the deed and becomes the property of the person in whose favour it has been executed That is not so with a fictitious invoice or a receipt for money which has never been paid. The documents no doubt are evidence of a fact, but the question is whether they may not be rebutted by evidence that there was no sale and no payment .... Then is there any established rule of evidence or practice in the administration of justice, that, where parol documents are produced leading to one result it is not competent to contradict them and to show that the real truth is not that which the documents import? I think that there is no such rule."

Martin, B in this very case held that there was no real sale and that the invoice only created an appearance of a sale and that no property really passed by such a transaction.

The rule of English Law laid down in *Pym* v. *Campbell* (67) was followed as late as 1925 by the Patna High Court in a ruling reported as *Ramdhani Singh* v. *Kewal Mani Bibi* (70) and it was followed even before the passing of Evidence Act by the Madras High Court in the ruling quoted above, *Guddalur Ruthna Mudaliyar* v. *Kunnaitur Arumuga Mudaliyar* (66).

Finally in this connexion I may quote the ruling of their Lordships of the Privy Council reported as *Baij Nath Singh* v. *Mohammad Abba* (71) in which their Lordships held that under s. 92, Evidence Act as between the parties to an instrument, oral evidence of intention was not admissible for the purpose either of construing deeds or of proving intention of the parties, but that section merely prescribed a rule of evidence and did not fetter the Court's

(67) (1856) 6 E. & B. 370; 25 L. J. Q. B. 277; 2 Jur (N. S.) 641; 4 W. R. 528; 106 R. R. 632; 119 E. R. 903.

(68) (1856) 119 E. R. 903; 25 L. J. Q. B. 277; 2 Jur. (N. S.) 641; 4 W. R. 528; 6 El. & Bl. 370.

(69) (1858) 157 E. R. 322; 2 H. & N. 779; 27 L. J. Ex. 262; 4 Jur. (N. S.) 95; 6 W. R. 257; 30 L T. (O. S.) 306; 115 R. R. 801.

(70) 90 Ind. Cas. 929; A. I. R. 1926 Pat. 156; (1926) Pat. 29; 7 P. L. T. 145.

(71) 86 Ind. Cas. 332; A. I. R. 1925 P. C. 75; 3 R. 106; 48 M. L. J. 339; 2 O W. N. 279; 27 Bom. L. R. 787; 3 Pat. L. R. 227; L. R. 6 A. (P. C.) 57; 30 C. W. N. 242 (P. C.).

power to arrive at the true meaning and effect of a transaction in question in the light of the surrounding circumstances.

So too in the present suit it is open to the defendant Raja of Utraula to depose to and to prove facts which will go to show the true nature of the deeds of gift which he executed and the motives which actuated him into entering into such transactions with his wife. In a Full Bench ruling reported as *Beni Madhab Das* v. *Sadasukh Kotary* (72) their Lordships of the Calcutta High Court had occasion to discuss the true contruction of s. 92, Evidence Act; and here I may be permitted to quote the very pertient observations, if I may respectfully say so, of the learned Woodroffe, J.:

"The rule of evidence which is embodied in para. 1 s. 92, Evidence Act, presupposes the validity of the transaction evidenced by the documents to which that rule is to be applied. If therefore that validity is impeached, is no defence to point to the apparent rectitude of the document and to claim protection from enquiry under a rule which exists against the contradiction and variance of the terms only of those instruments the validity of which is not in question. In such cases the Court is not bound by what has been described as the paper expressions of the parties and is not precluded from enquiring into the real nature of the transaction between them."

The Rangoon High Court in a case reported as *Abdul* v. *Arlin* (73) also cited the authority of *Pym* v. *Campbell* (67) as late as 1926 and held that where a person who had executed a document sought to show that the document was a mere sham deed and represented nothing, he was not seeking to vary or contradict any of the terms of the document, and oral evidence was admissible to prove that there was no such agreement between the parties as was represented by the document.

In a still more recent ruling of their Lordships of the Privy Council *In re Mohammad Ali Mohammad Khan* v. *Bismillah Begam* (74) their Lordships held that if a person executed a deed of *wakf* but without any intention of divesting himself of the ownership of the property, his real intention being to utilize the document as a shield against any claims that might be made against him in future, then the deed of *wakf* was invalid as there was no real intention to create a *wakf*.

I think I have said enough to show that there is no force in the contention of the learned Counsel for the plaintiffs that defendant No. 1 the Raja of Utraula is estopped by s. 92, Evidence Act from pleading that the deeds of gift and the mortgage-deed are sham and fictitious transactions. I hold that defendant No. 1 the Raja of Utraula is legally competent to raise the plea that the deeds of gift are fictitious and colourable transactions. The learned Counsel for the plaintiffs after the close of the oral arguments of both parties has submitted to me written arguments in reply to the arguments of the learned Counsel for the defendants and in the course of these written arguments has invited my attention to the observations made by Ashworth, J., in *Lachman Das* v. *Ram Prasad* (75), in which that learned Judge has thought fit to criticise the remarks made in Mr. Ameer Ali's work on the Law of Evidence in India, occurring at page 613. With all due respect to that learned Judge, I am in entire disagreement with him when he assets that the remarks of Messrs Woodroffe and Ameer Ali in their standard work have often misled Courts. The clear and weighty reasoning of their Lordships of the Calcutta High Court in the Full Bench ruling reported as *Beni Madhab Das's case* (72) quoted above fully meet the strictures on this point made by Ashworth, J., and I need not say anything more on the subject.

The first part of issue No. 7 casts upon the plaintiffs the burden of proving that defendant No. 1, the Raja of Utraula had the intention of parting with his property and gifting it to his wife, as also the further burden of proving that actual possession of the gifted property was made to the donee by the donor. There is no evidence adduced by the plaintiffs to prove actual delivery of possession over the gifted villages. Defendant No. 1 the Raja of Utraula has proved to my entire satisfaction that he had no intention of parting with the ownership of the gifted property and that he never actually delivered possession over the gifted property to his wife. If there was no intention to part with ownership, then, mere mutation of names and entries in revenue papers showing Rani Kaniz Begam as the owner of the gifted villages count for nothing and do not prove the actual possession of the donee. The plaintiffs merely rely upon the deeds of gift themselves to prove the intention of the donor to gift the property covered by these

(72) 32 C. 437; 2 C. W. N. 305; 1 C. L. J. 155 (F. B.).

(73) 95 Ind. Cas. 512; A. I. R. 1926 Rang. 94; 5 Bur. L. J. 2.

(74) 128 Ind. Cas. 647; A. I. R. 1930 P. C. 255; 7 O. W. N. 821; 33 Bom. L. R. 155; 35 C. W. N. 324; 60 M. L. J. 341; 33 L. W. 397; (1931) M. W. N. 1 (P. C.).

(75) 100 Ind. Cas. 1029; A. I. R. 1927 All 422; 49 A. 680; 25 A. L. J. 349.

two deeds of gift. On the other hand, I have shown above from the various circumstances of the case and from the evidence of the Raja himself and of his witnesses that the Raja had not got the intention, the *animus*, of giving away his property but that his whole object was to screen it from his creditors and from the Deputy Commissioner of Bahraich as far as the jungles were concerned. This was the real intention of the Raja of Utraula whether it be laudable or not. In carrying out his real intention the Raja of Utraula had to have mutation of names in the revenue registers of proprietary titles namely, the *khewats*, effected in the name of his wife in order to keep up the pretence of his wife being the owner of the gifted villages; and in accordance with rent Court procedure suits for arrears of rents against the tenants of the gifted villages had also to be filed in the name of the ostensible owner of the village Rani Kaniz Begam. These ostensible acts of ownership on the part of Rani Kaniz Begam really prove nothing. They are part and parcel of the scheme designed by the Raja of Utraula to safeguard his property from the attacks of his creditors and from what the Raja conceived to be the attack of the Deputy Commissioner of Bahraich. This scheme was inaugurated by the Raja executing the deed of gift in favour of his wife and the rest followed as a matter of course as night follows day. Actual possession or receipt of profits by Rani Kaniz Begam or by her alleged successors-in-interest, the plaintiffs, is not even proved.

As to the value attached to mutation proceedings their Lordships of the Privy Council have held in *Nirman Singh* v. *Lal Rudra Partab Narain Singh* (76) that it was well established that an order made in mutation proceedings was not a judicial determination of title or proprietary interest.

The ruling in *Ma Mi* v. *Kallandar Ammal* (77) cited by the learned Counsel for the plaintiffs does not go against the principle enunciated by their Lordships in *Nirman Singh's case* (76) quoted above; but in this case from Rangoon their Lordships held that there was a clear intention of creating a trust and direct evidence that the author of the trust Sheikh Moiuddin used to be send regularly Rs. 450 to his wife as *mutawalli* of the trust. In *Quinn* v. *Leathem* (78) the Lord Chancellor delivered himself of this weighty pronouncement:

> "There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that very judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found."
>
> "The other is that a case is only an authority for what it actually decides."

These observations of the Right Honourable the Earl of Halsbury apply with force to the contenion on behalf of the plaintiffs that the ruling in the Rangoon case quoted above is applicable to the facts of the present case. In my opinion the facts of the present case are very different from the facts of the Rangoon case relied upon by the learned Counsel for the plaintiffs.

Similarly in *Amina Bibi* v. *Khatija Bibi* (79), and in *Emnabai* v. *Hajir Bai* (80) relied upon by the plaintiffs' learned Counsel there was also no question raised as to the fictitious nature of the deed of gift. In the present case however the entire defence of the Raja of Utraula rests upon the plea that the deeds of gift are fictitious and colourable transactions. Equally inapplicable to the facts of this suit is the ruling reported as *Mohammad Mumtaz Ahmad Khan* v. *Zubaida Jan* (81) which has been cited by the learned Counsel for the plaintiffs. Delivery of possession of the gifted property was the sole question involved in the case. No plea was taken in that case as in this that the gift was fictitious and so the question of the fictitious nature of the gift was outside the scope of the ruling relied upon by the plaintiffs. These rulings, therefore, do not in my opinion help the plaintiffs at all; they cannot by citing rulings fill up the gaps in their evidence. Ostensible acts of ownership under an ostensible deed of gift do not advance the plaintiffs' case at all nor do they prove actual enjoyment of rents and profits. As observed by their Lordships of the Privy

(76) 98 Ind. Cas. 1013; A. I. R. 1926 P. C. 100; 53 I. A. 220; 48 A. 529; 3 O. W. N, 623; (1926) M. W. N. 716; 44 C. L. J. 330; 28 Bom. L. R. 1409; 51 M. L. J. 836; 29 O. C. 316; 25 L. W. 1; 25 A. L. J. 25; 38 M. L. T. 81; 1 Luck 389 (P. C.).

(77) 100 Ind. Cas. 32; A. I. R. 1927 P. C. 22; 54 I. A. 2?; 5 R. 7;; 25 A. L. J. 69; (1927) M. W. N. 76; 38 M. L. T. 53; 52 M. L. J. 362; 4 O. W. N. 300; 6 Bur. L. J. 59; 45 C. L. J. 2 68; 25 L. W. 679; 29 Bom. L. R, 772; 31 C. W. N. 625 (P. C.).

(78) (1901) 1 A. C. 495; 85 L. T. 289; 50 W. R. 139 65 J. P. 708; 17 T. L. R. 749; 70 L. J. P. C. 76.

(79) 1 Bom. H. C. R. 157.

(80) 13 B. 352.

(81) 11 A. 460; 16 I. A. 205; 5 Sar. 433 (P. C.).

Council in *Syed Uzhar Ali* v. *Bibi Altaf Fatima* (82) "evidence of acts of ostensible ownership prove nothing."

My attention has also been invited to the observation of their Lordships of the Privy Council in *Imam Bandi Begam* v. *Kamleswar Prasad* (83), which runs as follows:

"Where there are *benami* transactions and the question is who is the real owner, the actual possession or receipt of rents of the property is most important."

Such proof of actual possession or receipt of the rents by Rani Kaniz Begam in the present case or by the plaintiffs, her would be successors-in-interest is conspicuous by its absence .....

For the reasons given above I decide issues Nos. 7 and 8 against the plaintiffs and in favour of defendant No. 1 and hold that the two deeds of gift were fictitious and colourable transactions and that the Raja of Utraula had no intention of parting with the property gifted by the deeds of 12th April, 1910, and 28th November, 1910, and that actual delivery of possession over the gifted property mentioned in these two deeds was not made to the donee Rani Kaniz Begam in consequence of the execution of these deeds of gift.

I next come to discuss Issue No. 9 which is as follows:

"Are the deeds of gift invalid and ineffectual under s. 13, Oudh Estates Act (I of 1869) even if they be assumed to be otherwise valid and operative as alleged in para. 17 of the written statement of the defendant."

Under sub-s. 2, s. 13, Act I of 1869 delivery of possession must be made to the donee within six months from the dates of the execution of the deeds of gift. The amended Oudh Estates Act came into force on 21st February 1910, and the two deeds of gift of April, 1910, and November, 1910, being subsequent to this date 21st February, 1910, are governed by this amending Act of 1910. Delivery of possession in s. 13, Oudh Estates Act must mean delivery of actual possession apart from the mere recitals in the deeds of gift or mere paper entries in revenue registers, otherwise the requirements of actual delivery of possession in s. 13, Act I of 1869, would be superfluous and meaningless. As I have shown above in deciding issues Nos. 7 and 8, there was no actual delivery of possession to Rani Kaniz Begam or control of the management or control over the income of rents and profits of the gifted villages by her. That being the case, issue No. 9 must also be decided against the plaintiffs and I find accordingly that the two deeds of gift of 1910 are invalid and ineffectual also under s. 13, Oudh Estates Act, inasmuch as actual delivery of possession was not made to Rani Kaniz Begam within six months from the date of the execution of each of these deeds of gift.

The next issue is issue No. 10 relating to village Katra and is as follows:

"Did the defendant Raja of Utraula make an oral gift of village Katra entered in list No. 4 at item No. 1 attached to the plaint in suit No 12 of 1928 to his wife in 1900, and has she been in proprietary possession since then till her death in 1919?"

The alleged oral gift of village Katra, said to have been made in 1910 (?), is governed by the provisions of the Unamended Act I of 1869, and s. 17 of the Act requires that the deed of gift must be registered and there must be actual delivery of possession. In the case of the gift of village Katra there was no deed of gift executed and registered and actual delivery of possession has not been proved. Apart from the order of mutation there is no evidence even of any oral gift having been effected in favour of Rani Kaniz Begam by her husband defendant No. 1. As has been held by their Lordships of the Privy Council in *Chokhey Singh* v. *Jote Singh* (84), mere mutation of names by itself confers no proprietary title. In the application made on behalf of the Raja of Utraula for mutation of names in respect of village Katra (Ex. 86, part III, page 4. Suit No. 12) there is not a word said regarding the nature of the transfer; there is only a desire expressed that mutation of names be effected in favour of Rani Kaniz Begam in respect of village Katra of which the applicant was the owner. There is no casual mention even that the village has been gifted to Rani Kaniz Begam. Again in the statement of Subhan Ali Khan, special agent and Naib of the Raja of Utraula (Ex. 188, page 351, Suit No. 12) there occurs the phrase that village Katra has been orally given away by the Raja to his wife Rani Kaniz Begam. The phrase used by the agent is "*zabani dediya*". There is no assertion by the Naib Subhan Ali that actual possession of this village Katra had been made over either to Rani Kaniz Begam or that the Raja of Utraula had any real intention of parting with this village or that the Rani had accepted the gift of this village made to her by her husband. Under Muhammadan Law certain require-

(82) 13 M. I. A. 232; 13 W. R. 1; 4 B. L. R. P. C. 1; 2 Suther 279; 2 Sar. 522.

(83) 14 C. 169; 13 I. A. 160; 4 Sar. 732 (P. C.).

(84) 1 Ind. Cas. 166; 31 A. 73; 36 I. A. 38; 11 Bom. L. R. 69; 13 C. W. N. 274; 6 A. L. J. 100; 9 C. L. J. 151; 5 M. L. T. 167; 19 M. L. J. 123; 12 C. C. 288 (P. C.).

ments have to be fulfilled in respect of oral gift even and these have not been deposed to in the present case. In *Chaudhari Mehdi Hasan* v. *Mohammad Hasan* (55) their Lordships of the Privy Council stated the law as follows:

"By the Muhammadan Law (by which the present case is governed) a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms; but it is incumbent upon those who seek to set up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply, or by deed of gift coupled with consideration."

In *Sadik Husain* v. *Hashim Ali Khan* (54), the Privy Council laid down that the necessity under Muhammadan Law for delivery of possession in the case of a gift without consideration was not modified by the Transfer of Property Act (Act IV of 1882), although the gift was made by a registered deed of trust.

The Rajah of Utraula or rather his agent on his behalf did not use any such technical terms as *hiba* with reference to the oral gift of village Katra to Rani Kaniz Begam. The intention of the would-be donor seems to me to be merely to have mutation of names effected in favour of his wife in respect of village Katra and nothing more. Exhibit 193, page 356 is a copy of the order of the Sub-Divisional Officer of Utraula in the mutation case relating to the village Katra to the effect that at the time of verification of the *khatauni* or register of proprietary titles by the proprietor, mutation of names would be effected in favour of Rani Kaniz Begam with consent of the agent for Raja Muhammad Mumtaz Ali Khan. Thus it is clear that no enquiry was made by the Revenue Court as to the fact of actual delivery of possession to the donee nor as to the intention of the donor to gift this village to his wife. The simple desire of the Raja to have mutation of names effected in favour of his wife was blindly carried out by the Revenue Court regardless of the requirements as to certain forms necessary to make the oral gift of village Katra valid under Muhammadan Law. Neither under the Oudh Estates Act nor under Muhammadan Law can mere mutation of names confer title. Rani Kaniz Begam never had any actual possession over village Katra as is clear from the evidence of Udit (D. 2, W. 6, page 355) and of Mahomed (D 2, W. 7, page 357) and of the Raja himself (D. 2, W. 34 at pages 454, 467 and 468),

Exhibits A-391 (page 5, part III. Suit No. Barhai a cultivator of village Katra recorded on 22nd December, 1919, in a mutation case which proves that village Katra was all along in the possession of defendant No. 1 the Raja of Utraula and that the latter always got rent from the tenants of his village. Exhibit A-390 is another deposition of another cultivator of village Katra, namely Udit who also gives similar evidence of possession by the Raja of Utraula over this village. Thus, even if it be assumed for the sake of argument that an oral gift of village Katra was made by the Raja of Utraula in favour of his wife it was not a valid gift in the eye of the law, whether the provisions of the Oudh Estates Act or of pure Muhammadan Law be made applicable to the construction of this oral gift. I accordingly decide issue No. 1 and hold that the Raja of Utraula did not make any valid gift of village Katra in favour of his wife Rani Kaniz Begam and that the latter was never in proprietary possession of the same till her death in 1919.

I next come to issue No. 11 which runs as follows:

11 (*a*) "Was the mortgage deed of 17th August 1890, relating to the property at No. 18 (*a*) (*b*), (*c*), (*d*) and (*e*) entered in list A attached to the plaint in Suit No. 12 of 1928 fictitious?

11 (*b*) Were the sale-deeds relating to the property marked Nos. 1, 2, and 3 of List B and Nos. 14, 15 16, and 17 of List attached to the plaint in Suit No. 12 of 1928 *benami* and acquired with the money belonging to the defendant?

[The learned Judge decided issue No 2 (*a*) against the plaintiffs and in favour of defendants and held that the mortgage-deed of 7th August, 1890, was purely fictitious.]

Issue No. 2 (*b* relates to certain smaller items of property claimed by plaintiffs. These acquisitions may be divided under two heads:

(*a*) Acquisition of tenant and grove rights in miscellaneous plots situated in village which were mutated in the name of Rani Kaniz Begam.

(*b*) Acquisition of shares of under-proprietary rights in villages of which the Raja was the undisputed superior proprietor.

[The learned Judge held that the plaintiff's suit in respect of these items in dispute in List A attached to the plaint referred to in Issue No. 2 (*b*) fail for want of proof.]

The items of property mentioned in Schedule B attached to the plaint and covered by group (*d*) of this issue have been mentioned in para. 3 of the plaint in Suit No. 12 of 1928. The plaintiffs are not the heirs of Rani Kaniz Begam under Muhammadan Law but they claim this property under the custom of single heir succession to the exclusion of Rani Kaniz Begam's husband and her

have failed to prove the custom of the exclusion of females by collaterals, and they have not even pleaded any custom of the exclusion of husbands by collaterals.

Then again it is to be noted that the purchases made in the name of Rani Kaniz Begam by the Raja of Utraula defendant No. 1 were in respect of under-proprietary rights in villages in which he held superior proprietary rights. This was done obviously with a view to avoid merger of under-proprietary rights in superior proprietary rights By the device of purchasing under-proprietary rights in the name of his wife the Raja of Utraula preserved intact these under-proprietary rights notwithstanding the fact that he as superior proprietor had purchased them These purchases were really *benami* transactions.

In respect of item No. 1 of schedule B attached to the plaint there is the sale deed of a three annas under-proprietary share in village Bhairauli executed by Madar Khan and others. Item No. 2 of schedule B attached to the plaint relates to village Bannu Kapur, the sale-deed of a one anna under-proprietary share in respect of which was executed by Tilakgir Goshain (Ex. 3, part 3, page 14). Item No. 3, schedule B attached to the plaint relates to village Tilokpur the under-proprietary rights of which were sold by *Musammat* Subhaga to Rani Kaniz Begam on 17th May, 1901, (Ex. 87, part 3, page 16). Mr. Abdul Hamim (D. 2, W. 16, page 401, line 5) had deposed that he advised Pt. Kanhaiya the manager of the Utraula Estate to purchase the under-proprietary rights in this village on behalf of the Raja in the name of his wife Rani Kaniz Begam. Mumtaz Ali Khan (D. 2. W. 32 at page 44) a nephew of Changur Khan has fully proved the execution of the saledeed of under-proprietary rights by Chunjr (?), Madar and others in village Bhairauli in favour of Rani Kaniz Begam. He has proved that the sale consideration in respect of this saledeed was paid by Pt. Kanhaiya the Naib of the Utraula Estate on behalf of the Raja of Utraula but the saledeed was drawn up in the name of Rani Kaniz Begam *ismfarazi*. To the same effect is the evidence of Husain Ali Khan (D. 2, W. 23, page 450). The evidence of Budhgir (D. 2, W. 27, page 437) who is the son of Tilakgir Goshain not only proves the execution of the saledeeds (Ex. 3, page 14, part 3 and Ex. 27, page 16, part 3) but also that they are *benami* transactions and that Rani Kaniz Begam never had actual possession and enjoyment of the property entered in these *benami* sale deeds.

Exhibit 184 (page 341, part 3) and Ex. 241 (page 61, part 2) are copies of plaints filed by the Raja of Utraula against Rani Kaniz Begam and others for recovery of under-proprietary rent, and Ex 185 (page 344, part 3) and Ex. 242 (page 65, part 2) are the decrees passed in these suits. These documents clearly go to show that the Raja of Utraula defendant No. 1 merely purchased these under proprietary shares in villages in the name of his wife in order to enable him to sue his recalcitrant under-proprietors for arrears of under-proprietary rent due from them without allowing the shares of those under-proprietors, which he had purchased from getting merged into his superior proprietary title. The Raja of Utraula under legal advice wanted to preserve intact the joint and several liabilities of the under-proprietors for payment of their under-proprietary rent and so he resorted to this dodge by buying up the shares of indigent under-proprietors in the name of his wife Rani Kaniz Begam. In this connexion, in support of his arguments, the learned Counsel for the Raja of Utraula cited two rulings reported as *Rudra Partab Singh* v. *Sikandar Khan* (85) and in *Jugnu Khan* v *Rudra Partab Singh* (86).

There is no presumption that the doctrine of advancement prevails in this country. No presumption can, therefore, be made that the husband wanted to make a gift to his wife. In *Gopeekrist Gosain* v. *Gunga Persaud Gosain* (87) their Lordships of the Privy Council have held that

"there is no authority in Indian law, no distinct case, or dictum, establishing or recognizing such a principle or such a rule."

Further on, their Lordships go on to state that

"various reasons may be urged against the abstract propriety of the English rule".

and in *Maulvi Saiyid Uzhur Ali* v. *Bibi Ultaf Fatima* (82) that their Lordships of the Privy Council re-affirmed their view and held

"that there was no presumption of an advancement by the name of a son being used as a purchaser other than in the case of the name of a stranger being used."

In *Bilas Kunwar* v. *Desraj Ramjit Singh* (51) their Lordships of the Privy Council held that the purchase of house property by a Hindu in the name of his Muhamadan mistress was a *benami* transaction and they

(85) 39 Ind. Cas. 598; 20 O. C. 104.

(86) 74 Ind Cas. 429; A. I. R. 1923 Oudh 216; 26 O. C. 118

(87) 6 M. I. A. 53; 2 Suth. 13; 4 W. R. 46; 1 Sar. 493; 4 Suth. P. C. J. 13; 19 E. R. 20 (P. C.).

repelled the contention that the intention of the *talukdar* was to confer a beneficial interest upon his mistress. They further held that

"the exception in our (English) Law by way of advancement in favour of wife or child does not apply in India."

Similarly in *Guran Ditta* v. *Ram Ditta* (88) it was held that a deposit by a Hindu of his own money in a Bank in the joint names of himself and his wife, and on the terms that it was to be payable to either or the survivor, did not on his death constitute a gift by him to his wife and that there was therefore a resulting trust in his favour in the absence of proof of a contrary intention and there was no presumption of an intended advancement in favour of a wife. In *Prince Suleman Kadar Bahadur* v. *Nawab Mehndi* (89) their Lordships of the Privy Council held a sale of a house between husband and wife to be *benami* although the wife was in possession of the house solely on the ground that the purchase money was paid by the husband. On the strength of the rulings quoted above it was argued by the learned Counsel for the Raja of Utraula that the slightest evidence as to the source from which the purchase money came was sufficient to establish the *benami* nature of the transaction.

In *Lakshmiah Chetty* v. *Kothandarama Pillai* (90), their Lordships of the Privy Council rejected the contention that a purchase of property by an Indian out of his own money in the name of his wife was not a *benami* transaction because it was made in pursuance of an alleged oral ante-nuptial agreement. The Madras High Court in *Mollaya Padayachi* v. *Krishnaswami Iyer* (91), following the ruling reported as *Kerwick* v. *Kerwick* (92), held that the purchase of immovable property by a Hindu in the name of his wife was a *benami* transaction and that the wife was merely a *benamidar* and that there was no presumption of an advancement.

Once it has been established that the source of money of the transaction flowed from the husband and that the transaction stood in the name of the wife, then it followed upon the strength of the rulings cited above that the transaction was a *benami* one and the wife was a mere *benamidar*. So too in the present suits all the circumstances point to these deeds of sale being all fictitious and the Raja of Utraula is clearly proved to be owner of the property in suit. For the reasons given above I decide issue No. 11 (*b*) also in favour of defendant No. 1 the Raja of Utraula and against the plaintiffs.

I come next to issue No. 12 which runs as follows:

"Do the villages marked 4 and 7 and entered in List A attached to the plaint in Suit No. 12 of 1901 constitute part of the Bilaspur estate within the meaning of s 3 the Act I of 1896."

Item No. 4 List A attached to the plaint is village Masihabad-Grant and item No. 7 of the same list is village Allenpur-Grant. Exhibit A-246, p. 278 is an extract from the *wajib ul-arz* of village Masihabad-Grant which shows that the Regular Settlement was made with the Raja of Utraula in respect of this village. This village must, therefore, be deemed to be a *talukdari* village and part of the *taluka* of Bilaspur within the meaning of s. 3, Act I of 1869. Exhibit A-247, p. 279, is an extract from the *wajib-ul-arz* of village Allenpur-Grant which shows that this village was formerly known as Durgapur jungle and was declared to be the property of Government. The latter sold it to one Mr. Cearns who renamed it after his wife as Helenpur which was subsequently corrupted into Allenpur. This village was subsequently acquired by the Raja of Utraula. It is, therefore, non-*talukdari* property. The conclusion arrived at by me in respect of these two villages, Items Nos. 4 and 7 of List A attached to the plaint, is virtually accepted by the learned Counsel of both parties. My finding on this issue is that item No. 4 Masihabad-Grant is *talukdari* property and item No. 7 Allenpur-Grant is non-*talukdari* property.

The next issue is issue No. 13 which is as follows:

"Is the suit as framed not maintainable on the ground that the suit is brought collectively by all the plaintiffs?"

This issue is virtually the same as issue No. 10 of Suit No. 11 of 1928 which I have decided in the early part of this judgment.

(88) 109 Ind. Cas. 723; A.I.R. 1928 P. C. 172; 55 I. A. 235; 55 C. 944; 32 C. W. N. 817; 29 P. L. R. 429; 28 L. W. 66; 48 C. L. J. 119; 5 O. W. N. 668; I. L. T. 40 Lah. 144; 30 Bom. L. R. 1384; 55 M. L. J. 651; (1928) M. W. N. 917 (P. C.).

(89) 25 C. 473; 25 I. A. 15; 7 Sar. 254 (P. C.).

(90) 88 Ind. Cas. 327; A. I. R. 1925 P. C. 181; 52 I. A. 286; 48 M. 605; 23 A. L. J. 662; 49 M. L. J. 109; 42 C. L. J. 8; 27 Bom. L. R. 1076; 29 C. W. N. 1013; 3 Pat. L. R. 290; 23 L. W. 138; (1925) M. W. N. 717 (P. C.).

(91) 85 Ind Cas. 855; A. I. R. 1925 Mad. 95.

(92) 57 Ind. Cas. 834; A. I. R. 1921 P. C. 56; 47 I. A. 275; 48 C. 260; (1920) M. W. N. 738; 39 M. L. J. 296; 28 M. L. T. 194; 32 C. L. J. 490; 2 U. P. L. R. (P. C.) 153; 13 L. W. 455; 23 Bom. L. R. 730; 10 L. B. R. 335 (P. C.).

I need not, therefore, repeat once more my reasoning on this issue. For the reasons given by me in deciding issue No. 10 of Suit No. 11 of 1928, I decide this issue in favour of the plaintiffs and hold that Suit No. 12 of 1928, as framed, is also maintainable.

The last issue in this case is issue No. 14 which is as under:

"To what relief, if any, are the plaintiffs entitled?"

Upon my findings in the issues decided above I decide this issue against the plaintiffs and hold that they are entitled to no relief.

For the reasons given above I dismiss also the claim of the plaintiffs in Suit No. 12 of 1928 with costs. Each of the defendants will be entitled to his separate costs from the plaintiffs. The plaintiffs have unnecessarily dragged defendant No. 2 the Raja of Nanpara in their Suit No. 12 of 1928, even after the Raja of Nanpara's claim in Suit No. 4 of 1928 against the Raja of Utraula in respect of this very property in suit had been dismissed by me in terms of the award of the arbitrator. The plaintiffs, when pointedly asked by the Counsel for the Raja of Nanpara to discharge his client, did not think it proper even at the time of hearing arguments to withdraw their suit against defendant No. 2, the Raja of Nanpara. It cannot, therefore, now be argued by the plaintiffs that their claim was only against the Raja of Utraula and that defendant No. 2 the Raja of Nanpara, was only a *pro forma* defendant. Even the reason which ostensibly justified the plaintiffs in impleading the Raja of Nanpara in this Suit No. 12 at the outset had long since ceased to exist when the Raja of Nanpara's claim against the Raja of Utraula had been dismissed by this Court. These considerations in my opinion justify me in allowing the Raja of Nanpara to have his full legal costs separately from the plaintiffs in this Suit No. 12 of 1928.

The result is that Suit No. 12 of 1928 like Suit No. 11 is dismissed with costs, and each of the defendants is allowed to have his costs separately from the plaintiffs who will bear their own costs.

In conclusion, I feel constrained to note that the trial of these two suits has made me realize with deep regret the absence of a law against champerty in India. As pointed out by the former Hon'ble Chief Judge in his judgment in F. C. A. No. 162 of 1911 (Ex. A-5 of Suit No. 11 at p. 264):

"there can be no doubt that toleration of champerty implies encouragement of fabrication of documents, fabrication of oral evidence, and the toleration of conduct in Courts of Law which is a direct incentive to retrogression in public morality."

This is the third litigation since 1908 connected with the Nanpara Estate, and it is as frivolous and vexatious as the claim set up by Abdul Hamid in the interpleader suit or that set up by Abdul Halim in the suit decided by the late Misra, J., on 16th September, 1927: see Ex. A-6, p. 297 of Suit No. 11.

The hope expressed by Kanhaiya Lal, J., at the close of his judgment in F. C. A. No. 162 of 1911, (Ex. A-5 at p. 296) that the rightful claimants will now be able to enjoy the Nanpara Estate "freed from the risk of further litigations" has so far been proved to be a vain hope. It is a matter for regret that in the present suits one of the financiers who has entered on this highly speculative litigation is no less a person than Maharaj Kunwar Captain Sardar Singhji, Dewan of Rutlam, son of Maharaj Adhiraj Sir Nahar Singh K. C. I. E., the Ruler of the Shahpur State in Rajputana, who has thought fit, behind the back of the Government of India and without its sanction, not only to buy up property in British India but even a law suit into the bargain. It is no concern of this Court if certain persons unwisely throw away good money after bad; but it is a matter of prime importance to this Court and to the sound administration of justice and its fair name that such champertous conduct and such champertous litigation should be strongly reprobated. But however strongly a Judge may condemn this evil, it cannot be eradicated unless the Legislature steps in and passes an Act making champerty illegal, at least in the Province of Oudh where it is most rampant.

Finally, I cannot conclude this lengthy judgment without expressing my deep sense of obligation and gratitude for the very able and illuminative arguments advanced before me by Mr. Wasim and Mr. Hyder Husein, the learned Counsel for the two principal defendants, the Raja of Nanpara and the Raja of Utraula. A just meed of praise and appreciation is also due to Mr. St. George Jackson the learned Counsel for the plaintiffs for the great care and learning that he displayed and the painstaking efforts that he made in putting up as stout a fight as one could well put up for a weak and lost cause, the genesis of which is shrouded in iniquity.

A. *Suits dismissed.*

OUDH CHIEF COURT.

Second Civil Appeal No. 41 of 1931.
November 19, 1931.
RAZA, J.

SITLA BAKHSH SINGH—DEFENDANT—
—APPELLANT
versus
Subadar Major SARABJIT SINGH
AND ANOTHER—PLAINTIFFS AND OTHERS
DEFENDANTS—RESPONDENTS

Adverse possession—Landlord and tenant—Entry in village papers as bila tasfia *tenants and twelve years' possession—Possession, whether adverse—Adverse possession, essentials of.*

Where a person is in possession as a tenant the mere fact that he is entered as tenant '*bila tasfia*' in the village papers and has held land for over twelve years, cannot make his possession adverse to the rightful owner. [p. 700, col. 2.]

To prove title to land by adverse possession for the statutory period it is not sufficient that some acts of possession have been done; the possession required must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitors; the possession must be actual, physical, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitations. *Babu* v. *Thakur Din* (1) and *Jogendronath Roy* v *Baldeo Das* (4), followed. *Raja Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (2) referred to. [p. 701, col. 2.]

Second Appeal against an order of the Subordinate Judge, Sultanpur, dated the 31st October, 1930, upholding that of the Munsif, Musafirkhana, District Sultanpur, dated the 14th December, 1929.

Mr. *Bhagwati Nath*, for the Appellant.

Mr. *Hyder Husein*, for the Respondents.

Judgment.—This is an appeal from a decree of the Additional Subordinate Judge, Sultanpur, dated the 31st October, 1930, affirming a decree of the Munsif, Musafirkhana at Sultanpur, dated the 14th December, 1929.

The dispute in this case relates to Nos. 16-3, 9 2 and 16-4 in village Gajanpur in the District of Sultanpur.

The defendant No. 1 Sitla Bakhsh Singh brought a suit against Harbans Singh (plaintiff No. 2) son of Onkar Singh for arrears of rent under s. 198 (2)/127 of the Oudh Rent Act in respect of plot No. 16-3 and obtained a decree in July, 1929. Sarabjit Singh (plaintiff No. 1) and Harbans Singh (plaintiff No. 2) brought the present suit in September, 1929, for a declaration that the plots in suit were owned and possessed by them jointly with defendants Nos. 4 to 10 and that the defendants Nos. 1 to 3 had no right to or interest in the said plots The claim was resisted by the defendants Nos. 1 to 3 on various grounds.

The learned Munsif found that the defendants Nos. 1 to 3 were the original proprietors of the plots in suit but the plaintiffs have now become owners thereof by right of adverse possession for more than twelve years. He therefore decreed the plaintiffs' claim.

The defendant No. 1 alone appealed from the whole decree under O XLI, r. 4, Sch I, Civil Procedure Code. The appeal was dismissed by the learned Additional Subordinate Judge on the finding that the plaintiffs had succeeded in establishing their adverse possession for more than twelve years before the suit. The defendant No. 1 has now appealed to this Court from the whole decree.

I have heard the learned Counsel on both sides at some length. In my opinion this appeal should be allowed. As I understand the judgment of the learned Additional Subordinate Judge, he has found that the plaintiffs have succeeded in establishing their adverse possession simply because they have been entered as '*bila tasfia*' tenants in the village papers for more than twelve years In my opinion this finding is clearly wrong and cannot be accepted. The possession of the plaintiffs, who are holding the plots in suit as tenants according to the entries in the village papers, did not and could not become adverse to the rightful proprietors merely because they (plaintiffs) were entered as tenants '*bila tasfia*' in the village papers. It has been definitely found in this case that the defendants Nos. 1 to 3 are the proprietors of the plots in suit. The entries in the village papers show that the plaintiffs are the tenants of the plots in suit. The defendants Nos. 1 to 3 (or their ancestors) have all along been recorded as proprietors of the plots in suit while the plaintiffs Nos. 1 and 2 (or their ancestors) have all along been recorded as tenants of the said plots. As pointed out in the case of *Babu* v. *Thakur Din* (1) where there is no reliable evidence to prove that the plaintiffs physically dispossessed the defendants or that they ever asserted a hostile title and all that is made out by the evidence is that the plaintiffs have been in possession for many years, that they have never paid any rent in respect of it and that in the village papers they have been recorded as '*bila tasfia*' tenants whereas the defendants have been recorded as proprietors, these facts are by

(1) 131 Ind. Cas. 400; 8 O. W. N. 140; A. I. R 1931 Oudh 144; L. R. 12 A. (O.) 62; 15 R. D. 89.

no means sufficient to establish title by adverse possession.

The respondents' learned Counsel has attempted to show that the plaintiffs had asserted a hostile title in or about 1904, in certain proceedings relating to mutation or correction of entries in village papers. I have not been referred to any documentary evidence on that point. As to oral evidence, I think there is no clear evidence on that point which can be safely relied upon. It should be borne in mind that it has been definitely found in this case that the title to the plots in suit is in the defendants Nos. 1 to 3 and not in the plaintiffs. The fact remains that the plaintiffs never succeeded in their attempt to get themselves recorded as proprietors of the plots in suit. The assertion, if any, was never accepted by the Revenue Court. Their assertion, if any, was surely unfounded at the time it was made and cannot by the mere lapse of time convert what was a tenant title into that of a proprietor—See *Raja Mohammad Mumtaz Ali Khan* v *Mohan Singh* (2). The respondents' learned Counsel has referred to the case of *Nadir Singh* v. *Anpurna Kuar* (3). It was held in that case that where it is found that a person has been in continuous possession of some property for more than twelve years without any right whatever and that, although he did not at any time make any openly avowed claim of right to it, his acts and the circumstances attending his possession clearly show that he intended to hold possession as of right, he has to be declared as having acquired title by adverse possession. In my opinion that ruling does not help the plaintiffs in this case. The entries in the village papers show that the plaintiffs or their ancestors have all along been recorded as tenants of the land in suit and were never recorded proprietors thereof. They were thus holding the land as tenants. The mere fact that no rent was realised from them is of no consequence If they ever attempted to assert a hostile title that assertion was not accepted by the Revenue Court. They never instituted any suit in the Civil Court to establish their right or title to the land in suit. They were content that possession should remain with them as tenants simply and so they have all along been recorded as tenants of the land in suit. It should be noted that the judgment of the learned Additional Subordinate Judge shows that it was not contended before him that the plaintiffs or their ancestors had ever asserted a hostile title to the land in suit. It appears that what was argued before him was simply this that the plaintiffs should be held to have perfected their title by adverse possession as they had been entered as '*bila tasfia*' tenants of the land in suit for more than twelve years before the institution of the suit. It should be borne in mind that to prove title to land by adverse possession for the statutory period it is not sufficient to show that some acts of possession have been done; the possession required must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitors; in other words, the possession must be actual, physical, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitation—See *Jogendronath Roy* v. *Baldeo Das* (4).

In my opinion the plaintiffs' claim is not made out. Hence I allow this appeal, set aside the decree of the lower Courts and dismiss the plaintiffs' suit with costs.

A. *Appeal allowed.*

(2) 74 Ind. Cas. 476; 26 O. C. 231 at p. 237; A. I. R. 1923 P. C. 118; 21 A. L. J. 757; 45 A. 419; 45 M. L. J. 623; 9 O. & A. I. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321; 50 I. A. 202 (P. C.).

(3) 56 Ind. Cas. 759; 7 O. L. J. 282; 2 U. P. L. R (O.) 113.

(4) 35 C. 961.

OUDH CHIEF COURT.

Application No 89 of 1931.

November 23, 1931.

RAZA, J.

BADLU—DEFENDANT—APPLICANT

versus

RAM DAS—PLAINTIFF AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XX, r. 4 (1)—Judgment of Court of Small Causes—Contents.

Under O. XX, r. 4, Civil Procedure Code, a Judge in a small cause suit may reduce his remarks to a minimum and they need not contain more than the points for determination and the decision thereon but this minimum must be intelligible, and must enable the High Court in revision to satisfy itself that the decree or order was according to law without the necessity of perusing the whole record.

Application for Revision from an order of the Second Additional Judge, Small Cause Court, Lucknow, dated the 11th September, 1931

Mr. *Rama Shankar Srivastava*, for the Applicant.

Messrs. *Sri Ram* and *Narain Lal*, for the Opposite Party.

Judgment.—This is an application in revision under s. 25 of the Small Cause Courts Act. The plaintiff sued to recover Rs. 150 on the basis of a pro note. The suit was contested by the defendants. The claim was decreed by the learned Second Additional Judge of the Small Cause Court, Lucknow, on the 11th September, 1931. I find there is no judgment according to law in this case. The order which is to be taken as the judgment of the Court runs thus :—

"Decree for Rs. 150 and costs. Attempt to be made to realise first from defendant No. 1."

It is impossible to treat this order as the judgment of the Court. Under O. XX, r. 4 (1), Civil Procedure Code the judgment of a Court of Small Causes must contain the points for determination and the decision thereon. The Judge of a Court of Small Causes is expected to apply his mind to the decision of a Small Cause Court case as carefully as he would apply his mind to the decision of a regular suit. Under O. XX, r. 4, Civil Procedure Code a Judge in a Small Cause suit may reduce his remarks to a minimum and they need not contain more than the points for determination and the decision thereon but this minimum must be intelligible, thus enabling the High Court in revision to satisfy itself that the decree or order was according to law without the necessity of perusing the whole record. The learned Judge ought to have written a judgment according to law to enable this Court to see if the case had been decided properly. He is directed to write his judgment according to law and submit the file to this Court without any unnecessary delay. The case will then be taken up by this Court for disposal. An early date will be fixed as soon as the record is received back from the lower Court after compliance.

N. K. & A. *Case remanded.*

OUDH CHIEF COURT.

Second Civil Appeal No. 111 of 1931.

November 26, 1931.

RAZA, J.

BADRI MISIR AND OTHERS—APPELLANTS

versus

SHANKAR MISIR AND OTHERS—RESPONDENTS.

Hindu Law—Joint family—Partition of some property—Status of members with regard to undivided property—Possession of one, if adverse to others.

Where the co-parceners in a joint Hindu family make a partition and divide the joint property with the exception of a portion of it, they are, in absence of indication to the contrary, tenants-in-common with reference to the excepted property. The fact that the property was originally acquired by the members of the family as trespassers does not make any difference. *Dagadu Govind odake* v. *Sakhubai Nana Bodake* (1), followed. [p. 703, cols 1, & 2.]

The possession of one tenant-in-common is not adverse to the other until ouster. [p. 703, col. 1.]

Second Appeal against a decree of the Additional Sessions Judge, Sultanpur, dated the 22nd December, 1930, reversing that of the Munsif, Sultanpur, dated the 18th November, 1929.

Mr. *Hyder Husein*, for the Appellants.

Mr. *Ghulam Imam*, for the Respondents.

Judgment.—This is an appeal from a decree of the Additional Subordinate Judge, Sultanpur, dated the 22nd December, 1930, setting aside a decree of the Munsif, Sultanpur, dated the 18th November, 1929.

The facts of the case are fully set out in the judgment of the learned Additional Subordinate Judge and they need not be repeated in detail.

The dispute in this case relates to certain *zemindari* shares in three villages called Kalkaura, Nakha and Kambhain in the District of Sultanpur.

The principal parties to the suit are the descendants of one Jasai Ram who died long ago. The plaintiff is the son of Sat Narain, one of the three sons of Jasai Ram. The principal contesting defendants are the descendants of the remaining two sons of Jasai Ram, namely, Ghisiawan and Bindeshuri. All the descendants of Jasai Ram were living jointly as members of a joint Hindu family before the year 1897. The property in suit originally belonged to one Beni Dayal Singh. Bindeshuri obtained a possessory mortgage from Beni Dayal Singh on the 28th August, 1875, in respect of certain shares in five villages including the three villages mentioned above. The property in suit was not comprised in the said mortgage but the descendants of Jasai Ram had been in possession of that property also along with the shares covered by the mortgage in the three villages mentioned above. It is not clear by what right they got possession of the property in suit which was not comprised in the mortgage, but the fact remains that they got possession of the property and held it as their property for more than twelve years. Achchebar Singh (defendant No. 13 (since deceased) sued for redemption of certain shares as transferee from Bajrang Singh son of Beni Dayal Singh in 1915. Bajrang Singh was the father of the defendant No

12. It was finally decided in that suit that Achchebar Singh was not entitled to redeem the entire shares of Beni Dayal Singh in villages Kalkhaura, Nakha and Kambhain and that he could redeem only the shares covered by the mortgage of 1875. The property in suit was thus left in the possession of the descendants of Jasai Ram.

The learned Additional Subordinate Judge has found that the property in suit as well as the property covered by the mortgage was the joint property of all the descendants of Jasai Ram and that the plaintiff is entitled to a one-third share in the property in suit which was not included in the partition which took place among the descendants of Jasai Ram in the year 1897. He held that the descendants of Jasai Ram were in possession of the property in suit as joint tenants before the partition of 1879 and that it came to be held after that partition by all the descendants of Jasai Ram as tenants-in-common. He therefore gave the plaintiff a decree for a one third share in the property in suit holding that the plaintiff's claim was not barred by time.

Some of the defendants have filed this appeal in this Court.

In my opinion there is no substance in this appeal

The findings of the learned Additional Subordinate Judge that the property in suit is the joint property of all the descendants of Jasai Ram and that it came to be held after the partition of 1897 by all the descendants of Jasai Ram as tenants-in-common are findings of fact based upon admissible evidence and cannot be impugned in second appeal. The possession of one tenant-in common is not adverse to the other until ouster. As pointed out in the case of *Dagadu Govind Bodake* v. *Sakhubai Nana Bodake* (1), where the co parceners in a joint Hindu family come to partition and divide the joint property with the exception of a portion of it, they are, in absence of indication to the contrary, tenants-in-common with reference to the excepted property. I am not prepared to accept the contention that the property in suit was not the joint property of the descendants of Jasai Ram as they had originally acquired it as trespassers. In the first place it appears that this plea was not raised in defence in the lower Courts. In the second place I think there is no substance in this plea. It may be that the property was originally acquired by the members of the joint family as trespassers, but they held it as such for more than twelve years and it became the property of the family after that period in which all members were interested. They held the property treating it as joint property of the family. The plea in question must therefore be repelled in second appeal. No ouster or adverse possession is satisfactorily established.

In my opinion no case has been made out to disturb the judgment of the learned Additional Subordinate Judge. Hence I dismiss the appeal with costs.

N. K. & A. *Appeal dismissed.*

(1) 73 Ind. Cas. 369; 47 B. 773; 25 Bom. L.R. 806; A. I.R. 1924 Bom. 31.

OUDH CHIEF COURT

SECOND CIVIL APPEAL No. 39 of 1931.

November 17, 1931.

HASAN C. J. AND KISCH, J.

BISHESHWAR PANDE AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHAWANI DIN SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Revenue Record—Entry contrary to express agreement—Evidentiary value

Where an entry in the village papers to the effect that certain persons are under-proprietors is contrary to the express terms of a compromise between the parties is no value whatsoever, the presumption of its corectness is destroyed by the terms of the compromise.

Second Appeal against a decree of the District Judge, Gonda, dated the 5th November, 1930, reversing that of the Subordinate Judge, Gonda, dated the 29th May, 1930.

Messrs. *G. Hasan* and *Ali Jawwad*, for the Appellants.

Mr. *Hyder Husein*, for the Respondents.

Judgment—This is the defendants' appeal from the decree of the District Judge of Gonda dated the 3rd November, 1930, reversing the decree of the Subordinate Judge of the same place dated the 29th May, 1930.

In the suit out of which this appeal arises the plaintiffs asked for a declaration that the defendants have no proprietary or under proprietary rights in certain plots of land, the list of which was attached to the plaint, situate in village Daulatpur, *mohal* Inderdawan Singh, Pargana Nawabganj, in the District of Gonda. The defences with which we are now concerned, were that the plots in question were held by the defendants in under-proprietary rights and that the suit was barred by limitation. Both these defences were upheld by the Court of first instance and the plaintiffs' suit was dismissed On appeal the learned District Judge of Gonda has disagreed with the Subordinate Judge on both points, allowed the appeal and decreed the plaintiffs' suit.

In second appeal before us the same two questions are reiterated on behalf of the defendants. The judgment of the learned District Judge is so clear and exhaustive that we do not think that we can usefully add to it. The plaintiffs are admittedly the owners of the *mohal* and they concede that the defendants held the plots in question in the right of tenants. The onus, therefore, is on the defendants to establish that they possess rights higher than those conceded to them by the plaintiffs. In discharge of this onus they rely on entries made in village papers since the year 1200 up to the present day. These entries certainly support the defendants' case, and we are asked to give effect to them, as, it is argued, they must be presumed to be correct. The learned District Judge has faced this argument in all its details and has come to the conclusion that the presumption is wholly rebutted by the agreement entered into between the predecessors-in-interest of the present parties so far back as the year 1893 The agreement was filed in the form of a compromise in proceedings for mutation of names in respect of a much larger area which comprises the plots in suit. The plaintiffs' predecessor-in-interest claimed by an application in the Court of Revenue that his name be entered in respect of that area in the revenue papers as proprietor. The appellants' predecessor seemed to have resisted the application up to a certain stage and then the parties mutually settled the controversy by filing the agreement to which reference has just now been made. On the record of this case this agreement is marked as Ex. 3. Except five plots the rest of the plots in suit have been found by the learned District Judge to be covered by the terms of this compromise.

On the question of the construction of this agreement, there can be no two opinions. The appellants' predecessor in-interest agreed to hold the plots in suit, except the five plots, in the right of a tenant on a payment of yearly rent of Rs. 31. As regards the remaining five plots, the learned District Judge is of opinion that they too may well be considered to have been included in the agreement, Ex. 3 We are not prepared to affirm this opinion, but, as we have already said, the onus lay on the defendants to show that they have rights superior to tenancy rights in any of the plots in suit and we think that they have failed to discharge that onus.

On the question of limitation, we agree with the learned District Judge that the suit out of which this appeal arises is not barred by time. The learned District Judge rightly thinks that this point as well as the point just now disposed of are covered by the decision of their Lordships of the Judicial Committee in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (1). In the course of arguments the learned Advocate for the appellants placed before us a decision of a Bench of the late Court of the Judicial Commissioner of Oudh in *Bipin Chandra Chatterji* v. *Dawan Singh* (2), as a decision in support of his arguments. We think that decision is wholly irrelevant to the facts of this case. The entries in the village papers in favour of the appellants were made in teeth of the terms of the compromise. They are therefore of no value whatsoever, and whatever evidential effect they had by reason of a presumption in their correctness, that effect has been altogether swept away by the clear terms of the compromise.

The appeal fails and is dismissed with costs.

A. *Appeal dismissed.*

(1) 74 Ind. Cas. 476; 50 I. A. 202; A. I. R. 1923 P. C. 118; 21 A. L. J. 757; 40 A. 419; 26 C. C. 231; 45 M. L. J. 623; 9 O. & A. L. R 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 33 M. L. T. 321 (P. C.)

(2) 71 Ind. Cas. 121; 2 O. W. N. 894; A. I. R. 1925 Oudh 732; L. R. 7 A (O) 26.

LAHORE HIGH COURT

Criminal Revision Petition No. 1307 of 1931.

February 17, 1932.

BROADWAY, J.

IBRAHIM AND OTHERS—PETITIONERS

versus

GURAN DITTA MAL—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 436—Order directing Magistrate to frame charge—Legality of.

Section 436, Criminal Procedure Code, only empowers a Sessions Judge to direct a further enquiry; it does not empower him to direct the Magistrate to frame a charge and to try the accused on that charge.

Petition for revision of an order of the Sessions Judge, Gurdaspur, dated the 13th of July, 1931, reversing that of the Magistrate, First Class, Gurdaspur, dated the 2 st of March, 1931.

Mr. *Mohsin Shah*, for the Petitioners.

Mr. *Muhammad Amin Khan*, for the Government-Advocate and Mr. *Shamair Chand*, for the Respondents.

Judgment.—Five persons were sent up for trial charged with offences under ss. 323 and 325 of the Indian Penal Code. A Magistrate of the First Class enquired into the offences and discharged four of the five persons sent up, under s. 253 of the Criminal Procedure Code. He framed a charge against the fifth man, named Ramzan, under s. 325 of the Indian Penal Code. He then apparently was transferred, for Ramzan was tried by another Magistrate who acquitted him. A petition for revision was then filed by the complainant against the order discharging the four persons referred to above. This petition came before the learned Sessions Judge, Gurdaspur, who found that the Magistrate had apparently made no reference whatever to the evidence on the record but had mentioned in the course of his order of discharge that he had examined the Police papers without recording the result of his examination and finding that there had not been a proper enquiry and that the said Magistrate had acted perversely, he accepted the petition for revision and ordered a further enquiry. Unfortunately, the order was as follows:—

"* * * *I direct further enquiry against the respondents who will be charged for causing simple hurts to the complainant and who will be duly tried on that charge.* * * * * * * * * "

This order was passed on the 7th February, 1931. The case went back to a Magistrate of the First Class Sheikh Abdul Rahim who took up the inquiry. No further evidence was led before him and apparently neither party wished him to commence proceedings *de novo*. The Magistrate, therefore, proceeded to record an elaborate order weighing all the evidence on the record and, finally, came to the conclusion that that evidence did not carry conviction and, for that reason the four persons were discharged.

Against this order of discharge the complainant preferred a second petition under s. 436 of the Criminal Procedure Code, challenging in the very first ground the construction placed by the Magistrate on the order of the learned Sessions Judge dated the 7th February, 1931. The learned Sessions Judge decided the petition on the first ground. He held that he had ordered the learned Magistrate to frame a charge and to try persons against whom that charge was framed, and that, therefore, the Magistrate had misinterpreted the order passed and that he had acted wrongly in not framing a charge and proceeding to try the said persons He accordingly accepted the petition and directed another Magistrate to read carefully the order of the 7th February, 1931, and directions contained therein and then to proceed in accordance with law.

It is against this order that the four persons concerned have submitted this petition to this Court and on their behalf, Mr. Mohsin Shah has urged that the learned Sessions Judge had no power to order a trial, his power under s. 436 of the Criminal Procedure Code being confined to the ordering of a further enquiry, and that, therefore, the Magistrate had acted within his jurisdiction in considering the question as to whether, on the record, a charge should or should not be framed. On the other hand, it has been contended by the learned Counsel for the Crown, firstly, that this Court has no jurisdiction in the matter and, secondly, that the learned Sessions Judge when passing the order dated the 7th February, 1931, acted within his jurisdiction. So far as the first objection is concerned, I am satisfied that I am empowered, sitting as a Court of Revision, to rectify any error in law made by Subordinate Courts which error would lead to injustice. As to the second contention, s. 436 of the Criminal Procedure Code is perfectly clear and only empowers a Sessions Court to direct a further enquiry. It has been held more than once that an enquiry is not a trial and the definition of the word "enquiry" to be found in s. 4 (*k*) of the Criminal Procedure Code bears out that

interpretation. I must hold, therefore, that the learned Sessions Judge was in error when he directed the Magistrate to frame a charge and to try the persons so charged on that charge. All that he was empowered to do was to direct the Magistrate to hold a further enquiry and then to proceed in accordance with law. If the result of that enquiry warranted his so doing, the Magistrate was to frame a charge. If the result of the inquiry rendered it, in the opinion of the Magistrate, impossible to frame a charge he was entitled to discharge the persons before him. In the present case the Magistrate has dealt very thoroughly with the evidence and has come to a considered opinion on that evidence and that opinion is that it is insufficient for a charge.

In these circumstances, I accept this petition, set aside the order of the learned Sessions Judge dated the 13th July, 1931, and restore the order of discharge passed by the Magistrate on the 21st March, 1931.

A. *Petition accepted.*

LAHORE HIGH COURT.

Civil Reference No. 14 of 1931.

January 21, 1932.

BROADWAY AND ADDISON, JJ.

GOVERNMENT MAIL MOTOR SERVICE, RAWALPINDI—ASSESSEES —PETITIONERS

versus

THE COMMISSIONER OF INCOME-TAX —RESPONDENT.

Income Tax Act (XI of 1922), ss. 23 (4), 10 (2) (vi) —Deductions—Depreciation of motor cars—Assessment to best judgment—Notice for assessment for subsequent year—Claim for depreciation of motor cars in use for more than five years—Admissibility—Failure to keep depreciation account, effect of.

Where assessment for the years 1923-24 to 1927-28 was made to the best of the Income-tax Officer's judgment under s. 23 (4), Income Tax Act, and the assessee on receiving notice of assessment for the year 1928-29, claimed depreciation in respect of motor cars which had been in use in 1922-23 and the claim was disallowed:

Held, that in view of the fact that the assessment for the years 1922-24 to 1927-28 was final and not subject to appeal and that for the purpose of allowing depreciation the life of motor cars is taken as five years under the Income-tax rules, the assessee was not entitled to claim depreciation on the cars which were in use from 1922-23, in a year subsequent to the said five years [p. 706, col. 2.]

Held, further, that the fact that no depreciation account had been maintained as required by the rules did not give rise to any inference that no allowance for deductions had been made in the assessment for the years 1922-24 to 1927-28. [p. 707, col. 1.]

When an assessment is made to the best of the Income Tax Officer's judgment on a net income under s 23 (4) of the Act all expenses incidental to the business must be assumed to have been considered in arriving at the net income assessed. [*ibid*]

Case referred by the Commissioner of Income Tax, Punjab, North West Frontier and Delhi Provinces Lahore, with his No. 221 531-1132, dated the 23rd July, 1931.

Mr. *Kirpa Ram Bajaj*, for the Petitioners.

Mr. *J. N. Aggarwal*, for the Respondent.

Addison J.—The Commissioner of Income-Tax, Punjab, has referred the following question of law for decision, namely:—In view of the fact that the assessments in this case for the years 1923-1924 to 1927-28 inclusive were made to the best of the Income-Tax Officer's judgment under s. 23 (4) of the Act and that for purposes of allowing depreciation under the Income tax rules the life of motor-cars used in connection with the business is taken as five years, is the assessee entitled to claim depreciation on the cars in use from 1922-23 in a year subsequent to the five years?

The facts stated are as follows:—No return was made by the Government Mail Service, Rawalpindi, for the years 1923-24 to 1927-28 inclusive and the Income-Tax Officer assessed the income of the firm for these years under s 23 (4) to the best of his judgment. For the year 1928-29 an assessment was made on the firm again under s. 23 (4) on an income of Rs 1,60,000. Subsequently the Income-Tax Officer considered that his original assessment omitted certain profits and he issued notice to the firm under s. 34 read with s. 22 (2) of the Act. On receiving this notice the firm in question filed a return declaring their income to be Rs. 1,59,765. In these proceedings the firm claimed depreciation on the prescribed form to the extent of Rs. 53,580 on certain motor-cars and lorries valued at Rs. 2,67,903. The Income Tax Officer held that depreciation was admissible only on cars of the value of Rs. 84,631 and on this sum allowed depreciation to the extent of Rs. 16,972. As regards the other cars for which depreciation was claimed and disallowad the reason given by him was that they were in use in 1922-23 and thus, as depreciation was only permissible for five years, there could be no claim for depreciation in the year 1928-29, the assessments for the preceding five years having been made to the best of the

Income-Tax Officer's judgment under s 23 (4), these assessments being final and not capable of being re-opened. The assessee's appeal was dismissed by the Assistant Commissioner of Income-tax and this reference was thereupon demanded and allowed by the Commissioner of Income Tax.

The matter is simple. In my judgment the question referred must be answered in the negative. Once an assessment has been made to the best of the Income Tax Officer's judgment on a net income under s. 23 (4) of the Act it follows that all expenses incidental to the business must be assumed to have been taken into consideration in arriving at the net income assessed. Such an assessment is final, conclusive and not open to appeal. It was argued, however, that as no depreciation account was maintained by the Income Tax Officer as required by the departmental rules it should be assumed that this allowance was not given for the years referred to. This does not follow. The depreciation account is merely for the convenience of the department; nor does the fact that under s. 10 (2) (*vi*) of the Act the depreciation allowance can be carried forward to a subsequent year if there is no profit in the particular year for which it is claimed, help the assessee. In all the years in question there was a profit. In my judgment the assessee has no case and it must be held that the depreciation demanded is inadmissible as all claim to it must be taken to have been exhausted in the assessments for the five preceding years in which it was claimable. I would allow the Commissioner of Income-Tax his costs. Counsel's fee Rs. 100.

Broadway, J.—I concur.

N. K. & A. *Answered in the negative.*

LAHORE HIGH COURT.

Criminal Revision Petition No. 1189 of 1931.

January 29, 1932.

JAI LAL, J.

{*Musammat* SABHAI—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Frontier Crimes Regulation (III of 1901), ss. 30, 48, 49 and 59—Jurisdiction of High Court to revise orders of Sessions Judge and Magistrate on merits—Charge for adultery—Strict proof of adultery, necessity of.

The provisions of ss. 48 and 49 of the Frontier Crimes Regulation apply only to orders passed by the Deputy Commissioner and the Commissioner acting under the express provisions of the Regulation. The High Court has, therefore, jurisdiction to revise the orders of the Sessions Judge or a Magistrate of the First Class in a case tried by them under s. 59 of the Regulation. [p. 708, col .2.]

In a charge of adultery under s. 30 of the Frontier Crimes Regulation, it is necessary to prove by direct evidence either the commission of adultery or such circumstances as raise an irresistible conclusion that adultery has been committed. This cannot be done by merely alleging that the woman is of bad character and that another person has been visiting her father with whom she had been residing. [p 708, col. 2; p. 709, col. 1.]

Petition for revision of an order of the Sessions Judge, Multan, dated the 24th July, 1931, affirming that of the Magistrate, First Class, Leiah, dated the 18th May, 1931.

Mr. *S R Laul*, for the Petitioner.

Mr. *Khurshaid Zaman* for The Government Advocate, for the Respondent.

Order.—This petition for revision raises an important question of jurisdiction. The petitioner *Musammat* Sabhai has been convicted under s. 30 of the Frontier Crimes Regulation III of 1901 and has been sentenced to two years' rigorous imprisonment. Section 30 of the Regulation has enacted a substantive offence and provides that a married woman who knowingly and by her consent has sexual intercourse with any man who is not her husband is to be deemed to be guilty of the offence of adultery punishable with imprisonment which may extend to five years. The petitioner was tried and convicted by Sardar Balwant Singh Garewal, Magistrate First Class, Leiah in the District of Muzaffargarh and her appeal was dismissed by the Sessions Judge of Multan on its merits.

As I was doubtful whether there was sufficient evinence in support of the conviction I issued notice to the Crown; at the hearing of the petition the Crown was represented by Mr. Khurshaid Zaman, Advocate who raised a preliminary objection that this Court is not competent to interfere on revision where a person has been convicted under any section of the Regulation concerned and, in support of this objection he relied upon ss. 48 and 49 of the Regulation, the former of which provides that "no appeal shall lie from any decision given, decree or sentence passed, order made, or act done, under any of the provisions of this Regulation," and the latter authorises the Commissioner to call for the record of any proceeding under the Regulation and revise any decision, decree, sentence or order given, passed or made therein. It appears

to me, however, that these two sections merely relate to orders passed by the "Deputy Commissioner" or the "Commissioner" in exercise of powers expressly conferred on them by the Regulation and which mainly have the effect of ousting the jurisdiction (original and appellate) of the ordinary Courts. So far as the appellate and revisional jurisdiction of this Court with regard to proceedings pending before or cases decided by the Magistrates or Sessions Judges is concerned it is not affected by these sections.

Section 59 of the Regulation expressly provides that an offence punishable under s. 29 or s. 30 of the Regulation may be tried by a Court of Session or by the Court of a Magistrate of the First Class and that the offence punishable under s 37 may be tried by any Magistrate of the First Class. It seems to me that the present case was decided by the Magistrate, First Class, under the provisions of s. 59 and therefore the Appellate Jurisdiction of the Sessions Judge and the revisional jurisdiction of this Court is not affected.

The Regulation mentioned above has the effect of constituting special tribunals for the trial of specified offences, of providing special procedure for dealing with certain acts which affect public tranquility and, lastly, of constituting new offences. It further confers power on the Deputy Commissioner to withdraw proceedings from the ordinary Courts and to commit them for trial to specially constituted tribunals and to dispose of them himself and also to pass certain orders himself without reference to such tribunals. But persons who offend against the ordinary criminal law or against the newly constituted offences are amenable either to the jurisdiction of the ordinary Criminal Courts or, at the discretion of the Deputy Commissioner, to the jurisdiction of the specially constituted tribunals. When, however, jurisdiction is exercised by ordinary Criminal Courts even with regard to the specially constituted offences, the exercise of such jurisdiction by them is subject to the appellate and revisional jurisdiction of the superior Courts. The application of the provisions of ss. 48 and 49 is, therefore, only to orders passed by the Deputy Commissioner and the Commissioner acting under the express provisions of the Regulation, I am, therefore, of opinion that this Court has jurisdiction to revise the order of the Sessions Judge and the Magistrate in the case on its merits. If, however, I had held that the objection raised on behalf of the Crown is sound still I would have had jurisdiction to set aside the order of the Sessions Judge owing to its being without jurisdiction, thus leaving the convict to invoke the revisional jurisdiction of the Commissioner. But I am of opinion that I am competent to revise the judgments of the Magistrate and also of the Sessions Judge on the merits. I have not expressed any opinion on the merits of the case as I have not heard Counsel on that aspect of the case, and I proceed to do so now. To be heard on 29th January 1932.

After further hearing his Lordship made the following

Order.—This judgment will be read in continuation of my order of the 21st January, 1932. I have now heard Counsel and am of opinion that an offence under s. 30 of the Frontier Crimes Regulation has not been proved against the petitioner. A complaint was filed by the husband of the petitioner but no specific time was mentioned when the petitioner had committed the offence. Some evidence was given at the trial by persons who alleged that they had actually seen her committing adultery but the occasion mentioned by them is different to that mentioned by the complainant in his statement. In any case the evidence has not been considered to be reliable and the Sessions Judge has upheld the conviction merely on the testimony of the husband who in his examination in-chief did not state that he had witnessed the offence on any particular occasion though in cross examination he did say that he had actually seen the persons concerned committing adultery with the petitioner a few days before the statement. The Sessions Judge has upheld the conviction for the following reasons.

"Now, in a case like the present, the important witness is the husband. For this reason the law insists that such a complaint shall be brought by the husband. The offence is such which by its nature is committed in secret, and it is not likely that there will be a number of eye-witnesses to it. The evidence of alleged eye witnesses is, therefore, *a priori* aspect but unless very good reason is shown why the husband should bring a false charge, it is reasonable to believe him. It is unlikely that a husband will accuse his wife of adultery without a cause."

This is a reasoning which does not appeal to me. The husband may have other motives for bringing a false charge and in this case it is conceded that the husband and wife have been living separately. The latter is living with her father. The mere fact that another person has been going to visit the father of the wife is no proof of her adultery with that other person. In a

charge for adultery it is necessary to prove by direct evidence either the commission of adultery or such circumstances as raise an irresistible conclusion that adultery has been committed. This in my opinion cannot be done by merely alleging that the woman is of bad character and that another person has been visiting her father with whom she had been residing.

The evidence of the witnesses who have deposed to have seen the petitioner committing adultery is not reliable and, as I have already stated above, does not correspond with the testimony of the husband. I have not been able to follow the whole of the judgment of the learned Sessions Judge but after an examination of the evidence am of opinion that the charge has not been proved against the petitioner.

I accordingly accept the petition and setting aside the conviction acquit *Musammat* Sabhai and direct that she be released from jail forthwith.

N. K. & A. *Petition accepted.*

LAHORE HIGH COURT.

Civil Revision Petition No 7 of 1932.

February 29, 1932.

BROADWAY, J.

EMPEROR—PETITIONER

versus

PRITAM SINGH—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 439, 497 (5)—Bail—Power of High Court to cancel—Grounds for releasing on bail.

The High Court has jurisdiction to consider whether or not the order of a Subordinate Court passed under s. 497, Criminal Procedure Code, should or should not be maintained and also whether under the provisions of sub-s. 5 of s. 497, an accused person should be allowed to continue at large.

Where a person is accused on a charge of a serious nature such as an attempt to murder, bail should not be allowed for the reason that the injured person was not well enough to attend the identification parade.

Petition praying that the bail of Pritam Singh be cancelled and he be remanded to custody.

Mr. *C. H Carden Noad*, The Government Advocate, for the Petitioner.

Mr. *J. G Sethi*, for the Respondent.

Order.—As a result of certain happenings at Ludhiana on the 29th November, 1931, a lad named Ashiq Hussain was seriously stabbed. Certain persons were arrested under s. 307, Indian Penal Code, on a charge of attempting to murder the said lad. The Magistrate refused to release these persons on bail whereupon they moved the Sessions Judge asking that they be allowed on bail. The learned Sessions Judge recorded a somewhat lengthy order on the 5th December, 1931, enlarging the said persons on bail on their furnishing security in the sum of Rs. 2,000 with one surety each. One of the principal reasons for allowing bail appears to have been that up to the 5th December, 1931, identification parade had not been held and, therefore, the prosecution were not in a position to state definitely which, if any, of the persons arrested had actually inflicted the knife wound on the boy.

An application has now been put in on behalf of the Crown under s. 497 (5), Criminal Procedure Code, setting out the facts and asking that the bail of one of the said persons, namely, Pritam Singh, should be cancelled and he should be remanded to custody. Notice of this application was issued on two occasions but strange to relate on neither occasion was it possible to serve Pritam Singh with the notice although Mr. Sethi who appeared for him to-day informed me that Pritam Singh had been regularly appearing in Court at the hearings of the case which appears to be proceeding. I have also been told to-day that, as soon as the injured lad was in a condition to do so, he was called upon to identify his assailant and that he had identified Pritam Singh as the man who actually inflicted the knife wound on him.

Mr. Sethi has contended first that this Court has no jurisdiction either under s 497 or s. 439, Criminal Procedure Code, to interfere with the discretion of the Sessions Court. In this veiw I am unable to concur. Had the learned Sessions Judge refused to admit Pritam Singh to bail this Court would undoubtedly have been moved in the matter and could, had it thought fit, have passed an order in favour of Pritam Singh. Similarly, to my mind, it is within the jurisdiction of this Court to consider whether or not the order of the Sessions Judge passed under s. 97, Criminal Procedure Code, should or should not be maintained and also whether under the provisions of sub-s. (5) of s 497, Criminal Procedure Code, Pritam Singh should be allowed to continue at large. While I am in favour of exercising the Court's discretion in matters relating to bail liberally in the case of ordinary offences, I do not think that when a person is arrainged on a charge of so serious a nature as attempt to murder, bail should be allowed especially,

when the main reason appears to have been that the injured person had not been well enough to be subjected to the ordeal of an identification parade. Under these circumstances I consider that at the present moment Pritam Singh should be taken into custody. I, therefore, cancel his bail and direct that he surrender to that bail and be taken into custody until such time as the Magistrate concerned is in a position to come to a definite conclusion in the case.

A. *Bail cancelled.*

LAHORE HIGH COURT.

Second Civil Appeal No. 1714 of 1930.

January 7, 1932.

HARRISON, J.

GHASI—DEFENDANT—APPELLANT

versus

MANGA—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100, O. XXXII, r. 1, O. VI, r 17—Suit by major as minor—Application for amendment—Amendment, when to be allowed—Bona fides, *whether question of fact.*

Where a suit is instituted by a next friend for a person described as a minor who is really a major and an application is subsequently made for permitting the real plaintiff to continue the suit as a major what the Court has to see is whether at the time the wrong recital was entered in the plaint those responsible for it were acting *bona fide* or not, that is to say, whether they themselves were mistaken and if there was no mistake and at best gross carelessness permission should not be granted. *Amritsaria* v. *Gamun* (1), *Durga Devi* v. *Gur Narain* (2), *Shanmuga Chetty* v. *Narayana Ayyar* (3), *Narayan Chandra Das* v. *Dulal Chandra Dutta* (4), *Taqui Din* v. *Obaidulla* (5), *Sheorania* v. *Bharat Singh* (6) and *Ruhul Amin* v. *Shankar Lal* (7), referred to.

Though the question whether the conduct of a person was *bona fide* is usually one of fact the High Court can interfere in second appeal if there is no evidence to support the finding. [p. 711, col 2.]

Second Appeal from a decree of the Senior Subordinate Judge, Karnal, dated the 2nd July, 1930, affirming that of the Subordinate Judge, Fourth Class, Panipat, dated the 16th December, 1929.

Mr. *Din Dayal Khanna*, for the Appellant.

Messrs. *Shamair Chand*, *Mehr Chand Sud* and *Qabul Chand*, for the Respondents.

Judgment.—The only point agitated in this second appeal is what should be the consequences on the facts found. The plaintiff, a man of over twenty-three at the time the plaint was presented, sued as a minor with his mother as his next friend. On the 22nd of May, 1929, the plaint was presented in this form. On the 17th of August the plaintiff, who had been shown as minor in the plaint, put in a petition that he wished to continue the suit as a major. An order was passed that he was to come with his next friend at the next hearing and on the 11th of November he again presented a similar application. On the 11th of November he finally applied to be treated as a minor and to be allowed to continue the suit as such and to be represented by his next friend. The question of his age was put in issue and the trial Court decided that he was over twenty-three years at the time the suit was instituted. On the application put in on the 2nd of December, to the effect that if the Court found that he, the plaintiff, was a major he wished to be allowed to amend the plaint accordingly, permission for amendment was given and a decree for pre-emption of the house on payment of Rs. 50 was passed.

On appeal the learned District Judge wrote a lengthy judgment in which he found as follows :—

"The plaintiff was born on 24th February, 1906, and was more than twenty-three years old at the time of the suit. Two facts are against this finding. In the sale deed itself plaintiff is mentioned as a minor. The second fact is that both plaintiff and his brother who died in 1910 and was born in 1909 were named Manga. Two living brothers never have the same name and it is, therefore, very probable that plaintiff was never born on 24th February, 1906. Plaintiff also does not look twenty-four. This means that though the evidence shows that plainliff was born in 1906 he was really not as old as 24."

This is not very satisfactory, but the finding remains and the entries relating to the three sons of the father of the plaintiff make the matter perfectly clear, when read with P. 2, the entry of death. He must have been at least twenty-three years of age at the time the suit was instituted. There were three sons. The youngest was born in 1909 and he is shown as having died at the age of one year in 1910. The plaintiff must be the eldest or the second son. Whatever the reason of the identity of the two names may be whether faulty copying or bad writing or something else, the fact remains that the plaintiff cannot have been less than twenty-three at the time the suit was instituted.

The judgment continues:—

"These two circumstances make the bringing of a suit in his name through a next friend a *bona fide* mistake."

The rulings are then quoted and the Court holds, being under the impression that it was a *bona fide* mistake, that the amendment was rightly allowed and the decree rightly given.

Counsel contends that the only Lahore ruling on the point, *Amritsaria* v. *Gamun* (1), does not deal with the question of the amendment except *obiter*, but treating the fact of the amendment as past history which cannot be gone into, holds that the failure of the plaintiff to sign the plaint as a major after the mistake was discovered is immaterial. This is so. The only other Lahore case is *Durga Devi* v. *Gur Narain* (2), the converse case, for the minority was established on the challenge of the defendant and proved by evidence, and it was held that where the plaintiff had no knowledge of his minority, and had no intention of deceiving the Court, an opportunity should be given to him to amend the plaint. It is argued with considerable force that the same principle applies where a major sues as a minor. He is presumably well aware of the fact of his majority and it is only where he is ignorant that he has attained majority that he can claim that he should be allowed to amend his plaint. In *Shanmuga Chetty* v. *Narayana Ayyar* (3) and *Narayan Chandra Das* v. *Dulal Chandra Dutta* (4) it is clearly stated that the mistake was *bona fide*. *Taqui Din* v. *Obaidulla* (5) goes further and would allow amendment whether the mistake was intentional or not. As opposed to these we have *Sheorania* v. *Bharat Singh* (6) which takes the extreme view in the opposite direction and *Ruhul Amin* v. *Shankar Lal* (7), a case very closely resembling the present where the minor was 24 years of age at the time the suit was instituted. Counsel contends that the finding that it is a *bona fide* mistake is a finding of fact and cannot be challenged in second appeal. If this be conceded it is only a finding of fact so far as the conduct of the mother is concerned, and although at the time the suit was instituted the major, being shown as a minor, technically took no part in the matter, his subsequent conduct brings, him, I think, into the picture and makes it necessary for him to show that he was acting *bona fide* throughout. This he has wholly failed to do. It is not shown or stated that he did not know of the presentation of the plaint, and his subsequent conduct in presenting two petitions to be allowed to be treated as major and finally asking to be allowed to remain a minor, shows anything but good faith on his part. If the definition of *bona fide* be taken from the Limitation Act and it be held, as I understand the District Judge to have thought possible, that the mistake arose from a slavish following of the recital in the sale deed, possibly again by the lawyer engaged, it cannot be said that anybody exercised due care and attention While I am of opinion that a finding that the conduct is *bona fide* is usually a finding of fact being an inference of fact from facts, here there are no facts from which to make the inference. There is no evidence whatsoever as to how the next friend or the minor or the lawyer came to make the mistake.

While, therefore, I think the Allahabad rule is too strict, it appears to me that the rule laid down in *Taqui Din* v *Obaidulla* (5) is too lenient and what is to be seen is whether at the time the wrong recital was entered in the plaint those responsible for it were acting *bona fide* or not, that is to say, whether they themselves were mistaken and though it would be possible to go a long way in presuming the fact under certain circumstances, no such circumstances here exist.

I hold, therefore, that there was no mistake whatever and that at best there was gross carelessness, and at worst the parties concerned deliberately misled the Court. It is possible to theorise as to why plaintiff was shown as minor, but I do not think there is any advantage in doing so. I am of opinion that the appeal must be accepted and the suit dismissed with costs throughout.

I think that I should not conclude without giving two further quotations from the judgment of the District Judge:—

"To be sure their evidence is worthless as they are not shown to have bought or purchased houses and do not give the date on which they base their opinion of the market price, but at the same time defendant gave no rebuttal and there is no evidence before me that this sum does not represent the true market price of the house."

This is an entirely wrong way of looking at the matter. If the evidence is worthless as the District Judge held, it can establish nothing and the position is precisely the same as if no witnesses had been produced. Again

"There is little to choose between the evidence of either side and the volume of the evidence is greater on defendant's side."

If there is little to choose between the evidence of either side, that side must lose on which the burden of proof has been laid.

A. *Appeal accepted.*

(1) 89 Ind. Cas. 363; A. I. R. 1926 Lah. 82; 1 Lah. Cas 50.
(2) 69 Ind. Cas. 401; A. I. R. 1924 Lah. 157.
(3) 41 Ind. Cas. 510; 40 M. 743.
(4) 100 Ind. Cas. 469; A. I R. 1927 Cal. 477.
(5) 21 C. 866.
(6) 20 A. 90; A. W. N. 1897, 203.
(7) 77 Ind. Cas. 30; 45 A. 701; A. I. R. 1924 All. 54; 21 A. L. J. 626.

LAHORE HIGH COURT.

Civil Revision Petition No. 376 of 1931.
March 7, 1932.

THEK CHAND, J.

AMIR SHAH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

Khan Sahib ABDUL AZIZ—DEFENDANT AND ANOTHER—PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 4—Pleader—Authority to refer—Document in writing, necessity of—'Act', meaning of—Referring pending suit to arbitration amounts to 'acting' and not merely 'pleading'.

Under O. III, r. 4 (1) of the Civil Procedure Code, as amended in 1926 a Pleader cannot act for any person unless he has been authorised for the purpose by a document in writing.

Where a *vakalatnama* authorised the Pleader to refer the dispute to arbitration and also gave authority to the Pleader to engage another Pleader who would have authority to exercise all the powers which had been given to the former and a Pleader who had been engaged by the original Pleader applied to the court for referring the dispute to arbitrators and the court accordingly referred the case:

Held, that the reference was illegal inasmuch as the Pleader who had signed the application for reference was not appointed in writing as required by O. III, r. 4, Civil Procedure Code.

Petition for revision of an order of the Subordinate Judge, Fourth Class, Lahore, dated the 18th May, 1931.

Mr. *Prakash Chandra*, for the Petitioners.

Sheikh *Akbar Ali*, for Mr. *Dina Nath Bhasin*, for the Respondents-Defendant.

Judgment—The suit which has given rise to this petition was instituted in the Court of the Subordinate Judge, Lahore, against the defendant respondent, by the following six persons as plaintiffs:—

1. Amir Shah (Major)
2. Iqbal Ali Shah | minors through their next friend Amir Shah, plaintiff No. 1.
3. Iftikhar Ali Shah |
4. *Musammat* Rahmat Bibi (major).
5. *Musammat* Mehraj Begum (major).

and 6. Syed Hussain Shah (major).

The plaint was presented by *Lala* Panna Lal, Advocate, who filed a *vakalatnama* on behalf of the plaintiffs In this *vakalat nama Lala* Panna Lal was specifically authorised to compromise the dispute or to refer it to arbitration. Authority was also given to him to engage another Legal Practitioner for himself, who would have authority to exercise all the powers which had been given to *Lala* Panna Lal by the *vakalatnama.*

On the 18th of May, 1931, *Lala* Panna Lal was not present in Court but another Advocate, *Lala* Joti Sarup, appeared for him. At the commencement of the proceedings, an application praying that the suit be referred to the arbitration of certain persons named therein, was presented. This application was signed by Amir Shah, plaintiff No 1, *Lala* Joti Sarup, Advocate and *Sheikh* Abdul Aziz, defendant. A joint statement by Amir Shah and *Lala* Joti Sarup, and another statement by the defendant were recorded supporting the application and praying that the dispute be referred to the arbitrators named in the application. Another application signed by Amir Shah, as the next friend of Iqbal Ali Shah and Iftikhar Ali Shah, minors, plaintiffs Nos. 2 and 3, was also filed asking for permission to refer the dispute to arbitration on behalf of the minors. The court granted both these applications and referred the case to the aforesaid arbitrators.

On the 2nd June, 1931, apparently before the arbitrators had entered upon their duties, a petition for revision was presented in this court on behalf of the plaintiffs Nos. 1 to 5 for setting aside the order of the Subordinate Judge referring the suit to arbitration. Various grounds are urged in the petition, but the only one argued before me is that the reference is invalid, inasmuch as *Musammat* Rahmat Bibi and *Musammat* Mehraj Begum (plaintiffs Nos 4 and 5) had not signed the application for reference to arbitration, nor were they personally present in Court on the 18th May, 1931, and that *Lala* Joti Sarup, who purported to act on their behalf, had no authority to refer the dispute to arbitration.

As stated above, the plaintiffs, including *Musammat* Rahmat Bibi and *Musammat* Mehraj Begum, had engaged *Lala* Panna Lal, Advocate, to file the plaint and prosecute the suit on their behalf, and in the *Vakalatnama* had specifically given him authority to refer the dispute to arbitration. It is clear that even if specific authority to refer the suit to arbitration had not been conferred on the Advocate by the *vakalatnama*, he still had the power to do so under the recent decision of their Lordships of the Privy Council in *Surendra Nath Mitra* v. *Tarubala Dasi* (1). But *Lala* Panna Lal did not sign the application to refer the dispute to arbitration, nor was he present in court on the 18th of May,

(1) 123 Ind Cas. 545; 57 C. 1311; A. I R. 1930 P. C. 158; Ind. Rul. (1930) P. C. 177; (1930) A. L. J. 489; 32 Bom. L. R. 645; 51 C. L. J. 309; 58 M. L. J. 551; 34 C. W. N. 553; 11 P. L. T. 461; 31 L. W. 803 (P. C.).

1931, when the Subordinate Judge passed the order of reference. On his behalf another Advocate *Lala* Joti Sarup appeared, and it was he who signed the application and made a statement in court praying that the dispute be referred to the arbitrators named therein. *Lala* Joti Sarup had filed no authority in writing either from *Musammat* Rahmat Bibi and *Musammat* Mehraj Begam or from their duly authorised Pleader, *Lala* Panna Lal to "act" on their behalf. Now, O. III, r. 4 (1) of the Code of Civil Procedure as amended by Act XXII of 1926, lays down that "no Pleader shall *act* for any person in any court, unless he has been appointed *for the purpose* by such person *by a document in writing* signed by such person or by his recognised agent or by some other person duly authorised by or under a power-of-attorney to make such appointment". In this Rule a distinction is made between "acting" and "pleading" and in cl. (5) it is provided that for "pleading" all that is necessary is that the Pleader shall file a memorandum of appearance, signed by himself and containing certain particulars. As used in the Code the word "Pleader" has the meaning given to it in s. 2 (15) of the Code of the Civil Procedure where it is defined as "any person entitled to appear and plead for another in court and includes an Advocate, a Vakil and an Attorney of a High Court". It is clear, therefore, that, while *Lala* Joti Sarup could appear for *Lala* Panna Lal to "plead" on behalf of the persons who had engaged the latter Advocate, he had no power to "act" on his behalf without a document in writing executed in the manner prescribed in O. III, r. 4. It is not denied that in referring a pending suit to arbitration the Advocate "acts" and not merely "pleads". It is therefore clear that the reference on behalf of *Musammat* Rahmat Bibi and *Musammat* Mehraj Begum, plaintiffs Nos. 4 and 5, was unauthorised and is not binding on them.

I accept the petition, set aside the order of the learned Subordinate Judge referring the suit to arbitration and remand it to him for disposal in accordance with law. Having regard to all the circumstances I leave the parties to bear their own costs in this court.

A. *Petition accepted.*

LAHORE HIGH COURT.

Criminal Revision Petition No. 1320 of 1931.

February 12, 1932.

JAI LAL, J.

PARMA NAND—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Cantonments Act (II of 1924), ss. 184, 185, 207—Construction of building before New Act—Notice to alter after Act—Non-compliance—Prosecution under new Act—Competency of—Limitation.

Under the Cantonments Act of 1924 erecting or re-erecting a building without the permission of the Cantonment authority and failure to comply with a notice to alter or demolish a building are separate offences; and therefore non-compliance with a notice given after the enactment of 1924 is punishable under the Act of 1924 even though the building in respect of which such notice was given was erected before 1924. [p. 714, col. 2.]

Further, prosecution for such disobedience may be launched within 6 months of such disobedience. [*ibid.*]

Petition for revision of an order of the Sessions Judge, Rawalpindi, dated the 20th July, 1931, affirming that of the Magistrate, First Class, Rawalpindi, dated the 2nd June, 1931.

Mr. *S. L. Puri*, for the Petitioner.

Malik *Muhammad Amin* and Sardar Bahadur *Beant Singh*, for the Respondent.

Judgment.—The petitioner Parma Nand is the owner of a building within the limits of the Rawalpindi Cantonment. Recently it has been discovered that he has divided the building into two portions by constructing a boundary wall so as to be able to rent it into two portions to two different tenants. It appears that the portion separated from the main building in this manner was originally appurtenant to the main house as a range of out-houses. There is some dispute as to the date when this separation took place. It is contended by the petitioner that it was in or before 1922, on the other hand it is conceded on behalf of the Crown that it was sometime in 1924-25 but not before. The question, however, in my opinion, is immaterial for the decision of the present petition.

On the 10th January 1930 the Cantonment Board served a notice on the petitioner to demolish the wall in question and on his failure to do so prosecuted him under s. 268 of the Cantonment Act, 1924. The Magistrate convicted him and sentenced him to pay a fine of Rs. 150. His appeal has been dismissed by the Sessions Judge and consequently the present petition for revision has been made in this court

I have heard Counsel on both sides and

am of opinion that on the merits there is no force in the petition. Before the present Cantonment Act was enacted in 1924 the law applicable to cases like this was contained in the Cantonment Code of 1912. Section 92 of the Code made it a condition that any person who erected or re-erected a building should do so after the permission of the Cantonment authority. Sub-s (3) of that section provided as follows :

"Where any building is begun or erected without the giving of the notice and the submission of the plans and specification required by this section or in contravention of any order of the Cantonment authority issued within six weeks of the receipt of a valid notice thereunder, the Cantonment authority may, by notice in writing, to be delivered in a reasonable time, require the building to be altered or demolished as it may think necessary."

Section 107 of the Code provided a penalty up to Rs. 50 in case of any person who failed to comply with any notice issued under the section referred to above and also continuing fine.

Section 92 of the Code has now been sub divided into two sections of the Cantonment Act. Section 84 provides that a person who intends to erect or re-erect a building within the cantonment limits shall apply for sanction of the Cantonment authority and shall comply with any direction that may be given by such authority. Failure to do so is made punishable with a fine which may extend to Rs. 500 Section 85 provides that a Cantonment authority may at any time by notice in writing direct the owners to alter or demolish as it thinks necessary, any building or any part thereof erected without notice to the authority or without its sanction. Then s. 268 provides a penalty which may extend to Rs. 200 in case of non-compliance with the notice of the above description in addition to continuing fine.

It would thus be observed that the only change that has been made under the present Act is that instead of making it necessary for the Cantonment authority to issue a notice for demolition within a reasonable time it is now provided that such a notice can be given at any time. The learned Counsel, however, contends that at the time when this notice was given the Cantonment Code of 1912 had ceased to be in force and as the offence had been committed when that Code was in force therefore no action could be taken under the Act of 1924. In my opinion there is no force in this contention because the learned Counsel seems to ignore the distinction between ss. 184 and 185 of the present Act. The provisions of sub-cl. (3) of s. 92 of the Cantonment Code are analogous to those of s. 185 of the present Act while s. 184 of the Act is analogous to the remaining provisions of s. 92 of the Code. Both the enactments draw a clearer distinction between two sets of offences. One relates to the erection or re-erection of a building without the permission of the Cantonment authority; the other offence is the failure to comply with a notice issued by authority. In this case the notice was given when the Act of 1924 was in force and it is for the disobedience of that notice that the petitioner was prosecuted and he could therefore be prosecuted under the Act of 1924.

The period of six months within which as provided by s. 207 of the Cantonment Act of 1924, the offences under the Act are made triable could have applied only if the prosecution of the petitioner had been for erecting the building without sanction; the prosecution is for disobedience of the notice and it is conceded that it was launched within six months of such disobedience.

The only question that needs consideration in this case is whether the fine imposed upon the petitioner is not excessive having regard to the fact that the unauthorised erection took place more than eight years according to one version and six years according to the other before the action was taken by the Cantonment authority; in the meantime the petitioner has been paying taxes on two separate buildings. I consider that under the circumstances the fine should be reduced and I reduce it to Rs. 50. To this extent the petition is accepted. The balance of fine, if paid, shall be refunded to the petitioner.

A. *Sentence reduced.*

LAHORE HIGH COURT.

Criminal Revision No. 129 of 1932.

February 23, 1932.

HARRISON, J.

LAKSHMI NARAIN VERMA AND ANOTHER —PETITIONERS

versus

MOHAMMAD HANIF ACCUSED— RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 494 —Permission to withdraw complaint—Omission to record reasons—Legality.

In granting permission to withdraw a prosecution under s. 494, Criminal Procedure Code, the Court is

not bound to record any reasons for granting any such permission. *Gulli Bhagat* v. *Narain Singh* (2), approved.

Case reported by the Sessions Judge, Ambala, with his No. 32 of the 25th January 1932.

Petition for revision under s. 435 Criminal Procedure Code against an order passed by the Magistrate, First Class, Ambala, dated the 28th November, 1931.

Report.—A criminal case was brought against the applicant, Lala Lakshmi Narain Verma, Advocate, Ambala Contonment. An application was subsequently made for the institution of a criminal complaint against one of the prosecution witnesses, named Mohammad Hanif under s. 193 Indian Penal Code. The application was accepted, and a complaint was instituted by the Court concerned. When the case came up for hearing, however, the Public Prosecutor stated that he had been directed to withdraw from the case. The accused was accordingly discharged. *Lala* Lakshmi Narain has lodged a revision application against this order.

No reasons have been given by the learned District Magistrate for the withdrawal of the prosecution. The learned Magistrate also appears to have given his consent more or less automatically in accordance with the District Magistrate's order. There are two conflicting views as to whether such reasons are necessary or not. In *Abdul Gani* v. *Abdul Kadar* (1), it was held that prosecutors may not withdraw from a prosecution without giving reasons; and in withholding or according consent the Court is acting in a judicial capacity and must record its own reasons. From the fact that the Court originally concerned has deemed fit to institute a complaint, there must be some *prima facie* grounds of posecution, so that there should be some definite reason for not proceeding with the complaint.

On the other hand, it has been held in *Gulli Bhagat* v. *Narain Singh* (2) that it is not necessary on a permission to withdraw under s. 494, Criminal Procedure Code to record any reasons for such permission. The same view appears to have been taken in Madras, while the Rangoon view is based upon a Calcutta decision.

On the whole, it appears to be undesirable that a person who has been found on a preliminary enquiry to have committed the offence of perjury should be absolved by a purely executive order. For these reasons, I report the case to the Hon'ble Judges of the High Court for such action as they may deem fit to take in the matter, together with the connected application against another witness, who has been similarly discharged in the same proceedings.

Order.—There is the authority of the two High Courts for the procedure adopted by the District Magistrate and I do not consider any further action necessary on this reference.

A. *Order accordingly.*

(1) 81 Ind. Cas. 930; 1 R 756; 2 Bur. L. J. 287; A. I. R. 1924 Rang 168; 25 Cr. L. J. 1106.

(2) 77 Ind. Cas 734; 2 Pat. 708; 25 Cr. L. J. 446; A. I. R. 1924 Pat. 283; 2 Pat L. R. 165 and 187 Cr.; 5 P. L. T. 404.

LAHORE HIGH COURT.

Criminal Appeal No 40 of 1932.

March 10, 1932

SHADI LAL, C. J. AND AGHA HAIDAR, J.

ABDULLAH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s 300, Exception 1—Murder—'Grave and sudden provocation'—Mere vulgar abuse—Provocation not grave and sudden—Sentence.

Mere vulgar abuse is not such a grave and sudden provocation as is contemplated by Exception 1 to s. 300 of the Penal Code. But provocation though not grave and sudden may be a sufficient reason for not imposing the capital sentence.

Vulgar abuse may amount to provocation even though the party abused is a mere *kamin*.

Appeal from an order of the Sessions Judge, Lyallpur, dated the 8th December, 1931.

Mr. *J. R. Agnihotri*, for the Appellant.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

Agha Haider, J.—Abdullah, Indian Christain, has been convicted of the murder of one *Sardar* Ishar Singh, a well-to-do *Rais* of *Chak* 132 R. B. in the District of Lyallpur, and has been sentenced under s. 302 of the Indian Penal Code, to death. He has appealed to this Court and the record is also before us under s. 374 of the Criminal Procedure Code, for confirmation of the capital sentence.

On the 8th August, 1931, at about 10 A. M. the accused was sitting in the *pohara* of *Sardar* Ishar Singh together with a number of other persons. Balwant Singh, P. W. No. 3, who had fever, was also lying there. The accused was a servant of one Bal Singh, a nephew of *Sardar* Ishar Singh. *Sardar* Ishar Singh came and addressed the accused as the son of a dog and told him that if he stole his *bhusa* he would have him imprisoned. The accused replied

that he had not stolen his *bhusa* and that, if anybody did so he could be imprisoned. The accused resented the abusive language which the *Sardar* had used towards him and asked him not to do so. The *Sardar* got infuriated at this mild protest and struck the accused on his forehead with the ferrule of his umbrella, causing a slight bleeding wound. The people present told Abdulla that he should not be angry and speak to the *Sardar* in an impertinent manner. After this incident *Sardar* Ishar Singh left the place. He returned again at about midday and again addressed the accused in the same manner, saying "you son of a dog, are you still here? If you steal my *bhusa* again I will have you imprisoned." The accused kept quiet and the *Sardar* went towards the village. All of a sudden a cry of agony was heard and five persons, who have appeared as eye-witnesses, saw the accused hitting *Sardar* Ishar Singh with a hatchet, Exhibit P. 1. The result of this attack was that the *Sardar* died on the spot. Some of the eye-witnesses went forward apparently with the idea of intervening, but, it is said, the accused told them not to come near him, otherwise he would kill them. This story is amply borne out by the evidence of Balwant Singh P. W. No. 3, Manga, P. W. No. 4, Rura, P. W. No 5, Umra P. W. No. 6 and Wadhawa Singh, P. W No 7. These witnesses have been fully cross-examined but nothing has been brought out which would in any way cast any doubt upon their veracity.

In the appeal before us the learned Counsel, who represented the appellant, did not deny the *factum* of the fatal attack which the accused had made upon *Sardar* Ishar Singh in the manner deposed to by the eye witnesses. He, however, argued that the case fell within the purview of Exception 1 to s. 300 of the Indian Penal Code, and that the accused was entitled to the benefit of the rule of "grave and sudden provocation" and should therefore be convicted under s. 304 (1) of the Indian Penal Code. A mere vulgar abuse, however, is not such a grave and sudden provocation as is contemplated by Exception I to s. 300. This part of the argument, therefore, fails.

The learned Counsel further argued that there was provocation, though not of the technically, "grave and sudden" character as mentioned in the Exception noted above, and that the capital sentence was not, therefore appropriate under the circumstances of the case. There is force in this argument. The deceased Ishar Singh seems to have been a foul-mouthed old man who appears to have been in the habit of abusing and bullying the poor servants and dependants of his family. He abused the accused in the morning and further struck him on the forehead causing it to bleed. These insults were offered in the presence of several persons who were the associates and fellow-workmen of the accused and it is but natural that he must have resented this conduct. *Sardar* Ishar Singh returned to the *pohara* at about noon and once again abused the appellant in the manner which apparently was habitual with him. This repeated insult infuriated the accused who picked up the hatchet, Ex. P. 1, which happened to be lying near by and without any premeditation, made a murderous attack on *Sardar* Ishar Singh. When dealing with the question of grave and sudden provocation, the Sessions Judge observed in his judgment that

"the provocation could not be said to be sudden and regard being had to the language which is commonly used to *kamins* it could not be said to be grave."

I do not agree with this view of the Sessions Judge which appears to countenance the use of foul language towards the *kamins*. I believe in the dignity of man as a man and I do not think that it is the privilege of any person to abuse or maltreat his fellow human beings If he does so he is taking a mistaken view of that code of universal morality which regulates the mutual relations of the citizens of a civilised state, whatever their position and status in life may be. In my opinion, having regard to the conduct of *Sardar* Ishar Singh and the repeated insults which he had offered to the accused, who seems to be an impulsive young man, the provocation was grave. Under these circumstances the sentence of death which has been passed upon the accused by the Sessions Judge was not called for.

I would, therefore, while maintaining the conviction of the accused under s. 302 of the Indian Penal Code, commute the capital sentence to that of transportation for life. To this extent only the appeal is allowed.

Shadi Lal, C. J.—I concur.

A. *Sentence reduced.*

LAHORE HIGH COURT.

Criminal Revision Petition No. 171 of 1932

February 25, 1932.

DALIP SINGH, J.

HIGH COURT BAR ASSOCIATION, LAHORE FOR *Shrimati* LILA WATI AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439—Accused not preferring appeal—Application for revision by third party—Power to interfere.

The High Court has power to interfere in revision under s. 439, Criminal Procedure Code, with an order of conviction even though the accused has not preferred an appeal and the application for revision is made by a third party, *e. g.*, the Bar Association. *Bhim Sen* v. *Emperor* (1) and *Emperor* v. *Mohan Lal* (2), relied on.

Petition for revision of an order of the Magistrate, First Class, Lahore, dated the 3rd February, 1932.

Messrs. *J. N. Aggarwal* and *S. R. Sawhney*, for the Petitioners.

Mr. *C. H. Carden Noad*, Government Advocate, for the Respondent.

Judgment.—Nine ladies, *Shrimati* Lilawati, *Shrimati* Parkash Devi, *Shrimati* Gian Devi, *Shrimati* Dayawati, *Shrimati* Gur Devi, *Shrimati* Puran Devi, *Shrimati* Kasturi Devi, *Shrimati* Basant Kaur and *Shrimati* Pushpa Kumari were challaned and convicted under s. 151 and sentenced, with the exception of Pushpa Kumari, to four months' rigorous imprisonment and a fine of Rs. 50 each. In default they were ordered to undergo two weeks' further rigorous imprisonment each. Pushpa Kumari whose age is given as 14 to 15 was fined Rs. 100 and in default one month's rigorous imprisonment. The High Court Bar Association has put in a petition of revision on their behalf. These ladies did not appeal and took no part in the case refusing to enter upon their defence, but they put in a written statement denying that they were guilty of any offence

It was not contended before me that this Court had no jurisdiction to intervene because the persons in question had not appealed. I have, however, looked up the law and I find that a number of High Courts and other Courts have held that this Court has jurisdiction to intervene without any regard to the question of the failure of the accused to appeal. The rulings are summarised in 131 Ind. Cas. 360 *Bhim Sen* v. *Emperor* (1), and I might add to those rulings a ruling reported as *Emperor* v. *Mohan Lal* (2), where action was taken by the Oudh Chief Court on a petition put in by the President of the Bar Association. There is, therefore, no ground for doubting the jurisdiction of this Court to intervene. It is not a question of any right of the accused nor the *locus standi* of the High Court Bar Association but the High Court itself has power in any case to which its attention has been drawn in any manner whatsoever to interfere in the interests of law and justice.

I have gone into the record of the case. I do not find any ground to interfere with the conviction under s. 151 There is evidence which would justify such a conviction and in the circumstances as the matter is purely one of discretion I am not inclined to interfere.

At the same time so far as the sentences are concerned, I am definitely of opinion that the sentences passed *are much too severe.* According to the learned Magistrate himself, and his finding is based on the evidence, eighteen persons, nine men and nine ladies in question, formed a procession for the purpose of preaching the wearing of *khaddar.* As they entered Anarkali a very large crowd assembled amounting according to the evidence of the Magistrate, to about two thousand people in number. This crowd became excited and the Magistrate ordered them to disperse as he feared a breach of the peace. One minute was given them to do so Most of the crowd did disperse but the processionists did not disperse and were accordingly arrested. The ladies in their written statements have stated that they never heard the order to disperse and considering that they were in the heart of a large crowd of about two thousand persons this is quite possible. It may well be that seeing that the excited crowd had dispersed the processionists, whose objects were quite lawful and peaceful, did not think that they had been called upon to disperse In the circumstances, therefore, the offence committed, if any, was of a somewhat technical nature, though I point out that it is a serious thing to refuse to disperse when ordered to do so by a Magistrate.

I would, therefore, accept the revision so far as to reduce the sentences of fine, except in the case of Pushpa Kumari, to Rs. 15 each, and in default one week's rigorous

(1) 131 Ind. Cas. 360; at page 363; A. I. R. 1931 Lah. 153; 32 Cr. L. J. 708; Ind. Rul. (1931) Lah. 456; (1931) Cr. Cas. 265.

(2) 128 Ind. Cas. 221; A. I. R. 1930 Oudh 497; 7 O. W. N. 895; 32 Cr. L. J. 104; (1930) Cr. Cas 116.

imprisonment. One week of the imprisonment already undergone shall be deemed to have been undergone in default of the payment of fines which, I understand, have not been paid. As regards imprisonment the remainder of imprisonment already undergone would be sufficient in the circumstances of this case and I order accordingly. As regards *Musammat* Pushpa Kumari, I reduce her fine to a nominal sum of Re 1 and the imprisonment undergone will be considered to have been undergone in default of payment of this fine.

A. *Sentence reduced.*

LAHORE HIGH COURT.

First Civil Appeal No. 2395 of 1928.
October 14, 1931.

BROADWAY, OFFG. C. J., AND BHIDE, J.

Musammat SHIV DEVI AND ANOTHER —APPELLANTS

versus

SHIROMANI GURDWARA PRABANDHAK COMMITTEE AND ANOTHER—RESPONDENTS.

Sikh Gurdwaras Act (VIII of 1925), s. 18 (g)—Person in possession of property proved to be office-holder—Presumption regarding nature of property.

Where it is proved that a person is an office-holder, the burden of proof is on him or on those who claim through him to show that the property in dispute was his personal property and did not belong to the Gurdwara.

First Appeal against the decree of Sikh Gurdwaras Tribunal, Lahore, dated the 21st June, 1928.

Messrs. *Badri Das* and *Achhru Ram*, for the Appellants.

Mr. *Bhagat Singh*, for the Respondents.

Bhide, J.—The appellants *Musammat* Shiv Devi and *Musammat* Lal Devi filed a petition under s 5, Sikh Gurdwaras Act, claiming certain property which was included in the consolidated list of properties published under s. 3 of that Act and shown as attached to a notified Sikh Gurdwara called "Guru Kotha" situated at Wazirabad. The property included two parcels of land, *viz.*, (*a*) 178 *kanals* of land attached to a well called Ghumman Singh Wala, and (*b*) 45 *kanals* and 14 *marlas* attached to a well called *Khuhi* Guru Kotha. The petitioners claimed this land to be their personal property as the heirs of Sunder Singh, deceased, who was the son of *Musammat* Shiv Devi and husband of *Musammat* Lal Devi. The Tribunal to which the petition was sent for disposal has decided that the petitioners have a life-estate in property (*a*) and that it will revert to the Gurdwara Guru Kotha on their death and that they have no right to property (*b*) which belongs to that Gurdwara. From this decision the present appeal has been preferred.

The main points raised by the learned Counsel for the appellants were that Sundar Singh deceased was not an office-holder and did not hold the lands in dispute in that capacity, that the lands were inherited by Sunder Singh from his father Nihal Singh as his personal property and that the petitioners are therefore entitled to inherit them. The first contention seems to have no force. Sunder Singh was described as a *mahant* of the Gurdwara in paras. 2 to 4 of the petition itself and it was stated therein that he was forcibly ousted therefrom by the *Akalis* in the year 1921. In addition, there is on the record a copy of a statement made by Sunder Singh himself before the Tahsildar of Wazirabad in November 1922 (*vide* Ex. R. 1) from which it appears that Sunder Singh held charge of the Gurdwara as a *pujari* or *mahant* for some time. This evidence receives further support from the statement of Guranditta Mal (P. W. No. 4) a member of the Managing Committee of the Gurdwara and from Ex. R-4, a list of articles prepared in May 1919, when the charge of the Gurdwara was transferred to Sunder Singh. It is true that on the death of Nihal Singh the charge was at first formally given to Sant Attar Das and then to *Musammat* Shiv Devi, but that was only on account of the minority of Sunder Singh. I have therefore no hesitation in agreeing with the Tribunal's finding that Sunder Singh was an office-holder.

In view of the provisions of s. 18 (*g*) Sikh Gurdwaras Act, it was conceded on behalf of the appellants that if Sunder Singh was an office-holder, the burden of proof lay on the petitioners to show that the property in dispute was the personal property of Sunder Singh and did not belong to the Gurdwara. The petitioners have however failed to discharge this onus. The oral evidence on the record is of little value. The documentary evidence seems to be almost entirely in favour of the respondents. The most important document bearing on the question is an award dated 9th July 1898 given by Sardul Singh and others, on a reference to arbitration: *vide* Ex. R-13. It appears that, on the death of Ganda Singh, who was a *mahant*

of the Gurdwara, a dispute arose amongst his widow *Musammat* Mehtab Kaur, Uttam Singh, his *chela* and Nihal Singh, who was his sister's son, about the succession to the *mahantship* and the property attached to the Gurdwara The dispute was referred to arbitration and it was decided that the 178 *kanals* of land attached to Ghumman Singh Wala should go to *Musammat* Mehtab Kaur, and Nihal Singh and their heirs, but that they should have no right to alienate the land and that in the absence of any heirs it should be considered to be the "*wakf*" property of the Gurdwara. The area of 45 *kanal* 14 *marlas* attached to "*Khuhi* Guru Kotha" was declared forthwith to be the *wakf* property of the Gurdwara. As regards the award, it was contended on behalf of the appellants that it was not acted upon. But the evidence on the record shows that Uttam Singh and Nihal Singh were appointed *mahants* and discharged their duties by turns in accordance with the award and that a committee was also appointed in accordance with the award and exercised its powers of appointment and removal of *mahants* and supervised the management of the Gurdwara. On the death of Nihal Singh, *Musammat* Shiv Devi petitioner, approached this committee for the appointment of Sunder Singh as a *mahant* and carried out their orders. There is therefore no substance in the contention that the award was not acted upon and I see no good reason why the award should not be held to be binding on the petitioners.

It is true that Nihal Singh made some conflicting statements at times to suit his interests claiming the land as his own; but his will dated 23rd May 1913 (Ex. R. 16-1) shows that he was conscious of the fact that the property now in dispute was not his personal property. It is significant that in his will Nihal Singh did not claim to be the full proprietor of the land. He clearly says therein that he was not competent to alienate the land and that the powers of his male heirs would be similarly restricted. It was urged that such restrictions could not be legally imposed by a will so as to fetter the powers of the beneficiaries. But the will was really in favour of the Gurdwara and not of Nihal Singh's heirs. Besides on a careful perusal of the contents of the award and the will, it seems to me that the will did not really create any new restrictions, but merely declared such restrictions as were already in existence.

The petitioners have produced no evidence to show that the property in suit was acquired by *mahant* Ganda Singh or any of his predecessors as his personal property. Even the mutations relating to the succession to the property on the death of Ganda Singh or any of his predecessors were not produced. The only mutation of which a copy is produced is the one relating to the succession of Sunder Singh, but that was sanctioned after the present dispute had arisen and is of no significance

I accordingly hold that the award dated 9th July 1898, referred to above, is binding on the petitioners. Affirming the decision of the Tribunal, which is in conformity with the terms of the award, I would dismiss this appeal with costs

Broadway, Offg. C. J.—I agree.

R. L. *Appeal dismissed.*

LAHORE HIGH COURT.

Second Civil Appeal No. 241 of 1929.

December, 16, 1931.

SHADI LAL, C. J. AND MONROE, J.

SHAM SINGH—DEFENDANT—APPELLANT

versus

NANAK—PLAINTIFF—RESPONDENT.

Interest—Interest by way of damages, when awardable.

Interest can be allowed only either under a contract, express or implied, between the parties or when the requirements of the Interest Act have been satisfied. Where these conditions are not fulfilled interest cannot be allowed by way of damages for the wrongful detention of money. [p. 720, col. 1.]

Second appeal from the decree of the Additional District Judge, Lahore, dated the 14th October, 1927 modifying that of the Subordinate Judge, Third Class, Kasur, District Lahore, dated the 23rd December, 1926.

Mr. *M. C. Mahajan*, for the Appellant.

Rai Sahib Lala *Mool Chand*, for the Respondent

Judgment.—This appeal arises out of an action brought by the plaintiff Nanak for the recovery of the price of the goats supplied by him to the defendant. The learned Additional Judge holds that a sum of Rs. 100 was due to the plaintiff as the balance of the price of the goats supplied by him up to the end of November, 1925. This finding is clearly one of fact and cannot be attacked in second appeal.

As regards the number of goats delivered in December, 1925, the learned Judge has

reached the conclusion that 102 goats were supplied, and he has allowed Rs. 460 as the price of those goats. The learned Counsel for the defendant-appellant contends that there is no evidence in support of the finding that 102 goats were supplied to his client, and the finding cannot, therefore, be sustained. It is true that there is no direct evidence that those goats were supplied in December, but the learned Judge bases his conclusion upon two pieces of evidence. In the first place, he refers to the evidence of the witness Ghulam Mustafa, who was admittedly in the employ of the defendant from 12th November, 1925 to 20th February, 1926, and who states that on three occasions during the period of his employment the plaintiff supplied 55, 43 and 59 goats respectively. He then refers to a telegram which was sent by the defendant to the plaintiff on the 28th November, 1925, in which the latter was asked to supply 100 goats: and he assumes that the last two instalments, namely, 43 and 59 goats admitted by Ghulam Mustafa to have been delivered to the defendant, were in pursuance of the telegram. The learned Judge could draw from this evidence the inference he did, and it cannot be said that there is no evidence in support of his finding. It must be remembered that the defendant has withheld his account books, and it is difficult to believe his version that he being a contractor did not keep any accounts, showing his dealings with the plaintiff and with the Military authorities to whom he was supplying mutton.

The lower Appellate Court has, however, made a mistake in awarding interest by way of damages for the wrongful detention of money. There is ample authority for the proposition that interest can be allowed only either under a contract express or implied between the parties or when the requirements of the Interest Act have been satisfied. It is not disputed that there was no contract for the payment of interest, and it is clear that the conditions prescribed by the Interest Act have not been fulfilled in the present case.

The respondent has filed certain objections which impeach the findings of facts recorded by the Additional Judge. The objections must, therefore, be dismissed.

The result is that the appeal of the defendants is accepted so far as to reduce the decree made against him from Rs. 575 to Rs. 560. In all other respects the appeal is dismissed and the parties are directed to bear their own costs in this Court.

A. *Appeal dismissed*

LAHORE HIGH COURT.

Criminal Revision No. 268 of 1931.

July 3, 1931.

DALIP SINGH, J.

JAGNA AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Cantonments Act (II of 1924), s. 118—Gaming—'Public place', meaning of.

A verandah of a private house accessible to a public street is not a public place within the meaning of s. 118 of the Cantonments Act and the mere fact that it is open to the road, and can be entered by the public is not sufficient for holding it to be a public place *Mul Sing* v. *Empress* (1), *Bhagwan* v. *Empress* (2), *Empress* v. *Ratan* (3), and *Empress* v. *Kalandar Khan* (4), referred to.

Criminal Revision reported by the Sessions Judge, Ambala, dated the 18th February, 1931.

Report.—The petitioners, 12 in number, have been convicted of gaming in a public place and sentenced to a fine of Rs. 20 each under s. 118, Cantonments Act, 1924.

The conviction is based on the evidence of a Sergeant of Police, who states that he found the accused gaming at cards with money at the side of a public road. Evidence was produced in defence to show that there was a meeting at the house in question for the purpose of reading the scriptures and that no gaming took place. The defence evidence was not accepted by the lower Court, which convicted the accused as already mentioned.

There is no reason to doubt that gaming was going on, but it is open to question whether it occurred in a public place or street, within the meaning of the Act. The only reason given by the learned Magistrate for finding that this was the case is that the verandah became a public place when once it was used by the public for gaming. There is however no evidence to show that the accused were participating in the gaming as members of the public and not as friends of the owner of the house. No inquiry on this point seems to have been made.

The authorities which I have been able to find relate to s. 13, Punjab Gambling Act, 1867, where the offence is substantially

the same. But in *Mul Singh* v. *Empress* (1) it was held that a *tharra* attached to a shop and situated on the verge of a village bazaar was not a public place. The question whether a *tharra* situated actually might be a public place was left open In *Bhagwan* v. *Empress* (2) a verandah attached to the room of a private house, looking on an alley, was held not to be a public place. Similarly, the *chabutra* of a shop was excluded from the definition in *Empress* v. *Ratan* (3) and *Empress* v *Kalandar Khan* (4). The last three cases are not before me, but are cited from Khandekar's Indian Criminal Court Manual.

There is no suggestion that the accused are regular gamblers or that the place is a common gaming house. The verandah is stated by the only prosecution witness to be on the side of the public road. It is not stated to be part of the road, though the witness says that it is an open place and that anybody can go into it. In the light of the rulings cited above, the mere fact that the verandah is open to the road and can be entered by the public does not appear to be sufficient reason for holding it to be anything but a private place The proceedings are, therefore, submitted with the recommendation that the convictions may be set aside.

As there is no note on the record regarding the realization of fine, information will be given after inquiry from the Magistrate concerned.

Order.—The question is whether a verandah of a private house accessible to a public street is a public place within the meaning of the Act. The evidence is that the site is open for the use to the public. The words are not very clear as it is previously stated that the site is the verandah of the house. On the whole I am not satisfied that the place is shown to be a public place. I accept the reference and acquit the petitioners. The fine if paid will be refunded and the money confiscated returned to the owners.

A. *Conviction set aside.*

(1) 11 P. R. (1890) Cr.
(2) A. W. N. (1881) 17.
(3) A. W. N. (1881) 8.
(4) A. W. N. (1887) 75.

LAHORE HIGH COURT.

Criminal Appeal No. 407 of 1931.

July 20, 1931.

SHAH LAL, C. J. AND TAPP, J.

JOGINDAR SINGH—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss 237, 238—Charge under ss. 302 and 149, Penal Code—Conviction under s. 323—Legality—Absence of formal charge, effect of.

Where some of the persons tried under s. 302 read with s. 149, Penal Code, are found not to be liable for murder and are acquitted in respect of the charge under s 302 read with s. 149, they can be convicted under s 323 for having caused hurt in the same transaction to the companion of the deceased, provided the commission of this offence is imputed to them and brought out by the evidence. The omission of a charge under s 323 would not render such conviction illegal. *Boota Singh* v *King-Emperor*, Criminal Appeal No 1211 of 1929, doubted. *Dasarath Mandal* v. *Emperor* (1) and *Panchu Das* v. *Emperor* (2), distinguished. [p. 724, col. 1.]

Criminal Appeal against an order of the Sessions Judge, Amritsar, dated the 30th March, 1931.

Messrs. *M. L. Sethi* and *J. G. Sethi*, for the Appellant.

Mr. *Sunder Das*, for the Crown.

Tapp, J.—On the morning of 28th October last, two parties of *Jat Sikhs* of *Mauza* Rattoke in the Amritsar District came into conflict, and in the course of the fight the leader of each party was killed by a spear thrust and four persons on both sides injured.

As a consequence the following persons of each party were sent up for trial under s 302 read with s. 149, Indian Penal Code, for the murder respectively of Ujagar Singh of party No. 2 and Bhagat Singh of party No. 1 in two separate cases.

Party No 1—1. Indar Singh, 2. Gurdial Singh, 3 Pal Singh, 4. Anokh Singh. 5. Sawan Singh, 6. Sher Singh, 7. Hari Singh, 8. Jagat Singh and 9. Jogindar Singh.

Party No 2—1. Hazara Singh, 2. Teja Singh, 3 Sohan Singh and 4. Megh Singh.

Only one member of party No. 1, namely Jagat Singh was injured while on the side of party No. 2 Hazara Singh, Sohan Singh and Megh Singh bore injuries.

The result of the two trials has been the acquittal of all members of party No. 2, it being held that Teja Singh who was found to have inflicted the spear wound, which caused the death of Bhagat Singh of party No. 1 had acted in exercise of the right of private defence. As regards the members of party

No. 1 Jogindar Singh in accordance with the opinion of three out of the four assessors was found guilty of being individually responsible for causing the death of Ujagar Singh of party No. 2 by means of a spear thrust in the abdomen and has been sentenced to transportation for life under s. 302, Indian Penal Code. Pal Singh and Anokh Singh of party No. 1 were jointly found guilty of causing simple hurt to Megh Singh of party No. 2, and each has been sentenced to six months' rigorous imprisonment under s. 323, Indian Penal Code. They and the other members of party No. 1 were not found to be constructively liable for the murder of Ujagar Singh and so were acquitted of this charge.

We have, therefore, before us only the appeals of Jogindar Singh represented by Mr. Sethi, and Pal Singh and Anokh Singh by Mr. Saunders.

The cause of this encounter and the facts relating thereto are briefly as follows:

Some four or five days previous to the occurrence there was a quarrel and a fight between the two deceased persons owing to one Tota Singh, a partner in cultivation of Bhagat Singh, having turned off the water from Ujagar Singh's field some 15 minutes before the latter's turn was up. The two were separated but apparently the affair still rankled in the mind of Ujagar Singh for on meeting Bhagat Singh in the *gali* on the morning of the 28th he attacked the latter with a *kahi* which he had in his hand at the time. Bhagat Singh avoided the blow and going to his house, which is on the north side of the village pond, he re appeared armed with a *barchhi*. Ujagar Singh likewise ran to his *haveli*, which is on the opposite side or south side of the pond and emerged similarly armed. These two abused and challenged each other from opposite sides of the pond, each of them being apparently soon joined by the other members of the two parties equipped with weapons of different kinds. While Jagat Singh (brother of Bhagat Singh) and Ganda Singh, a cousin of Ujagar Singh, who has appeared as a defence witness, on the one side and Harnam Singh on the other were trying to keep the peace, Jogindar Singh, who was carrying a *gandali*, aimed a blow at Ganda Singh, which the latter avoiding retreated in the direction of party No. 2. The members of this party advanced towards party No. 1, Megh Singh going round the east side of the pond while Ujagar Singh, Hazara Singh, Sohan Singh and Teja Singh went round the west side. Bhagat Singh on seeing Megh Singh advancing attacked him with his *barchhi* but Megh Singh warded off the blow with the iron pointed *dang* which he was carrying.

The two then appear to have grappled with each other and in course of this struggle each dropped his weapon. It was at this juncture that Pal Singh and Anokh Singh, appellants, were alleged to have come up and beaten Megh Singh with *dangs* causing him six simple injuries consisting of four contusions and two scratches. Megh Singh is then said to have retreated and Jogindar Singh picking up the *barchhi* dropped by Bhagat Singh and the latter picking up the iron-pointed *dang* dropped by Megh Singh and joined by Pal Singh and Anokh Singh ran in the direction of where the other members of the two parties were fighting. On reaching the spot Bhagat Singh was alleged to have aimed a blow at Teja Singh, who avoiding this dealt Bhagat Singh a blow in the stomach with the *barchhi* which he (Teja Singh) was carrying. Bhagat Singh fell, whereupon Jogindar Singh struck Ujagar a similar blow with the *barchhi* of Bhagat Singh which he (Jogindar Singh) had picked up. Ujagar Singh on receipt of this injury also fell, and it appears that the fight then came to an end. Hazara Singh of party No. 2 made a report at the Sarhali Police Station at 2 P. M. the same day, and the only portion of this report to which reference need be made for the purposes of the appeal of Jogindar Singh is the statement therein that one Hari Singh was responsible for causing the death of Ujagar Singh by a spear thrust and that in addition to others, Kartar Singh (P. W. No. 4), Sohan Singh (P. W. No. 10), Thakur Singh (P. W. No. 11) and Ishar Singh (P. W. No. 12), whose evidence has been believed by the learned Sessions Judge were present during the fight.

The defence set up was that the fight took place between Bhagat Singh and Ujagar Singh only and each was responsible for causing the death of the other by means of a spear thrust. This, however, has not been established. Jogindar Singh appellant also pleaded an *alibi*, but, as the learned Counsel for this appellant has not referred to the evidence in this connexion, it is unnecessary to deal with this matter.

Now in connexion with the appeal of

Jogindar Singh only two points, as urged by his learned Counsel, arise for determination: (1) whether the prosecution has established that Jogindar Singh took part in the fight and was responsible for causing the death of Ujagar Singh and (2) if so, whether he acted in exercise of the right of private defence.

The participation of Jogindar Singh in this affair and his responsibility for causing the death of Ujagar Singh depends entirely on the evidence of the four prosecution witnesses mentioned above. Their testimony has been criticized in respect of certain details mentioned by them, but after a careful examination of their evidence I see no reason whatever for disbelieving them in regard to Jogindar Singh having caused the death of Ujagar Singh. The petty enmities disclosed by the cross-examination are insufficient to discount the value of their evidence; on the contrary it would appear that these four witnesses were not ill-disposed towards the members of party No. 1 and tried to help them in their evidence. As observed by the learned Sessions Judge, owing to one member of each party having been killed, the others were disinclined to press the matter and wanted to bury the hatchet. Consequently the prosecution experienced some difficulty in obtaining the evidence from the members of party No. 2. Indeed Hazara Singh denied the correctness of the report made by him and had to be treated as a hostile witness, while Sohan Singh and Megh Singh were given up by the prosecution on the ground that they had become hostile.

It is also urged on behalf of the appellant Jogindar Singh that Hari Singh had been mentioned as the assailant of Ujagar Singh in the First Information Report, but it is clear from the evidence not only of Hazara Singh but also of the other four prosecution witnesses referred to above, that Hari Singh was not present during the affair. His name probably crept into the report either through an oversight or through mistake on the part of Hazara Singh.

Turning now to the question as to whether Jogindar Singh in assailing and injuring Ujagar Singh was acting in exercise of the right of private defence, it is apparent from the evidence that this appellant could not possibly have entertained any apprehension whatever that he was going to be attacked by Ujagar Singh. On the other hand, it is in my opinion, quite evident that in assailing and injuring Ujagar Singh he was actuated by revenge. I would, therefore, hold that Jogindar Singh has been rightly convicted and I would dismiss his appeal.

As regards the appeal of Pal Singh and Anokh Singh the only point urged by Mr. Saunders was that as these appellants had been found not constructively liable for the murder of Ujagar Singh, and had been acquitted in respect of the charges under s. 302-149, Indian Penal Code, they should not have been convicted of causing simple hurt to Megh Singh not having been charged with the commission of an offence under s. 323, Indian Penal Code. The learned Counsel relied on an unreported Division ruling of this Court in Criminal Appeal No. 1211 of 1929, *Boota Singh* v. *King Emperor*. There three persons were tried for the murder of one Sher Singh and the learned Sessions Judge, while convicting Boota Singh under cl. (1), s. 304, Indian Penal Code, declined to apply s. 34 to the case of the other two persons, but convicted them of an offence under s. 324, Indian Penal Code, for having caused hurt at the same time to the two companions of the deceased. The Bench set aside their conviction on the ground that they were not charged with the commission of this offence. No reasons were, however, given nor were any authorities quoted in support of the view taken.

In *Dasarath Mandal* v. *Emperor* (1) it was held that when the accused are charged under ss. 304, and 325, Indian Penal Code, they may be convicted of an offence under s. 323, Indian Penal Code, though no charge under that section has been drawn up against them But when they are charged under ss. 304 and 325 read with s. 149, Indian Penal Code, in respect of an offence alleged to have been committed by another person in the course of a riot and the commission of the riot is disbelieved they should not be convicted under s. 323 in respect of their individual acts with which they are not charged and which are not imputed to them in the Judge's charge to the jury. A similar view was taken in *Panchu Das* v. *Emperor* (2). But it will be obvious that the *dictum* in these two cases as to the illegality of the convictions is based on the omission of the Judge to impute the commission of those particular offences in his charge to the Jury.

In the present case it is manifest from

(1) 34 C. 325; 5 Cr. L. J. 424.
(2) 34 C. 693; 5 Cr. L. J. 427; 11 C. W. N. 666.

the evidence that though the appellants were not charged with having caused simple hurt to Megh Singh, the commission of this offence was imputed to them and clearly brought out by the evidence This offence was committed in the course of the same transaction and they might have been charged with it according to the provisions of s. 236, Criminal Procedure Code. The omission to do so would not however render their conviction for this offence illegal in the circumstances on the application of ss. 237 and 238 of the said Code.

In my opinion, therefore, the conviction of these two appellants under s. 323, Indian Penal Code, is not illegal, and I would affirm the conviction; but as they have been enlarged on bail and probably sufficiently punished for their offence I would reduce the sentence to the period of imprisonment already undergone.

Shadi Lal, C. J.—I concur.

A. *Order accordingly.*

LAHORE HIGH COURT.

Criminal Appeal No. 478 of 1931.
June 12, 1931.
ABDUL QADIR, J.

IDA—ACCUSED—APPELLANT
versus
EMPEROR—OPPOSITE PARTY.

Arms Act (XI of 1878), ss. 19, 20—Keeping chhavi *blade in one's house—Nature of offence—Essentials of offence under s. 20.*

An essential ingredient of s. 20 of the Arms Act, is that the man doing any act mentioned in cls. (*a*), (*c*), (*d*), or (*f*), of s. 19, should do it in such a manner as to indicate an intention that such act may not be known to any public servant. Merely keeping of a *chhavi* blade in one's own house and possessing a stick that would fit into it, cannot be regarded as falling within the purview of s. 20. The case would fall more appropriately under the definition of s. 19 (*f*).

Criminal Appeal from an order of the First Class Magistrate, Lahore, dated the 25th March, 1931.

Mr. *D. R. Sawhney*, for the Crown.

Judgment.—The facts of this case briefly are that the appellant Ida was suspected in a case under s. 457, Indian Penal Code, and his house was searched on 14th September, 1930. At the time of the search of the house, he himself was not present but his wife was in the house. In the course of the search, Khuda Baksh, head constable, found the head of a *chhavi* lying under some bags in the room occupied by Ida and his wife, and a *dang* standing in one corner of the same room. The *chhavi* blade was fixed on to the *dang* and fitted it. He reported this to the authorities and Ida and his wife were challaned for an offence under s. 20, Arms Act The learned Magistrate discharged the wife, as her possession was, in the eye of the law, possession of the husband, and convicted Ida under s. 20, Arms Act, and sentenced him to five years' rigorous imprisonment.

Ida has presented an appeal through Jail and I have examined the record with the help of the learned Public Prosecutor The recovery of the *chhavi* from the house of Ida is satisfactorily proved by the evidence of Khuda Bakhsh, head constable, and of Devi Das and Mehar Din, who were witnesses as to this search. There cannot, therefore, be any doubt as to Ida being in possession of this *chhavi*.

The only question for consideration is whether the sentence awarded is called for in this case An essential ingredient of s. 20, Arms Act, is that the man doing any act mentioned in cls. (*a*), *c*), (*d*), or (*f*), s. 19, should do it in such a manner as to indicate an intention that such act may not be known to any public servant I do not see how the keeping of a *chhavi* blade in one's own house and possessing a stick that would fit into it, can be regarded as falling within the purview of s. 20, Arms Act. The case seems to me to fall more appropriately under the definition of s. 19 (*f*) The learned Public Prosecutor concedes this point.

I think, therefore, that a sentence of one year's rigorous imprisonment would meet the ends of justice in the present case and I modify the conviction from one under s. 20, Arms Act, to that under s. 19 (*f*) of the same Act, and reduce the sentence to one year's rigorous imprisonment.

A. *Sentence reduced.*

LAHORE HIGH COURT.

Criminal Revision No. 578 of 1931.
July 4, 1931
SHADI LAL, C. J.

PHULA SINGH—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 516-A—Penal Code (Act XLV of 1860), s. 338—Prosecution of motor driver under s. 338—Detention of car, legality of—'Used', meaning of.

In a prosecution of a motor driver for an offence under s. 338 Penal, Code, it cannot be said that the car

has been used by the accused for the commission of the offence within the meaning of s. 516-A, Criminal Procedure Code, and it is illegal for the Magistrate to detain the motor car pending conclusion of the trial. *Emperor* v. *Ilahi Bakhsh* (1), followed.

Criminal Revision reported by the Sessions Judge, Sargodha, dated the 27th April, 1931.

Report—The accused who is a motor driver is being prosecuted for an offence under s. 338, Indian Penal Code. Pending trial his motor car has been seized and placed in the custody of the court. The accused applied to the Magistrate (Sheikh Alauddin Arshad, Magistrate, First Class, Sargodha) that the car be returned to him; but the Magistrate has dismissed his application with the following order,

"I have seen the order of the District Magistrate on the file. The motor car appears to have been used for the commission of an offence under s 338, Indian Penal Code and it would be needed to be shown to the witnesses when evidence is being taken The car should be kept where it is till the decision of the case."

The order of the Magistrate is clearly illegal and without jurisdiction in my opinion as it cannot be said that the car had been used by the accused for the commission of an offence: see on this point *Emperor* v. *Ilahi Bakhsh* (1). The Magistrate has apparently been influenced by the order of the District Magistrate on the accused's previous application on which the District Magistrate wrote that the car cannot be returned till the the prosecution evidence had been recorded or till the trial Magistrate finds that it shall not be needed any more for the purpose of the trial. I do not think the car is needed at all during the trial, and even if it is necessary to show it to the witnesses, security can be taken from the accused to produce the car on every hearing. It is not known when the trial is going to end and the car may deteriorate if it is kept without use and proper care in Court custody or custody of the Police. Cases of this nature crop up frequently and an authoritative pronouncement is necessary in the ends of justice as to whether the Magistrate can pass an order under s. 516-A, Criminal Procedure Code, for custody of the motor car pending the conclusion of the trial.

I, therefore, forward the case to the High Court with the recommendation that the order of the Magistrate be set aside and that he should be directed to return the car to the accused taking security, if necessary, for its production whenever required by him for purposes of the trial.

(1) 4 P. L. R. 1904.

Order.—The Magistrate's order detaining the motor car pending the conclusion of the trial is illegal and cannot be sustained. He has appparently been influenced by the order of the District Magistrate which was obviously improper as it was his duty to decide the matter himself on the facts and the law applicable to the case.

I think it would be straining the language to hold that the motor car was used for the commission of the offence within the meaning of s. 516 A, Criminal Procedure Code, The ruling in *Emperor* v. *Ilahi Bakhsh* (1), is directly applicable to the case. It is to be observed that all the witnesses for the prosecution have been examined, and even the plea that the car is needed to be shown to the witnesses when evidence is being taken cannot now be urged

I accordingly accept the recommendation made by the learned Sessions Judge and quash the order of the Magistrate detaining the car.

A. *Order quashed.*

LAHORE HIGH COURT.

Civil Reference No. 7 of 1930.

February 9, 1931.

JAI LAL AND AGHA HAIDAR, JJ.

LAXMI INSURANCE Co, LTD, LAHORE—ASSESSEE—PETITIONER

versus

COMMISSIONER OF INCOME-TAX, PUNJAB, N. W. F., AND DELHI PROVINCES—RESPONDENT.

Income Tax Act (XI of 1922), s 34—Income Tax Rules, r. 25—Assessment of Life Insurance Companies—Rule 25, whether mandatory—Recourse to other modes of assessment, legality of—Chargeability and assessability—Difference.

Rule 25 of the Income Tax Manual is of a mandatory character and provides the only manner in which the income, profits and gains of Life Assurance Companies can be determined. The assessing officer has no discretion to depart from its provisions and to have recourse to the other provisions of the Income Tax Act for the purpose of determining and assessing the income, profits and gains of a Life Assurance Company. [p. 727, col. 1.]

There is a clear distinction between chargeability and assessability. The former expression connotes liability to pay income-tax; the latter expression has reference primarily to the machinery, which ought to be utilized, and the procedure that must be followed in determining the amount which should be levied as income-tax. [p. 726, col. 2]

Where, therefore, no machinery exists to make it possible for the Income Tax Authorities to assess the income, profits or gains of the company during a particular year the assessment for that year is not legal. [*ibid*]

Section 34, Income Tax Act, pre-supposes that the income, profits or gains which can be assessed under it

should have been chargeable during the preceding year and also must have escaped assessment. [p. 726, col. 1.]

Civil Reference case referred by the Commissioner, Income-tax, Punjab, N. W. F., and Delhi Provinces, dated the 21st January, 1929.

Messrs. *Badri Das* and *Har Gopal*, for the Petitioner.

Mr. *J. N. Aggarwal*, for the Respondent.

Order.—This reference under s. 66, Income-tax Act, has been made by the Commissioner of Income-tax, under the following circumstances:

The Laxmi Insurance Company started business on 1st May, 1924, and as provided by s. 8, Life Assurance Companies Act, 1912, the first actuarial report as to its financial condition and the valuation of its liabilities was prepared for the period ending 30th April, 1928, that is to say, for the first four years of its actual working. As a result of this valuation a profit of Rs 1,25,684 was found to have been made by the company. In this manner the average net profits for one year have been found to be Rs. 34,707. The company was for the first time assessed to income-tax for the year 1928-29 on the basis of this income and there is no dispute as to this. But during the year 1928 the Incom-tax Officer also proceeded to assess the company to income-tax in respect of its profits for the year 1927-28 professing to act under s. 34, Income tax Act. To this course an objection was taken on behalf of the company that the Income-tax Officer had no legal power to proceed under that section in the circumstances of the case. Consequently on the application of the company the following question has been referred for the opinion of this court:

"Whether in the circumstances of this case the assessment made under s. 34 for the year 1927-28 is legal."

We have heard Counsel for both parties and I am of opinion that our answer should be in the negative.

Now s. 34, Income-tax Act, reads as follows:

"If for any reason, income, profits or gains chargeable to income-tax has escaped assessment in any year * * * * the Income tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay income-tax * * * * a notice * * * * and may proceed to assess or re-assess such income etc."

The section, therefore, pre-supposes that the income, profits or gains which can be assessed under it should have been chargeable during the preceding year and also must have escaped assessment.

There is no question raised before us that the income, profits or gains in question, if assessable were chargeable. But it is contended that they did not "escape assessment" because this expression implies that they should have been assessable which it is further contended, means that they were capable of assessment during the previous year. Now it seems that there is clear distinction between chargeability and assessability. The former expression connotes liability to pay income-tax; the latter expression has reference primarily to the machinery, which ought to be utilized, and the procedure that must be followed in determining the amount which should be levied as income-tax. It, therefore, appears to me that during the year 1927-28 no machinery existed which made it possible in law for the Income-Tax authorities to assess the income, profits or gains of the company during that year.

Section 59, Income Tax Act provides that the Central Board of Revenue may,..... make rules for carrying out the purposes of the Act and for the ascertainment and determination of any class of income; it further particularly provides that it may make rules prescribing the manner in which and the procedure by which the income, profits and gains of the insurance companies shall be arrived at. In pursuance of the powers conferred upon the Central Board of Revenue rules have been framed by it and the relevant rule is r. 25 which is to be found at page 67 of the Income-tax Manual (Ed. 2). That rule lays down that in the case of Life Assurance Companies, whose profits are periodically ascertained by actuarial valuation, the income, profits and gains of the life assurance business shall be the average annual net profits disclosed by the last preceding valuation.

Now there is no question that in the year 1927-28 no profits of the Lakshmi Assurance Company had been ascertained by actuarial valuation, and consequently no assessment was possible during that year under the Income Tax Act according to the rule cited above. In other words during that year there were no means provided by law for ascertaining or assessing the income of the company. But the learned Counsel who represented the Income-tax Commissioner before us contended that if the actuarial valuation was not available to the Income-tax Officer during the year 1927-28, it was open to that officer to proceed in the ordinary way, that is to say, to levy the income-tax after obtaining a return of its income from the

company as is done in the case of ordinary individuals, companies or associations, and in this connexion he contended that the provisions of s. 59, Income Tax Act, are enabling provisions and that it is not incumbent on the Central Board of Revenue to frame rules under that section. This is true, but the Central Board of Revenue have made the rules under that section and the rule concerned is of a mandatory character. It provides the only manner in which the income, profits and gains of Life Assurance Companies can be determined. It does not give any discretion to the assessing officer to depart from its provisions and to have recourse to the other provisions of the Income Tax Act for the purpose of determining and assessing the income, profits and gains of a Life Assurance Company.

That being so, it is clear, in my opinion, that in the year 1927-28 it was not possible under the provisions of the existing law for the Income-tax Officer to assess the Lakshmi Insurance Company to income-tax. Can it, therefore, be urged that the income, profits and gains of the company "escaped assessment" during that year as that term is used in s. 34, Income Tax Act. A thing cannot be said to escape certain consequences unless it is capable of facing or being subjected to those consequences and, as, in my opinion, the income of the company was not capable of assessment under the rules laid down by the Central Board of Revenue, which have the force of law, during the year 1927-28 in the absence of an actuarial valuation, which valuation according to the wording of r. 25 referred to above is to be utilized for assessing the income of the succeeding years till the next valuation is made, it cannot be said to have escaped assessment.

It is further to be noted that according to r. 25 cited above the last preceding valuation has to be made the basis of the succeeding assessments. In the present case there is no last preceding valuation with reference to the income which should ordinarily be taken as the basis of assessment for 1927-28

I would, therefore, answer the question in the negative and leave the parties to bear their own costs of these proceedings

A. *Reference answered in negative.*

LAHORE HIGH COURT.

Second Civil Appeal No. 2314 of 1925.

November 26, 1930.

SHADI LAL, C. J. AND COLDSTREAM, J.

HARI KISHEN—PLAINTIFF—APPELLANT

versus

FIRM SHANKAR DAS SHIB LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Second appeal—Effect of construction of words in document—Question as to—Question of fact.

The question as to the effect of the construction of the words in a document which is neither a document of title nor the foundation of the plaintiff's claim is one of fact and not of law. *Wali Muhammad* v. *Muhammad Bakhsh* (1), relied on.

Second Appeal from a decree of the Additional District Judge, Amritsar, dated the 9th July, 1925.

Lala *Badri Das*, R B, for the Appellant.

Mr. *D. C. Ralli*, for the Respondents.

Coldstream, *J.*—On this appeal coming before us to-day a preliminary objection is taken by Counsel for the respondents to the effect that the only question arising in the appeal is one of fact which has been finally decided by the lower Appellate Court.

The question for decision is whether or not the second defendant in the suit, a firm known as Shankar Das Shib Lal was liable as surety for the debt found due by the first defendant to the plaintiff firm on a *bahi* account relating to the sale of goods by the latter firm to the first defendant.

The plaintiff firm's contention in the suit was that the firm Shankar Das-Shib Lal through its proprietor Shankar Das, had guaranteed payment by the debtor in respect of the transactions to which the suit related which transactions commenced in 1917 and this contention was sought to be established by oral evidence and also by the evidence of some post-cards written by Shankar Das. The lower Appellate Court held that the alleged guarantee had not been established.

In reply to Mr. D. C. Ralli's objection Mr. Badri Das for the plaintiff firm, the present appellants, argues that the decision of the lower Court turns on the construction of the words in the post-card written on the 13th April, 1918, and that the question of their effect is one not of fact but of law which is still open for decision on second appeal.

There is in my judgment no doubt as to the validity of the objection put forward by Mr. D. C. Ralli. It is obvious that the post-

card is neither a document of title nor the foundation of the plaintiff's claim. It was produced with other post cards merely as evidence in support of a prior guarantee which was held not proved as a fact. Applying the principle laid down by the Privy Council in *Wali Muhammad* v. *Muhammad Bakhsh* (1) I must hold that the matter in second appeal involves no question of law. The lower Court's decision was final and this appeal should be dismissed with costs.

Shadi Lal, C. J.—I concur.

N K & A. *Appeal dismissed.*

(1) 122 Ind. Cas. 316; 31 P. L. R. 145; 11 Lah 199. A. I. R. 1930 P. C. 91; (1930) A L. J. 292; Ind Rul. (1930) P. C. 124; 31 L. W. 321; 32 Bom. L. R. 380; 51 C. L. J. 518; 59 M. L. J. 53 (P.C.)

LAHORE HIGH COURT.

First Civil Appeal No. 192 of 1930.

December 8, 1931.

SHADI LAL, C. J., AND MONRO, J.

MESSRS. BRIJ LAL & SONS —DEFENDANTS—APPELLANTS

versus

THE PUNJAB AND KASHMIR BANK, LIMITED, RAWALPINDI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Mortgage suit—Parties—Persons claiming paramount title.

A person who sets up a title paramount to that of the mortgagor and mortgagee should not be joined as a party to a suit to enforce the mortgage as he is neither interested in the mortgage-security nor in the right of redemption.

First Appeal from a decree of the Senior Subordinate Judge, Rawalpindi, dated the 28th August, 1930.

Mr. *Govind Das*, for the Appellants.

Mr. *Hargopal*, for the Respondents.

Shadi Lal, C. J.—On the 9th April, 1923 the firm of Messrs. Brij Lal and Sons, carrying on business as iron merchants at Rawalpindi, borrowed Rs 6000 from the Punjab and Kashmir Bank, Limited, and executed a promissory note for that sum in favour of their creditors. They also created an equitable mortgage in favour of the Bank by depositing title deeds in respect of certain immoveable property which belonged to them. It appears that the dealings between the parties continued up to July, 1926, and in March, 1930, the Bank brought the present action for the recovery of a certain sum of money by the sale of the mortgaged property. The trial Judge made a preliminary decree on the 25th August, 1931, and as the amount due to the mortgagees was not paid in pursuance of that decree, he made the decree final on the 28th August, 1930.

There is no dispute about the money due by the defendants to the plaintiffs, and the arguments in the appeal have been narrowed down to a few technical objections. In the first place, it is urged that Ram Labhaya, who was impleaded as a defendant in the suit, raised an objection that he was not a partner in the firm of Messrs. Brij Lal and Sons, but that the trial Judge neither framed an issue nor recorded evidence on that matter. It appears that Ram Labhaya declined to receive the summons and absented himself from the court. It was only at a later stage of the trial that he came forward and denied his being a partner in the firm. If the learned Judge had enquired into the plea of Ram Labhaya, he would have probably come to the conclusion that this defendant was a member of a joint Hindu family with the other defendants and was consequently a partner in the firm. It is, however, clear that the immoveable property, which was mortgaged to the Bank, belonged to the firm of Messrs. Brij Lal and Sons; and that Ram Labhaya could have no interest in that property, if he was not a partner in the firm. If the decree holders seek to execute the decree against him personally, the question of his liability may be tried and determined in execution as prescribed by O. XXI, r. 50, sub r. (2) of the Civil Procedure Code.

The learned Counsel for the appellants also contends that Ram Labhaya's brother Jai Gopal was a necessary party to the suit, as he was the owner of the immoveable property and that he should have been impleaded as a defendant in the case. A perusal of O. XXXIV, r, 1, however, makes it clear that only a person having an interest either in the mortgage security or in the right of redemption can be joined as a party to a suit relating to a mortgage. It has been repeatedly held that a person, who sets up a title paramount to that of the mortgagor or mortgagee, should not be joined as a party, for he is interested neither in the mortgage security nor in the right of redemption. It is, therefore, clear that the claim made on behalf of Jai Gopal cannot be entertained and it is significant that he himself never came forward and made an application to be impleaded as a defendant.

Lastly, it is argued that the period of three days prescribed by the preliminary

decree for the redemption of the property was inadequate, and that the trial Judge should have fixed a longer period for the payment of the money. Considering that the defendants had been making efforts to delay the decision of the suit, and that it was open to them to make an application to the court under O. XXXIV, r. 2, sub r. (2) for an order to extend the time fixed for the payment of the money, I do not think that any useful purpose would be served by setting aside the final decree in order to give the debtors further time for payment. Indeed, it is not suggested that they would be able to provide the money, if the time for payment thereof be extended.

For the foregoing reasons I would affirm the decree of the trial Court and dismiss the appeal with costs.

Monroe, J.—I agree.

A. *Appe al dismissed.*

LAHORE HIGH COURT.

Civil Miscellaneous Petition No. 645 of 1931.
Civil Appeal No. 671 of 1931.
December 4, 1931.
BROADWAY, J.

DIWAN CHAND AND OTHERS—DEFENDANTS—PETITIONERS
versus
NANAK CHAND—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O XLI, r. 5—Mortgage suit—Appeal against preliminary decree—Stay of proceedings in lower Court.

Where an appeal has been preferred against a preliminary decree in a mortgage suit, the Appellate Court has power to stay further proceedings in the lower court and it is a general rule to do so where no loss would be caused to the decree-holder by the stay of proceedings. *Chote Lal* v. *Sultan Singh* (1) and *Karam Ilahi* v. *Amir-ul-nisa* (2), followed.

Petition under O. XLI, r. 5, Civil Procedure Code, for stay of proceedings in pursuance of the preliminary decree pending the decision of the appeal case noted above by the High Court.

Mr. *J. N. Aggarwal*, for the Petitioners.

Mr. *Shamair Chand*, for the Respondents.

Order.—The petitioner in this case seeks to obtain stay of proceedings. A preliminary decree has been passed against him in a mortgage suit and he has preferred an appeal against that decree which is pending in this court. It has been urged by the opposite party that there is no occasion to stay proceedings as the final decree would later be followed by execution proceedings which could then, on proper cause being shown, be stayed. [1]

In 111 I. C. 383 *Chote Lal* v *Sultan Singh* (1) Mr. Justice Addison stayed further proceedings on the ground that it was the general rule to do so.

The same view was expressed by Mr. Justice Zafar Ali in 119 I. C. 489 *Karam Ilahi* v. *Amir-ul Nisa* (2)

I am unable to see what loss would be caused to the decree holder if the proceedings were stayed at this stage and I accordingly make the Rule absolute.

A. *Rule made absolute*

(1) 111 Ind. Cas. 383; 29 P. L. R. 262.
(2) 119 Ind. Cas 489; Ind. Rul. (1929) Lah. 905; A. I. R. 1930 Lah. 108; 31 P. L. R. 268.

LAHORE HIGH COURT.

Criminal Appeal No 662 of 1931.
December 15, 1931
TEK CHAND J.

BHOLA NATH—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT

Criminal Procedure Code (Act V of 1898), s. 439—Enhancement of sentence—Principles—Penal Code (Act XLV of 1860), ss 304-II, 325—Offence under provocation—Resultant death—Nature of offence.

The principles upon which the High Court habitually acts as a court of revision in relation to the enhancement of sentences, where the law allows a discretion to the Court whose sentence is impugned, are that it should not interfere if the sentence passed involves substantial punishment, and should interfere if the sentence is manifestly inadequate. The Court is, in particular, slow to interfere where interference would involve the imprisonment of persons already discharged from Jail, though this circumstance is no insuperable obstacle. The Court also frequently declines to interfere in order to enhance a sentence, on the mere ground that it would itself have passed a heavier sentence, contenting itself with pointing out that the sentence is so far light that a heavier sentence would have been maintained. *Empress* v. *Chuni Lal* (1), relied on, *Crown* v. *Budha* (2), referred to. [p. 732, col. 1.]

Where the deceased had beaten the accused with a shoe and being overpowered by others, the accused lost self-control and picked up some sort of wooden substance which was lying near by and introduced it into the rectum of the deceased who died in consequence :

Held, that the offence was one under s. 304-II and one not under s. 325, Penal Code. [p 731, col. 1.]

Criminal Appeal from an order of the Sessions Judge, Multan, dated the 16th May, 1931

Mr. *B. R Puri*, for the Appellant.

Mr. *J. W. Fairlie*, for Government Advocate, for the Respondent.

Judgment—The appellant Bhola Nath has been convicted by the Sessions Judge of Multan of an offence under s. 304-II, Indian Penal Code, and sentenced to rigorous imprisonment for one year. He has appealed through Mr. B. R. Puri and an

application for enhancement of the sentence has been preferred by the Government Advocate under instructions from the Local Government.

The case for the prosecution is that on the 26th of January, 1931, at about 10 A. M. the appellant who was at that time the Senior Assistant Superintendent of the Central Jail at Montgomery thrust a wooden substance into the rectum of a long term prisoner named Nura, which caused a perforation nearly 4" above the anal orifice, and in consequence Nura died two days later in the early hours of the 28th of January.

The appellant denied his guilt. The learned Sessions Judge, however, held that Nura died as the result of the injury caused by the appellant, but having regard to the peculiar circumstances in which the offence was committed he was of opinion that the ends of justice would be met by imposing a sentence of one year's rigorous imprisonment.

On appeal Mr. Puri for the appellant and Mr. Fairlie for the Crown have taken me through the record and have addressed lengthy arguments in support of their respective contentions. Both Counsel are agreed that the four points which require consideration are:—

(1) What was the origin of the incident?

(2) How and by whom was the injury inside the rectum caused?

(3) Under what section of the Penal Code did the offence (if any) fall?

(4) Sentence.

Before dealing with these points it is necessary to state a few facts relating to the deceased which have been established by the documentary and unimpeachable oral evidence on the record. The history-sheet of the deceased as well as the evidence of Major S. D. Sondhi, I M.S. (P. W. No. 2) who was Superintendent of the Montgomery Jail at the time, Major P. D Chopra, I. M S (D W. No. 7), Deputy Inspector General of Prisons, Punjab, and Rai Sahib Gokal Chand (D. W. No. 1) show that Nura was undergoing a sentence of rigorous imprisonment for 11 years under s. 397 of the Indian Penal Code having been convicted on the 31st of August, 19.5. Since his incarceration he had been in several jails and during this period he had been punished no less than 117 times for offences under the Jail Rules. Major Chopra states that in the Central Jail, Lahore, he was considered to be a "man of very bad character", a "desperate" and 'violent fellow". On one occasion he supplied a razor to another convict who assaulted the Jailor at Lahore. He was declared to be "incorrigible" and transferred to the Montgomery Jail. According to Major Sondhi he did not improve himself in this jail and numerous complaints of misconduct were made against him. At Montgomery the appellant was in immediate charge of Nura and as such he had to enquire into these complaints and have him punished by proper authority.

It is common ground that on the morning of the 26th at about 9 A.M. a parade of the prisoners was held in the *chakar*, and after the Superintendent had left but while the appellant was still there, the incident in question took place. As to how it originated three different and conflicting versions have been given by the prosecution. One of them is contained in the dying declaration of Nura made before Mr. Sadiq Ali Shah, Magistrate, on the 26th of January, 1931; the second is given by Khanun (P. W. No. 8) who was an associate of the deceased and the third deposed to by Sant Charan Singh (P. W. No. 17). The learned Sessions Judge has rejected the first and second of these versions and after consideration I have no hesitation in agreeing with him. As Counsel for the Crown has not challenged the findings of the Sessions Judge on this point I do not think it necessary to discuss them in detail here. The learned Judge has accepted the evidence of Sant Charan Singh (P. W. No. 17) as correct and this view is endorsed by both Counsel before me. According to Sant Charan Singh, after the parade had been finished and the Superintendent departed, the appellant Bhola Nath came outside the iron-barred gate of barrack No. 6 and began to talk to the witness. As Bhola Nath turned his back towards the outer door Nura, who was standing beside the wall, came up and assaulted him striking him with a shoe on his face two or three times. On this Bhola Nath shouted to the *lambardars* and directed them to catch hold of the assailant. A number of prisoners ran immediately towards the spot, and caught hold of Nura, while he was aiming another blow at Bhola Nath. These persons overpowered Nura and began to beat him. Thereupon the witness withdrew into his barrack and did not see what happened afterwards. He is positive, however, that so long as he was on the scene Bhola Nath did not take any part in the beating.

As to what followed Sant Charan Singh is unable to throw any light upon, but there is the evidence of Mohammad Shafi (P. W. No. 9), Phuman Singh (P. W. No. 10), Turez (P. W. No. 11) and Narain Das Garg (P. W. No. 18) that after the deceased had been overpowered by the *lambardars* and others the appellant took hold of a wooden instrument and thrust it into the rectum of the deceased. The witnesses are not agreed as to the nature and size of the wooden substance which was used by the appellant. Some say that it was a sharp-pointed *killa* like a peg; others describe it as a rough and an unpolished *danda*; while the deceased had stated that it was a ruler. Soon after the occurrence when the Superintendent, Major Sondhi, arrived on the scene, he found near the spot two broken pieces of a ruler (Exs. P. 2, and P. 3), neither of which had any blood or faecal matter attached to it. The learned Sessions Judge has noticed at great length the discrepancies in the statements of the witnesses on this point and, while holding that it was not possible to reconcile them or to say with certainty what wooden weapon was actually used, he has held that the medical evidence left no doubt that it was some sort of polished ruler which had been used in the crime. Counsel for the appellant has laid great stress on these discrepancies and has argued that this circumstance discredits the testimony of all the eye-witnesses and that it is highly unsafe to rely on it, either for the purpose of fixing the identity of the person, who had thrust the wooden instrument inside the rectum of the deceased, or for determining the nature of the instrument itself. I think, however, that the discrepancies are not of great importance, as on an occasion like the one in question it is not possible for the eye-witnesses to keep in their minds an absolutely correct impression of the size and dimensions of the instrument used. In my opinion, the evidence leaves no doubt that after the deceased had beaten the appellant with a shoe and been overpowered by the prisoners the appellant lost self-control and picking up some sort of wooden substance which was lying near by introduced it into the rectum of the deceased.

The medical evidence is conclusive as to the cause of death. Major Sondhi, as soon as he heard of the incident, proceeded to the hospital and found Nura bleeding from the anus and complaining of pain in the abdomen. On examination the witness found the mucous membrane protruding out from the anus. He also noticed that there was a perforation of the rectum. The Civil Surgeon Rai Bahadur Doctor Ram Chand (P. W. No. 3), who conducted the *post mortem* examination stated that on internal examination he found the rectum perforated about 4" above the anus and that there was slight congestion is some of the intestines. In his opinion death was due to shock and septic absorption on account of perforation of the rectum. Mr. Puri has argued that the injuries caused by the insertion of the wooden instrument were not so serious and that the perforation was really caused by Sub Assistant Sugeon, Des Raj (P. W. No. 1), who was the first to examine the deceased and who is proved by clear and unimpeachable evidence to have had a long-standing enmity with the appellant. This enmity is no doubt established and as pointed out by the Sessions Judge, Des Raj gave his evidence at the trial in a most unsatisfactory manner but there is no warrant on the record for the suggestion that it was Des Raj, who had handled the deceased in such a manner as to cause the perforation, either intentionally or otherwise. After careful consideration of the evidence on the record and arguments of Counsel I have no hesitation in holding that it was the appellant who had inflicted the injury in the rectum of Nura. On the obove findings there can be no doubt that the offence falls under s. 304-II and not under s. 325 as was urged by Mr. Puri in a faint-hearted manner.

As to the sentence there is no doubt that ordinarily an offence of this kind committed by a person in authority like the appellant on a prisoner who was in his charge cannot be lightly dealt with and a very substantial sentence should be imposed. But as pointed out above the circumstances of the present case are very peculiar. The appellant appears to have been a strict disciplinarian, who, in the discharge of his official duties, had to enforce the rules against the deceased and get him punished. The deceased was a person of desperate and violent character and was on the lookout for an opportunity to have his revenge against the appellant On the day of the occurrence Nura had his chance. He stealthily concealed himself along the wall and as soon as the appellant came near the place he suddenly sprang on him and gave him a shoe-beating on the face, in the presence of his subordinates and a large number of convicts, causing injuries on the

forehead and the bridge of the nose *vide* evidence of Khan Sahib Dr. Haji Munir ud-Din, Assistant Surgeon (P. W No. 7) The appellant lost self-control and in the heat of the moment committed the crime. Having regard to these circumstances, and bearing in mind the fact that the appellant is described by his officers as a person "whose treatment towards the convicts and other people in Jail was unexceptional" (see page 63 of the record) I do not think that the sentence imposed on him by the learned Sessions Judge is so manifestly inadequate as to justify interference on the revision side. The principles which this Court should follow in this matter are well settled. He laid down by Sir Meredyth Plowden in *Empress* v. *Chuni Lal* (1)

"The principles upon which the Chief Court habitually acts as a court of revision in relation to the enhancement of sentences, where the law allows a discretion to the court whose sentence is impugned, are that it should not interfere if the sentence passed involves substantial punishment, and should interfere if the sentence is manifestly inadequate. The Court is, in particular, slow to interfere where interference would involve the imprisonment of persons already discharged from Jail, though this circumstance is no insuperable obstacle. The Court also frequently declines to interfere in order to enhance a sentence on the mere ground that it would itself have passed a heavier sentence contenting itself with pointing out that the sentence is so far light that a heavier sentence would have been maintained."

See also the judgment of Broadway, J., in *Crown* v. *Budha* (2). In my opinion the circumstances of this case do not warrant a departure from the rule laid down above.

For the foregoing reasons I dismiss the appeal of Bhola Nath and affirm his conviction under s. 304 II and the sentence of rigorous imprisonment for one year imposed on him. I also dismiss the petition for revision filed by the Local Government for enhancement of the sentence.

A. *Appeal dismissed.*

(1) 7 P. R. 1889 Cr.

(2) 49 Ind. Cas. 772; 7 P. R. 1919 Cr.; 48 P. L. R. 1919; 20 Cr. L. J. 212; 8 P. W. R. 1919 Cr.

LAHORE HIGH COURT.

First Civil Appeal No. 1544 of 1928.

December 22, 1931.

SHADI LAL, C. J. AND MONLOE, J.

Musammat DURGA DEVI—DEFENDANT—APPELLANT

versus

NAND LAL AND ANOTHER—PLAINTIFFS—DECREE-HOLDERS AND ATMA RAM AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, rr. 4, 5—Mortgage suit—Adjustment after preliminary decree—Power to pass final decree—Proceedings for decree absolute, whether execution proceedings—O. XXI, r 2, applicability of.

Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree but are proceedings in the suit to obtain a final decree for sale which is the only decree capable of execution. Order II, r. 2, Civil Procedure Code which provides for certifying a payment made out of Court is not, therefore, applicable to proceedings for a final decree and if money is not paid in the manner directed by the preliminary decree the Court is bound to pass a final decree for sale, notwithstanding an adjustment out of Court. *Banarsi Das* v. *Nathu Mal* (2), followed. [p. 733, col. 1.]

First Appeal from the final decree of the Senior Subordinate Judge, Amritsar, dated the 27th April, 1928.

Messrs. *Faqir Chand* and *Chandra Gupta*, for the Appellant.

Messrs *M. L. Puri* and *Bal Kishen Mehra*, for the Respondents.

Judgment—On the 19th July, 1927, the Subordinate Judge made a [preliminary decree under O. XXXIV, r. 4. Civil Procedure Code by which the mortgagor was directed to pay into Court Rs. 11,136 with interest specified therein on, or before, the 19th January, 1928. This direction was not complied with by the mortgagor, with the result that, on the 27th April, 1928, the Court passed a final decree for sale.

The final decree is impeached on two grounds. In the first place, it is urged that as a mortgagor had preferred an appeal from the preliminary decree to the High Court which appeal was dismissed *in limine* on the 6th January, 1928, the period of six months should be counted from that date, and not from the date of the preliminary decree passed by the trial Court. It is to be observed that the decision of the High Court dismissing the appeal *in limine* was not embodied in a decree, nor did it grant any extension of time for the payment of the money. It is, however, unnecessary to discuss the question whether the date of the preliminary decree or the date of the judgment of the High Court should be regarded as the *terminus a quo* because the language of the former makes it clear that no period was expressly fixed for the purpose of payment, but that a definite date, namely, the 19th January 1928, was specified on, or before, which the money was to be paid. It is admitted that no payment was made into court by the aforesaid date.

The second ground of attack proceeds upon the allegation that, on the 15th January, 1928, *Musammat* Durga Devi, the wife of the mortgagor Atma Ram, who

had transferred the mortgaged property to her, had paid Rs. 11,136 to the decree-holders. It is argued that, in view of this payment which is alleged by one party to have been made out of Court but denied by the other, the trial Judge should not have passed the final decree. Now, it has been repeatedly held that the proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree but are proceedings in the suit to obtain a final decree for sale which would be the only decree capable of execution *vide, inter alia Sital Singh* v *Baij Nath Prasad* (1). There can, therefore be no doubt that O. XXI, r. 2, Civil Procedure Code, which provides for certifying payment made out of court and is confined in its operation to execution proceedings, cannot be invoked by the appellant. Nor can she ask the court to recognise the alleged payment as an adjustment, compromise or satisfaction under O. XXIII, r. 3, Civil Procedure Code. It must be remembered that the preliminary decree expressly directs the defendant to make payment "into court" and O .XXXIV, r. 5, Civil Procedure Code, provides that if payment has not been made "into court" of all the amounts due from the defendant under the preliminary decree, the court shall pass a final decree for sale. It has been held by a Division Bench of the Chief Court of the Punjab in *Banarsi Das* v. *Nathu Mal* (2), that where the money is not paid in the mannar directed by the preliminary decree, the court, is bound to pass a final decree for sale, and can recognise no settlement except by payment into court.

The language of the preliminary decree made in this case, as well as the general law enacted by O. XXXIV, r. 5, Civil Procedure Code, supports the decision of the trial Judge, and there is no ground for dissenting from his conclusion. The appeal is accordingly dismissed with costs.

A. *Appeal dismissed.*

(1) 75 Ind. Cas. 485; 44 A. 668; 20 A. L. J. 602; A. I. 1922 All. 383.

(2) 16 Ind. Cas. 987; 12 P. R. 1913; 281 P. W. R. 1912; 276 P. L. R. 1914.

LAHORE HIGH COURT.

Miscellaneous First Civil Appeal No. 315 of 1931.

January 5, 1932.

ABDUL QADIR, J.

GIRDHARI LAL AND OTHERS— APPELLANTS

versus

JUGAL KISHORE AND OTHERS— RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 7—Application for adjudication—Death of debtor—Proceeding, whether abates—Civil Procedure Code (Act V of 1908), O. XLI, r. 2—New point in appeal.

In proceedings for adjudication of a person as insolvent he may be rightly declared such in spite of the fact that he died before the application for his being declared as insolvent was decided. The application may be allowed to proceed bringing on the record his legal representatives for realization and distribution of his property. *Venkatarama Aiyar* v. *Official Receiver, Tinnevelly* (1), *Ramathai Anni* v. *Kanniappa Mudaliar* (2) and *Ramesh Chandra Seal* v. *Charu Chandra Mohuri* (3), followed. [p. 734, col. 1.]

It will be unfair to allow the appellants in a case to spring a surprise on the opponent by allowing them to raise a contention not raised either in the lower Court or in the grounds of appeal. [*ibid.*]

Miscellaneous First Civil Appeal from an order of the District Judge, Attock at Campbellpur, dated the 27th November, 1930.

Mr. *M. L. Puri*, for the Appellants.

Mr. *Bishen Nath*, for the Respondents.

Judgment.—An application was made by one of the creditors of a firm, which was doing business at Peshawar under the name of Uttam Chand-Gobind Sahai, that Wadhu Shah son of Uttam Chand and Gobind Sahai, who were partners of the firm, may be declared insolvents, as they had left their usual place of buisness at Peshawar and had stopped their business. The other condition precedent for an application for insolvency that the debts of the debtors amounted to more than Rs. 500 was also alleged and has been proved. In the course of the proceedings Wadhu Shah died. It was urged by Counsel that being dead, the application could not proceed. The learned District Judge, however, overruled this objection. Following the decision of the Madras High Court in *Vankatarama Aiyar* v. *Official Receiver, Tinnevelly* (1) he allowed the application to proceed and ordered the names of the sons of Wadhu Shah to be brought on the record, for realization and distribution of the property of the debtor. The proceedings were concluded by an order

(1) 109 Ind. Cas 94; 51 M. 344; (1928) M. W. N. 237; 27 L. W. 437; 54 M. L. J. 585; A. I. R. 1928 Mad 476.

dated the 27th November, 1930, which held that an act of insolvency was proved, as Wadhu Shah and Gobind Sahai had given up their business at Peshawar and had absented themselves from that place. He declared both of them insolvents and ordered their property to vest in the Official Receiver. He also ordered that the creditor should prove his debt within three months and the application for discharge should be made within two years of the date of this order. The sons of Wadhu Shah have appealed against the order through Mr. Mukand Lal Puri.

The learned Counsel started his arguments with a point not raised by him in his grounds of appeal. He urged that there was no proof that the insolvents had departed from their usual place of business, with intent to defeat or delay their creditors and asked for permission under O. XLI, r. 2, to argue this new point. This was objected to by Mr. Bishen Nath, on behalf of the respondent. He pointed out that this contention had not been raised by the insolvents in the court below and it would be unfair to allow them to spring such a surprise on their opponent This objection is reasonable and consequently I did not allow Mr. Puri to raise a contention at this stage, which had not been raised in the court below.

Coming to the grounds of appeal already filed by Mr. Puri, his principal ground was that Wadhu Shah could not legally be adjudged insolvent after his death. In other words, he wanted to contest the correctness of the decision in *Venkatarma Aiyar* v. *Official Receiver, Tinnevelly* (1). He concedes, however, that since he filed his appeal, he has seen two other rulings in which the same view has been expressed. One is *Ramathai Anni* v. *Kanniappa Mudaliar* (2) and the other is *Ramesh Chandra Seal* v. *Charu Chandra Mohuri* (3). In this last decision a Division Bench of the Calcutta High Court has followed the ruling reported as *Venkatarama Aiyar* v. *Official Receiver, Tinnevelly* (1). Under the circumstances he admits that he cannot press the ground of appeal No 1, I agree with the view taken in the rulings referred to above and hold that Wadhu Shah has been rightly declared insolvent in spite of the fact that he died before the application for his being declared insolvent was decided.

(2) 110 Ind. Cas. 167; 51 M. 495; 27 L. W. 508; A. I. R. 1928 Mad. 485; 55 M. L. J. 235.

(3) 129 Ind. Cas. 622; A. I. R. 1930 Cal. 590; 34 C. W. N. 445; Ind. Rul. (1931) Cal. 238.

There is no substance in this appeal and it is hereby dismissed with costs.

Appeal dismissed.

LAHORE HIGH COURT.

Criminal Revision No 1082 of 1931.

November 25, 1931.

HARRISON, J.

EMPEROR—PETITIONER

versus

GHULAM NABI—CONVICT—RESPONDENT.

Penal Code (Act XLV of 1860), s. 335—Offence under provocation—Sentence of fine only—Insufficiency of.

An offence under s. 335, Penal Code, though committed under some provocation, should not be treated leniently and a sentence of fine only will not be sufficient to meet the ends of justice.

Case reported by the Sessions Judge, Attock at Campbellpur, with his No. 1919-J. dated the 16th September, 1931.

Messrs. *M. L. Batra*, for the Government Advocate, and *Jalal Din*, for the Complainant-Petitioner.

Mr. *Barkat Ali*, for the Respondent.

Order.—The accused, Ghulam Nabi, has been convicted under s. 335 of the Indian Penal Code of completely severing with a razor one ear of his wife, *Musammat* Anaran, and cutting off a portion of the other under the influence of grave and sudden provocation. He has been sentenced to pay a fine of Rs. 1,000 without any sentence of imprisonment in default.

An appeal was presented from the conviction and sentence to the learned Sessions Judge who by an oversight has written no final order accepting or dismissing the appeal but has referred the case to this Court with a recommendation that the sentence should be enhanced.

There is no dispute as to the facts and, although the case is now treated as an appeal before me, Counsel for the accused has not challenged the correctness of the finding which he could not really do as the accused pleaded guilty and in his statement gave his version of what led him to behave as he did and this version has been accepted. Counsel for the appellant merely urges that the sentence is very adequate and refers me to some authorities to the effect that the powers of enhancement should not be lightly exercised. He also relies upon the fact that the wife of the accused, whom he mutilated in this way was found to have committed adultery

later when in hospital with one Jahangir who has been duly convicted. He is unable to explain what bearing this has upon this case. Counsel for the Crown accepts the statement made by the accused as true and contends that it does not disclose such a degree of provocation as would justify the very lenient view taken by the Magistrate, though he is precluded from arguing that the facts establish an offence under a more serious section. I think this is true and, granting that the accused believed that his wife had been unfaithful and granting that she taunted him and said that she would not live with him and she preferred another man, the fact remains that to take a razor deliberately and mutilate her in the way this man did, constitutes as aggravated a case as could well occur under this section. The girl was sixteen years of age, the man twenty five. I am precluded from finding that a more serious offence has been committed. I am also precluded from passing a sentence more severe than the Magistrate, who tried the case, could have passed.

I first dismss the appeal acting under s. 439 of the Criminal Procedure Code and pass the order which should have been passed by the Sessions Judge. Under the same section I enhance the sentence to two years' rigorous imprisonment and a fine of Rs. 100. The fine, if realised, to be paid to *Musammat* Anaran. In default of payment of fine the accused to undergo a further sentence of six months' rigorous imprisonment.

A. *Sentence enhanced.*

LAHORE HIGH COURT

Criminal Revision No. 1216 of 1931.
January 8, 1932.
HARRISON, J.
JANKI DAS—COMPLAINANT—PETITIONER,
versus
EMPEROR AND OTHERS—ACCUSED—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 517—Appeal against order for disposal of stolen property—Notice to opposite side, whether necessary.

In an appeal against the order of a Magistrate for disposal of property regarding which an offence is committed, the Appellate Court should not reverse the order, without issuing notice to the party in whose favour the Magistrate has passed orders.

Petition for revision of an order of the Sessions Judge, Karnal, dated the 20th July 1931.

Mr. *Shamair Chand*, for the Petitioner.

Judgment.—A theft was committed from the house of Lala Janki Das at the end of August 1930 and a considerable amount of jewellery and cash was stolen. Two men, Jage and Kanhya, were sent up for trial and both were convicted. On appeal the conviction of Jage was upheld and Kanhya was acquitted.

The Magistrate who decided the case came to the conclusion that certain money which had been recovered in the course of investigation was the property of Lala Janki Das and he passed an order accordingly that this money was to be restored to him. The two persons, from whose possession this property had been recovered, Lehri and Bhagta, presented an appeal to the Sessions Judge who decided *ex parte*, without serving or hearing Lala Janki Das, that it was not proved that the money in question formed part of the proceeds of the stolen property and ordered that it should be restored to these two appellants.

A revision has now been presented by Lala Janki Das and admitted in this court. The Sessions Judge has held that the evidence of two men, Bakhtawar Singh and Tasadduq Hussain, as to what Lehri and Bhagta stated to the Police during the course of the enquiry was inadmissible under s. 162. Granting that this is so, the statement of the accused Jage, or such portion as led to the discovery of this money, was admissible. It appears to me that on the salient facts of the case there can be no shadow of doubt that the money produced by these two men formed part of the proceeds of the theft. The order should not have been passed by the Sessions Judge without serving or hearing the other side as it is clearly an order to the prejudice of complainant

I accept the revision, set aside the order passed by the Sessions Judge and restore the order passed by the Magistrate.

A. *Revision accepted.*

LAHORE HIGH COURT.

Civil Revision Petition No 333 of 1931.
January 2, 1932.
SHADI LAL, C. J.
SATIA NAND—AUCTION-PURCHASER—PETITIONER
versus
JHANGI RAM—DECREE-HOLDER AND KASHI RAM—JUDGMENT-DEBTOR—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI

r. 89—Court sale—Adjustment out of Court—Application to set aside sale without depositing 5 per cent. for auction-purchaser — Maintainability — Power to set aside sale—Inherent powers, when to be exercised.

Where after a court-sale has been held the decree-holder and the judgment-debtor made an application under O. XXI, r 89, Civil Procedure Code, for setting aside the sale without depositing 5 per cent. of the purchase-money for payment to the auction-purchaser the court has no power to refuse to confirm the sale either under that rule or under the inherent powers of the court. *Shankar* v. *Jowahir Lal* (2), *Nanhelal* v *Umrao Singh* (3) followed. *Maroti* v. *Vithoba* (1), not followed. [p. 736, col. 2.]

A court cannot make use of the special use of the provisions of s 151, Civil Procedure Code, where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it or has not complied with the conditions laid down by the Code. [*ibid.*]

Petition for Revision of an order of the Senior Subordinate Judge, exercising special appellate powers, Lahore, dated the 14th February, 1931, affirming that of the Subordinate Judge, Third Class, Kasur, dated the 24th November, 1930.

Diwan *Mehr Chand*, for the Petitioner.

Judgment.—On the 22nd May, 1930, a plot of land belonging to the judgment debtor, Kanshi Ram, was sold in execution of a decree obtained against him by one Jhangi Ram. On the 19th June, 1930, the judgment-debtor made an application under O. XXI, r. 89 of the Civil Procedure Code, stating that he had satisfied the claim of the decree-holder out of Court, and prayed that the sale should be set aside. It is to be observed that this application was not accompanied by a deposit of a sum equal to five per cent. of the purchase-money for payment to the auction-purchaser. The trial Judge, however, granted the application on the ground that the decree, which had been satisfied, had ceased to exist and the sale could not, therefore be confirmed. In support of his decision the learned Judge relied upon a judgment of the court of the Judicial Commissioner, Nagpur, in *Maroti* v. *Vithoba* (1).

The auction-purchaser preferred an appeal against the order of the trial court, and his appeal has been dismissed. It is conceded that the judgment relied upon by the trial court has been overruled by a Full Bench of the Court of the Judicial Commissioner, Nagpur, in *Shankar* v. *Jawahir Lal* (2). All doubt on the subject has been set at rest by the pronouncement made by their Lordships of the Privy Council in *Nanhelal* v. *Umrao Sinhg* (3), where their Lordships make the following pertinent observations:—

"In the first place, O. XXI, r. 2, which provides for certification of an adjustment come to out of court, clearly contemplates a stage in the execution proceedings when the matter lies only between the judgment-debtor and the decree-holder, and when no other interests have come into being When once a sale has been effected a third party's interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in r. 89, *viz*, by depositing in court the amount for the recovery of which the property was sold, together with five per cent. on the purchase-money which goes to the purchaser as statutory compensation, and this remedy can only be pursued within thirty days of the sale."

The law, as enunciated by the Privy Council, leaves no doubt that the settlement between the decree-holder and the judgment debtor cannot have the effect of extinguishig the right of the auction-purchaser. As regards the application made under r. 89, it is common ground that the judgment-debtor did not deposit in court for payment to the purchaser a sum equal to five per cent. of the purchase money and the sale could not, therefore, be set aside under that rule. Nor can the court invoke s. 151 in respect of a matter for which there is an express provision in the Code. It is incontrovertible that inherent jurisdiction conferred by that section must be exercised subject to the rule that if the Code does not contain specific provision which would meet the necessities of the case in question, such provisions should be followed and the inherent power should not be invoked. A court cannot make use of the special provisions of this section, where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it or has not complied with the conditions laid down by the Code.

For the aforesaid reasons I hold that the sale cannot be set aside either on account of the settlement between the parties to the decree, or under O. XXI, r. 89 of the Civil Procedure Code. I accordingly accept the application and, setting aside the orders of the court below, remit the case to the trial Judge for decision in accordance with law. The respondent must pay the costs incurred by the applicant in this court.

A. *Application accepted.*

(1) 100 Ind. Cas. 565; A. I. R. 1928 Nag. 43.

(2) 111 Ind. Cas. 895; A. I. R. 1928 Nag. 265; 24 N. L. R. 127; 11 N. L. J. 142 (F. B.).

(3) 130 Ind. Cas. 686; A. I. R. 1931 P. C. 33; 35 C W. N. 381; 14 N. L. J. 28; 53 C. L. J. 187; 60 M. L. J. 423; 33 L. W. 449; (1931) A. L. J. 257; (1931) M. W. N. 281; 8 O. W. N. 585; Ind. Rul. (1931) P. C. 94; 33 Bom. L. R. 450; 27 N. L. R. 95; 58 I. A. 50 (P. C.).

PRIVY COUNCIL.

Appeal from the Rangoon High Court.

March 3, 1932.

LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

THE OFFICIAL LIQUIDATOR OF M. E. MOOLLA SONS, LIMITED —APPELLANTS

versus

MRS. PERRIN R BURJORJEE —RESPONDENT.

Practice—New points in appeal—Question of law —Point of non-registration of admitted document, whether can be raised for the first time in appeal— Conduct of parties, effect of—Registration Act (XVI of 1908), s. 49—Unregistered agreement—Admissibility in suit for damages for breach of contract.

When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the courts below The course ought not in any case to be followed unless the court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea. *Connecticut Fire Insurance Company* v. *Kavanagh* (1), relied on. [p. 741, col. 2.]

There is nothing in s. 49 of the Registration Act when properly construed to compel the court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document. [*ibid.*]

[As the parties were not agreed on the facts and there were indications of a course of conduct on the part of the appellant which was sufficient to preclude him from raising the new point their Lordships refused to allow the appellant to raise the point of non-registration for the first time before the Board]

Where the claim is a personal one for damages of an admitted contract, the Court of Appeal is not bound to take notice of the fact of the non-registration of the deed of agreement as the proceedings do not in any way affect any immoveable property. [p. 741, col. 2.]

Messrs. *W. H. Upjohn, K. C.* and *T. B. W. Ramsay,* for the Appellant.

Messrs. *A. M. Dunne, K. C* and *Pennell,* for the Respondent.

Lord Tomlin—This appeal is concerned with the question whether a creditor's proof lodged by the respondent in the liquidation of the company whose liquidator is the appellant and rejected by the liquidator was properly so rejected.

On the 23rd December, 1929, the trial Judge on the Original Side of the High Court of Judicature at Rangoon held that the proof was rightly rejected. On the 4th August, 1930, this decision was reversed on appeal to the appellate side of the court.

The proof in question was for Rs. 63,219-15-0, damages alleged to have been incurred by the respondent by reason of the failure of the company to complete the purchase of property agreed to be sold by the respondent by an agreement dated the 27th July, 1921.

The only question in issue or debated at the hearing before the trial Judge, or on the appeal, was whether the agreement for sale (on the face of which the purchaser was one M E. Moolla) had been entered into by Moolla on his own account or whether the company was the undisclosed principal of Moolla in respect of such agreement.

The trial Judge held that Moolla had entered into the agreement as principal and had afterwards transferred the benefit of it to the company and that, therefore, the company was under no liability to the respondent.

The Appellate Court held that the company was the undisclosed principal and was liable to the respondent and that the proof had been wrongly rejected.

Against this decision the liquidator appealed to His Majesty in Council and before their Lordships' Board raised the contention that the agreement of the 27th July, 1921, required registration under the Indian Registration Act, that it had not been registered and that as it had not been registered it could not be used for any purpose whatever and ought to be ignored by the court with the result that any claim for damages based by the respondent upon breach of that agreement must necessarily fail.

The questions therefore which arise for their Lordships' consideration are:

(1) Ought the appellant to be allowed to raise now for the first time before the tribunal of last resort the question as to the registration of the agreement?

(2) If the question as to registration can now properly be raised (*a*) did the agreement, which admittedly was not registered, require registration, and (*b*) if it did require registration, what is the effect of non-registration in regard to the respondent's right to claim damages under the agreement?

(3) If the question as to registration cannot now be properly raised, or if it can be properly raised but upon consideration of the merits of the question, it is held that the non-registration of the agreement does

forward a claim for damages under the agreement, whether the Company was or was not the undisclosed principal of M. E, Moolla in regard to the agreement?

To enable these questions to be considered, it will be convenient to state the facts so far as they are proved or admitted.

The company was formed under the Indian Companies Act, 1913, on the 21st January, 1921, as a private company.

Clause III (6) of the Memorandum of Association enabled the company to acquire by purchase, lease, exchange or otherwise land, buildings, and hereditaments of any tenure or description in Burma.

By Articles of Association 115 and 116 (2) the Directors had power to purchase for the company any property which the Company was authorised to acquire.

At a meeting of the Board of Directors held on the 1st February, 1921, Moolla was appointed Managing Director, with power to manage the business of the company as he thought fit.

He was further authorised to purchase and sell any property (moveable or immoveable) as he thought best in the interest of the company.

The issued share capital of the company stood as to about 90 per cent. thereof in the name of Moolla, and as to the remainder in the name of his mother Mariam Bee Bee. The trial Judge said "the company was essentially a one man company, being for all practical purposes Moolla incorporate.".

The company's office was also Moolla's office.

The agreement of the 27th July, 1921, was made between the respondent (described as the vendor) and Moolla (described as the purchaser) and contained no reference to the company. Omitting formal parts, the agreement was as follows :—

"1. The vendor agrees to sell to the purchaser and the purchaser shall purchase from the vendor the properties described in the schedule hereinunder written measuring 12.54 more or less at or for the price of Rs. (Twelve thousand five hundred) per acre.

"2. That the purchaser had paid to the vendor Rs. (10,000) Ten thousand as earnest money, the receipt of which the vendor doth hereby acknowledge.

"3. That the purchaser agrees to complete the conveyance within three months from the 12th July, 1921, by paying the balance of the purchase money calculated at the rate aforesaid save and except a sum of Rs. (1,00,000) One hundred thousand which sum is to remain outstanding as in the clause next provided.

"4. The vendor agrees to keep the said balance of unpaid purchase money, namely, Rs. (1,00,000) One hundred thousand invested with the purchaser for a period not exceeding three to five years as the purchaser may wish on the purchaser paying interest thereon at the rate of eight per annum payable monthly and the same secured by the equitable mortgage of the premises hereby agreed to be sold, that is, by the purchaser depositing the title deeds of the said premises including the conveyance in his favour with the vendor.

"5. That the vendor shall make out a good and clean title to the said premises and produce for inspection the title deeds as soon as required by the purchaser".

The schedule contained a description of certain immoveable property in Burma belonging to the respondent. The acreage is given as 12 54 acres and on this basis, the total purchase price under the agreement would be Rs. 1,57,375 Upon the execution of the agreement Rs. 10,000 was paid to the respondent as earnest money.

The respondent had no personal contract with Moolla in connection with the negotiation for or the execution of the agreement. She acted by brokers throughout.

On the 31st December, 1921, the Board of Directors held a meeting, the Minutes of which state that "the following properties were purchased by the Managing Director during the course of the year on behalf of the company". A list of twenty-eight properties follows. The second on the list under date 13th July, 1921, is the property the subject of the agreement of the 27th July, 1921.

Of the twenty eight properties in the list twenty-five had been bought in the name of the company, three properties (including the respondent's property) had been purchased in Moolla's name and admittedly the two properties other than the respondent's property had been purchased on the company's behalf.

On the 30th March, 1923, the purchase being uncompleted, the respondent's brother-in-law wrote to Moolla asking for the balance of the purchase-price, or at least Rs. 15,000.

Moolla replied by executing four promissory notes in the respondent's favour, for a total of Rs. 40,000.

On the 20th November, 1923, the respondent gave to Moolla a receipt for Rs. 1,000 in respect of interest.

Further payments of interest were made up to February, 1927, but the purchase was never completed.

Moolla at the trial admitted that Rs. 15,000 in respect of the promissory notes and all interest was paid out of the company's funds He alleged that the earnest money was paid by himself but refunded to him by the company. He stated that all the company's books prior to 1924 were des-

troyed under his instructions, and that he had no books to show that the earnest money came originally out of his own moneys. He alleged that he had purchased the property on his own account and had subsequently transferred the benefit of the agreement to the company. He produced no document to evidence the alleged transfer.

On the 6th April, 1927, a creditors' petition was presented to wind up the company and an order for winding-up was made on the 21st June, 1927, and one Hormasji was appointed liquidator.

Between the presentation of the petition and the making of the order, *viz*, on the 18th June, 1927, the respondent at the instance of Moolla filed in opposition to the petition an affidavit prepared by Moolla's clerk. In this affidavit she stated that she was a secured creditor of the company for Rs. 1,31,137-8 0. This was the sum then calculated to be owing under the agreement of the 27th July, 1921.

Moolla himself was declared insolvent on some date between April and June, 1927. His assets were practically nil. He did not enter the name of the respondent as a creditor in the schedule relating to his own affairs which it was his duty to file in the insolvency proceedings.

What subsequently followed is not clear. The record before their Lordships' Board contains an affidavit sworn by the liquidator on the 17th February, 1928, on an application which he made to the Court for directions. This affidavit was treated as his evidence at the trial and at the trial no oral evidence was given by him.

The affidavit, omitting formal parts, is in the following terms:—

"1. On 27th July, 1921, Mr. M. E. Moolla in his own name entered into an agreement with Mrs. P. R. Burjorjee for the purchase of 12·54 acres of garden land near the Victoria Lake on the terms contained in the deed of agreement, a copy of which is herewith attached and marked "A."

"The balance of the purchase price save Rs. 1,00,000 which was to lie invested with the purchaser was never paid and default was made in the payment of interest as stipulated in the agreement and consequently no conveyance was executed by the vendor.

"2. When the vendor applied persistent pressure and threatened to specifically enforce the agreement, Mr. Moolla in his own name on 1st April, 1923, executed four pro-notes for Rs. 15,000, Rs. 10,000, Rs. 10,000, and Rs 5,000, towards the purchase price, out of which the first one for Rs. 15,000 was subsequently paid up in full."

"3. The payment of Rs 10,000 on account of earnest money, of Rs. 15,000 in discharge of the pro-note for Rs. 15,000, dated 1st April, 1923, and of Rs. 41.409.12.0 on account of interest on the balance of purchase-price amounting in all to Rs. 66,409-12-0 was made from the funds of M E. Moolla Sons, Limited, on different dates as detailed in the list annexed and marked "B." The payments have been debited in the company's books on the respective dates thereof.

"4 Throughout the correspondence, nothing is mentioned to show that Mr Moolla was acting as the agent of the company, except for some stray references in Mr. N. N. Burjorjee's letters and in the Minutes of a meeting of the Directors held on 31st December, 1921, copies of which are herewith annexed and marked "C" and "D" respectively.

"5. According to Art 111 of the company's Articles of Association, read with Minutes of Proceedings of meeting of Directors, dated 1st February, 1921 (of which copies are annexed marked "E" and E-1") the Managing Director of the company had power to purchase properties for and on behalf of the company.

'The vendor has put in her proof of claim (copy annexed and marked "F") in which she offers to take over the property at Rs. 4,500 per acre She has subsequently put in a valuation certificate by Mr. Joakim, Managing Director of Balthazar & Son, Limited (copy annexed marked "G") stating that the present market value of the land is about Rs 56,000 I have (without advertising (endeavoured unsuccessfully to obtain a better offer than that made by the vendor and from inquiries made and judging by a recent sale by auction of similar land in the neighbourhood, I have come to the conclusion that Rs. 56,000 is about as high a price as could possibly be realised for the land at the present time."

Of the exhibits referred to in the affidavit, Exhibit "A" was a copy of the agreement of the 27th July, 1921, Ex "B" was a statement printed in the record before their Lordships described as "Statement of payments made from funds of M. E. Moolla Sons Limited."

This statement purports to show payments made by the company in respect of the agreement of the 27th July, 1921, to a total amount of Rs. 66,409-12-0 including Rs. 10,000 for earnest money paid by the company on the 27th July, 1921 and Rs. 15,000 to satisfy one of the promissory notes given by Moolla, paid by the company on the 7th July, 1923. The balance of the Rs. 66,409-12 0 was made up of interest payments in respect of the period between the 1st April, 1923 and February 1927.

With regard to the Exs. "C" and "D," reference has already been made to the material minutes of the Directors' meeting. The only letter of the respondent's brother-in-law, N. N. Burjorjee, printed in the record, is one asking for payment of the Rs. 15,000 and carries matters no further.

Exhibits "E" and "E 1" dealt with the powers of the Managing Director to purchase immoveables, which have never been in dispute.

Exhibit "F" is not printed in the record.

and the form of the respondent's proof is, therefore, not before their Lordships.

It is, however, reasonably clear from the affidavit (1) that the respondent had put in a proof of claim presumably on the same lines as that contained in her affidavit of the 18th June, 1927; (2) that for the purpose of minimising her claim to damages she had offered to take over the property at Rs. 4,500 per acre; (3) that the liquidator had neither admitted nor rejected her claim, but had applied to the court for directions, putting in the agreement and pointing out that there was a question whether Moolla was principal or agent.

The printed extracts from the official diary of the proceedings in the winding-up contains the following passage:—

"28th February, 1928.—Doctor for Mrs. Burjorjee, Munshi for Company. Clark for Chartered Bank. Official Liquidator in person.

"Let the property mentioned in the application of the Official Liquidator be sold by public auction after due advertisement, with a reserve price of Rs. 56,000. No orders will be passed on the present application of the Official Liquidator till after the sale, and his proposal will be sanctioned thereafter if Mrs. Burjorjee is still willing to abide by the terms of the arrangement.

"As regards Mrs. Burjorjee's claim against the company, it will be enquired into by me on 12th March, 1928, unless before that date the Official Liquidator and Mr. Clark for the company admit the claim. The sale may be held after the enquiry, and, if at the enquiry, I uphold Mrs. Burjorjee's claim, she will be given leave to bid at the auction and set off the purchase price against her claim *pro tanto*."

Their Lordships are informed and both parties are agreed that the property was in fact sold and the proceeds paid to the respondent.

Presumably it was sold under the order referred to in the extract from the diary. It is, however, obvious that no title could have been made without the concurrence of the respondent. An agreement of some kind between the Official Liquidator and the respondent in relation to the matter seems therefore to have been essential, though the appellant does not admit that there was any such agreement.

Having regard to the material before their Lordships' Board there may well have been such an agreement upon the lines that, the existence of an agreement for purchase at Rs. 1,57,375 and non-performance of that agreement by the purchaser being admitted, the parties arranged to minimise damages by concurring in a sale of the property and in handing the proceeds of sale to the respondent, the question whether the company was the principal in respect of the agreement of sale being the only question left open for the decision of this Court.

However this may be, the respondent subsequently amended her proof by giving credit for the purchase money, her claim being thus reduced to Rs. 63,219-15-0.

On the 16th July, 1929, the Official Liquidator rejected the claim, giving the following reason:

"I am not satisfied that the company was the real contracting party. The contract is, therefore, not binding on and enforceable against the company."

On the 29th July, 1929, the respondent petitioned to have the decision of the Official Liquidator reversed.

At the hearing of the petition the respondent gave oral evidence. Neither the official liquidator nor Moolla gave oral evidence. The affidavit of the official liquidator already referred to was treated as his evidence, and a deposition of Moolla made apparently at some earlier stage in the winding-up proceedings, was treated as his evidence.

In his evidence in chief, Moolla stated as follows:—

"I entered into the transaction with Mrs. P. R. Burjorjee as evidenced by the agreement of 27th July 1921. When I agreed to buy this land, I was buying it at first for myself. I myself was the buyer. I signed the pro-notes which were given as part consideration of the purchase-price. The pro-notes were given in my own name and I paid Rs. 10,000 as earnest money and that was my own money. (Minutes of M. E. Moolla & Sons, Limited, dated the 31st December, 1921, explained to the witness). I purchased that property and put it in the assets of the company. From 31st December, 1921, it was considered as the property of the company. The Directors of the Company agreed and as I did not want to sell the property I put it into the company. The company agreed to take it over in December, 1921. I presided at that meeting Mariam Bee Bee is my mothar. Hashim Eusoof Moolla is my brother's son (nephew). I held shares worth I crore and 53 lakhs and 50 thousand. The capital of the company was I crore and 65 lakhs. My mother held shares worth Rs. 11,50,000. The minute was recorded at my suggestion. It was at my suggestion that the company took over this deal. Apart from this minute there is no written document showing that this deal was taken over by the company. The receipts made out by Mrs. Burjorjee were made out in my name.

In cross-examination, Moolla said:—

"I still say (*sic*) that the purchases by me of Mrs. Burjorjee's, Emin's and Bymeah's properties were for the company. I dont' remember whther I stated to Mr. Hormasji that the purchases made in my own name, of Mrs. Burjorjee's Emin's and Bymeah's lands were made for the company.

* * * * *

"When the Official Assignee examined me I made the following statements:—'As for properties purchased by me in my own name after the promotion of the company, they were treated as the company's properties because the purchase-money or part pur-

chase-money was paid from the company and debited in the Company's accounts and they were bought for the company. There are only two such properties, *viz.*, Mrs. R. N. Burjorjee's land and the house in Park Road mortgaged to Emin. The Tiger Alley property, which has been sold, was another such transaction, I shall furnish lists in a day or two of all properties held for the company though they are not in the company's name."

In reply to the Court, Moolla subsequently added "as regards Mrs. Burjorjee's land it was in my own name and this was because Mrs. Burjorjee refused to negotiate with the company."

Mrs. Burjorjee denied that she had refused to negotiate with the company and said in effect that she only knew of the company in the matter some time after the agreement.

The only matter debated before the Judge who tried the petition was the question of fact whether the company was in connection with the purchase the undisclosed principal of Moolla. The learned Judge held that Moolla purchased on his own account.

The respondent appealed. The question, and the only question, debated before the appellate side was that which had been debated below.

The appellate side reversed the trial Judge and held that the company was the principal in the matter.

Subsequently the appellant applied for a review of the judgment on the ground that Ex. "B" to his affidavit had been erroneous in so far as it showed the earnest money to have been paid out of the company's funds on the 27th July, 1921, the books of the company for 1921, having been destroyed and there being, therefore, no evidence of such payment.

The application for the review of judgment was rejected.

On the 7th January, 1931, leave to appeal to His Majesty in Council was granted to the appellant. In his application for such leave, the appellant for the first time raised the question of the non registration of the agreement in these terms: "This Honourable Court has omitted to take note of the fact that the agreement of sale of 27th July, 1921, had not been registered and was thereby invalid and inoperative." The same point was raised in his case before their Lordships' Board.

The first question for consideration, therefore, is ought the applicant to be allowed at this stage to raise for the first time the point of non-registration?

In *Connecticut Fire Insurance Company* v. *Kavanagh* (1, Lord Watson, in delivering the judgment of their Lordships' Board, said as follows:

"When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not in any case to be followed unless the court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea."

Section 49 of the Registration Act, which states the results of non-registration is, so far as material, as follows:—

"49. No document required by s. 17 to be registered shall

(*a*) affect any immoveable property comprised therein.

or * * * * *

(*c*) be received as evidence of any transaction affecting such property .....unless it has been registered.

Their Lordships are satisfied that there is nothing in the section cited when properly construed to compel the Court to take notice of the non registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document.

Here the agreement has been admitted throughout. Indeed, it was first put in by the appellant. Further, the proceedings do not in any respect affect any immoveable property. The immoveable property affected by the agreement long since passed out of the picture, and the only claim in these proceedings is a personal one for damages for breach of an admitted contract against an alleged undisclosed principal who denies he was a principal.

Their Lordships therefore regard themselves as free to consider upon general principles, whether the appellant ought to be allowed to raise the point of non-registration.

They are satisfied that he ought not to be allowed to do so. It has already been pointed out that the circumstances in which the appellant's petition founding these proceedings was launched are by no means clear. The parties are not agreed upon the facts. There are indications of a course of conduct or agreement on the part of the

(1) (1892) A. C. 473 at p. 480; 61 L. J. P. C. 50; 67 L. T. 508; 57 J. P. 21.

liquidator which would preclude him from raising any point in the proceedings except that as to the respective positions of the company and Moolla in regard to the agreement of the 27th July, 1921,

In this state of the evidence, it would not in their Lordships' judgment be in accordance with the principles indicated by Lord Watson, in the judgment already cited, to take into consideration at this stage for the first time the point of the non-registration of the document.

It becomes therefore unnecessary to consider the second question as to the necessity for registration.

There remains the third and last question, one of fact upon which the courts below have differed, *viz*, was the company the undisclosed principal of Moolla in relation to the agreement of the 27th July 1921.

Their Lordships are satisfied that the company was the undisclosed principal of Moolla. All the contemporary documents support this view. There is nothing in Moolla's conduct inconsistent with it. There is much in his conduct which, though not necessarily inconsistent with the other view, points strongly in the direction of his having acted as the company's agent throughout. His own evidence was obscure and contradictory, and he was not seen in the witness box by the trial Judge. In their Lordships' opinion the learned Judges of the appellate side reached a correct conclusion upon the issue of fact.

In the result, therefore, the appeal fails and must be dismissed with costs.

Their Lordships will humbly advise His Majesty accordingly.

A. *Appeal dismissed.*

Solicitors for the Appellant:—Mr. *Barrow Rogers & Nevill.*

Solicitor for the Respondent:—*J. E. Lambert.*

PRIVY COUNCIL.

Appeal from the Calcutta High Court.

March 14, 1932.

LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

THE COMMISSIONER OF INCOME TAX, BENGAL—APPELLANT

versus

SHAW, WALLACE & COMPANY—RESPONDENTS

Income Tax Act (XI of 1922), ss. 2, (4), 4 (3), (vii) 6 (iv), 10, 12—Amounts paid to agents as compensation for cessation of agency—Whether assessable income—'Income', 'business', meanings of—Principles of liability.

The word 'income' in the Income Tax Act connotes periodical monitory return 'coming in' with some sort of regularity or expected regularity from definite sources. The sources need not be continously productive but must be one whose object is the protection of a definite return excluding anything in the nature of a mere wind fall.

Though the words used in the definition of 'business' in s 2 (4) of the Act are wide, underlying each of them there is the fundamental idea of the continuous exercise of an activity, and in order that an income may be assessable under the head of business in s. 6 of the Act, it is essential that the business must one *carried on by the assessee*. It must be profits earned by a process of production.

The expression 'receipts arising from business' in s. 4 (3) *(vii)* means receipts arising from the carrying on of business. *In re Turner Morrison & Co.* (1), disapproved.

Where the assessees acted as distributing agents of certain oil companies and on the termination of the agency the assessees were paid a certain sum of money as compensation for cessation of the agency:

Held, that the amount so received by the assessees was not assessable income in as much as it was not the produce or the result of carrying on the business of agency but was received as a sort of *solatium* for its compulsory cessation.

Messrs *A. M. Dunne, K. C.* and *R P. Hills*, for the Appellant.

Messrs. *A. M. Latter, K. C.* and *Cyril King*, for the Respondent.

Sir George Lowndes.—This is an appeal from a judgment of the High Court at Calcutta delivered on a reference made to it under s. 66 of the Indian Income Tax Act, XI of 1922. The reference arose out of an assessment to income tax upon the respondents for the year 1929 30, in respect of an item of Rs. 9,83,361, part of a larger sum of Rs. 15,25,000 received by them in 1928 as compensation for the termination of certain agencies.

The respondents carry on business in Calcutta as merchants and agents of various companies, and have branch offices in different parts of India. For a number of years prior to 1928 they acted as distributing agents in India of the Burma

Oil Company and the Anglo-Persian Oil Company, but had no formal agreement with either company. In or about the year 1927 the two companies combined and decided to make other arrangements for the distribution of their products. The respondents' agency of the Burma Company was accordingly terminated on the 31st December, 1927, and that of the Anglo-Persian Company on the 30th June, following. Some time in the early part of 1928 the Burma Company paid to the respondents a sum of Rs. 12,00,000 "as full compensation for cessation of the agency," and in August of the same year the Anglo-Persian Company paid them another sum of Rs. 3,25,000 as "compensation for the loss of your office as agents to the company." The quotations are from letters by which the payments were recorded, and are accepted on both sides as correctly expressing the nature of the transactions.

The Income Tax Officer, in computing the assessable income of the respondents for the relevant year, took these two receipts into account as profits or gains of their business in the year ending the 31st December, 1928, but allowed certain deductions therefrom in respect of compensation paid by the respondents to various employees, leaving a balance of Rs. 9,83,361 which he included in the total income of the respondents found assessable for the year 1929-30.

The respondents objected to the assessment, and appealed to the Assistant Commissioner, who confirmed the assessment. Thereafter, on the requisition of the respondents, the Commissioner drew up a statement of the case, and referred the questions of law therein set out to the High Court with his own opinion thereon, which was against the contentions of the respondents.

The questions so formulated were as follows:—

"(*a*) Was not the sum of Rs. 9,83,361 which had been included in the total income of the assessees for purposes of assessment for 1929—30, in the nature of a capital receipt and, therefore, not income, profits or gains within the meaning of the Income Tax Act?

(*b*) If it could be said to be income, profits or gains within the meaning of the Act, was it liable to be assessed under either of the ss. 10 and 12 of the Act, inasmuch as (1) it was not the profits, or gains of any business carried on by the assessees within the meaning of s. 10 of the Act, nor (2) income, profits or gains from other sources within the meaning of s. 12 of the Act?

(*c*) In the alternative, was not the payment of Rs. 9,83,361 an *ex gratia* payment in the nature of a present from the oil companies in question and was it not, therefore, exempt under s. (4) 3 (*vii*) of the Act."

The reference was heard by the Chief Justice sitting with Ghose and Buckland, JJ. The judgment of the High Court was delivered by the Chief Justice, his colleagues concurring.

The learned Judges appear to have returned a formal answer only to question (*a*) which the Chief Justice stated to be "the real question in the case." He thought that if the respondents could not escape by reason of the contention raised by this question they must fail. The other questions, he thought, fell within a recent decision of the Court in the case of *In re Turner Morrison & Co.* (1) he had nothing to add to what was then said on these points

Their Lordships agree that the real matter for decision falls under (*a*), but they think that this question is not happily worded, as it seems to suggest that it was only if the sum there referred to was "in the nature of a capital receipt" that it would be exempt from assessment, whereas the more correct proposition would seem to be that it was only if it was in the nature of an income receipt that it would fall to be assessed to the tax. The question was, however, re-stated by the learned Chief Justice in more precise terms, *viz.*, "whether these sums are income, profits or gains within the meaning of the Act at all," and for the reasons stated in his judgment he came to the conclusion that they were not. Their Lordships think that his conclusion was right though they arrive at this result by a slightly different road.

In one part of his judgment the Chief Justice seems to hold that the "compensation for loss of these agencies is a receipt in respect of a capital asset in the nature of goodwill," but it has been objected with some force that there is nothing upon which this finding can be based. There was, so far as the facts disclose, no transfer of the goodwill of the respondents, and no agreement by them not to compete with the new selling agency of the companies.

In another part of the judgment the payment seems to be regarded as in the nature of compensation in lieu of notice. But here again their Lordships think that there are no facts to support such a conclusion, and they doubt if s. 206 of the Indian Contract Act upon which reliance is placed has any application.

(1) 117 Ind. Cas. 689; 56 C. 211; 33 C. W. N. 112; A. I. R. 1929 Cal. 212 (F. B.).

Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-Tax Statutes - both the cases upon which the High Court relied and the flood of other decisions which has been let loose in this Board. The Indian Act is not *in pari materia*; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions their Lordships think that little can be gained by attempting to reason from one to the other, at all events in the present case in which they think that the solution of the problem lies very near the surface of the Act, and depends mainly on general considerations.

The object of the Indian Act is to tax "income," a term which it does not define. It is expanded, no doubt, into "income profits and gains," but the expansion is more a matter of words than of substance. Income, their Lordships think, in this Act connotes a periodical monetary return "coming in" with some sort of regularity, or expectd regularity, from definite sources The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something, which is often loosely spoken of as "capital." But capital, though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production.

The sources from which the taxable income under the Act are to be derived are enumerated in s. 6, which runs as follows:—

"Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely:—

(*i*) Salaries.
(*ii*) Interest on securities.
(*iii*) Property.
(*iv*) Business
(*v*) Professional earnings.
(*vi*) Other sources"

The claim of the taxing authorities is that the sum in question is chargeable under head (*iv*) business. By s 2 (4) business "includes any trade, commerce or manufacture, or any adventure or concern in the nature of trade, commerce or manufacture." The words used are no doubt wide, but underlying each of them is the fundamental idea of the continuous exercise of an activity. Under s. 10 the tax is to be payable by an assessee under the head business "in respect of the profits or gains of any business *carried on by him*." Again, their Lordships think, the same central idea: the words italicised, are an essential constituent of that which is to produce the taxable income: it is to be the profit earned by a process of production. And this is borne out by the provision for allowances which follows. They include rent paid for the premises where the business is carried on; the cost of current repairs in respect of such premises; interest on money borrowed for carrying on the business, etc.

Some reliance has been placed in argument upon s. 4 (3) (*v*) which appears to suggest that the word "income" in this Act may have a wider significance than would ordinarily be attributed to it. The sub-section says that the Act "shall not apply to the following classes of *income*," and in the category that follows, cl. (*v*) runs:—

"Any capital sum received in commutation of the whole or a portion of a pension, or in the nature of consolidated compensation for death or injuries, or in payment of any insurance policy, or as the accumulated balance at the credit of a subscriber to any such Provident Fund"

Their Lordships do not think that any of these sums, apart from their exemption, could be regarded in any scheme of taxation as income, and they think that the clause must be due to the over anxiety of the draftsman to make this clear beyond possibility of doubt. They cannot construe it as enlarging the word "income" so as to include receipts of any kind which are not specially exempted. They do not think that the clause is of any assistance to the appellant.

Following the line of reasoning above indicated, the sums which the appellant seeks to charge can, in their Lordships' opinion, only be taxable if they are the produce, or the result, of carrying on the agencies of the oil companies in the year in which they were received by the respondents. But when once it is admitted that they were sums received, not for carrying on this business, but as some sort of *solatium* for its compulsory cessation, the answer seems fairly plain.

If the business had been sold—even if that somewhat indeterminate asset known as the "goodwill" had been assigned to

the employing companies, as the High Court seems to have thought it had—it is conceded that the price paid would not have been taxable. But why? Plainly because it could not be regarded as profit or gain from carrying on the business, and their Lordships think that the same reasoning must apply when the sum received is in the nature of a *solatium* for cessation.

It is contended for the appellant that the "business" of the respondents did in fact go on throughout the year, and this is no doubt true in a sense. They had other independent commercial interests which they continued to pursue, and the profits of which have been taxed in the ordinary course without objection on their part. But it is clear that the sum in question in this appeal had no connection with the continuance of the respondents' other business. The profits earned by them in 1928 were the fruit of a different tree, the crop of a different field.

For the reasons given their Lordships are of opinion that question (*a*) was rightly answered by the High Court in favour of the assessee. No objection has been taken to the form of the answer or to its sufficiency, and it would seem unnecessary therefore to deal with the other two questions. Their Lordships will only add that the reasoning of this judgment would apply equally if the appellant based his claim on head (*vi*) "other sources" and the corresponding provisions of s. 12.

With regard to the claim to exemption under s. 4 (3) (*vii*), their Lordships think that the decision in the case of *In re Turner Morrison & Co.*, (1), to which reference has been made above, may need re-consideration in the light of this judgment. In their Lordships' view the expression "receipts arising from business" in that clause must mean receipts arising from the carrying on of business.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

A. *Appeal dismissed.*

Solicitor for the Appellant.—*The Solicitor*, India Office.

Solicitors for the Respondents—Messrs. *Linkaters & Paines.*

PRIVY COUNCIL.

Appeal from the Oudh Chief Court.

March 10, 1932

LORD BLANESBURGH, LORD TOMLIN AND SIR GEORGE LOWNDES.

ABDUL HAMID KHAN—APPELLANT

versus

Raja SAADAT ALI KHAN AND OTHERS RESPONDENTS

Oudh Estates Act I of 1869, s. 29—Muhammadan Talukdar—*Widow's power to adopt—Adoption after re-marriage—Validity.*

The widow of a Muhammadan *taluqdar* of Oudh has under the terms of s. 29 of the Oudh Estate Act (which confers on her the power to adopt) no power to adopt a son after re-marriage and an adoption made by her after her re-marriage is therefore, invalid. [p. 746, col. 1.]

Mr. *B. Dube, K. C.*, for the Appellant.

Messrs. *A. M. Dunne, K. C., M. A. Jinnah* and *S. Hyam*, for the Respondents.

Sir George Lowndes.—The appellant in this case is the claimant to a large and valuable *talukdari* estate in Oudh, known as *taluka* Nanpara, the succession to which is governed by Act I of 1869. The 1st respondent was at the date of the suit in possession of the estate and unless the appellant is able to show a better title in himself, it is admitted that he cannot succeed.

The last full owner was Raja Muhammad Siddiq Khan, who died without issue on the 30th December, 1907. He left four widows him surviving, and by his will gave successive authorities to each of them to adopt a son. The 1st respondent is in as the adopted son of the second widow, Rani Saltanant. The appellant claims to oust him as the adopted son of the fourth widow, Rani Champa, on the ground that his (the appellant's) adoption was the only valid one. The other respondents are in possession of parts of the estate under a compromise with the 1st respondent.

The main question in the suit was whether the adoption of the appellant, the *factum* of which is admitted, was valid, and the first line of defence was that Rani Champa had been re-married to one Sher Muhammad Khan before the adoption of the appellant, and that for this reason his adoption was invalid.

The question of the re-marriage was contested at great length in the Oudh Court, as is testified by the bulky record now before the Board. The appellant, in addition to denying the re marriage in fact, asserted that, previous to the date on which it was alleged to have taken place, Sher Muhammad Khan had been married to the

sister of Rani Champa, and this was put forward as making the story of the latter's re-marriage impossible, it being admittedly contrary to the Muhammadan Law for a man to be the husband of two sisters.

The trial Judge and the Court of Appeal have concurrently held that the re-marriage of Rani Champa with Sher Mahomed Khan, on a date prior to the adoption of the appellant, is established by the evidence. They are also agreed that the alleged previous marriage with the Rani's sister, the burden of proving which was clearly upon the appellant, is not established. These findings must, in accordance with the recognized practice of the Board, be held conclusive as to the fact of the re-marriage.

It only remains to consider an alternative contention of the appellant that the re-marriage did not invalidate the adoption. This again has been negatived by both the Indian Courts, mainly on the strength of cl. 10 of Raja Muhammad Siddiq Khan's will. The official translation of this clause, which was before the trial Judge, was in the following terms:—

"If any of the Ranis contract a second marriage after me she shall not be entitled to be profited by any of the paragraphs of this will."

The learned Judge held that the power of adoption was on the same footing as a power of appointment and therefore 'a benefit or privilege" conferred on the widow which she would, under the terms of this clause, forfeit upon re marriage. He also thought that under s. 29 of the Oudh Estates Act (1 of 1869), by which a conditional power of adoption is given to the widow of a Muhammadan *Talukdar*, the power could only be exercised by her if she were still his widow at the time of making the adoption.

In the Court of Appeal the translation of cl. 10 of the will was amended by the learned Judges, and this has now come up to the Board under the official seal of the court. The amended translation runs as follows:—

"If any of the Ranis contract a second marriage after me she shall not be entitled to avail herself of any of the provisions of this will."

The learned Judges thought that on this reading of the clause it was clear, that Rani Champa "on her re-marriage with Sher Muhammad Khan forfeited her power of adoption, and consequently the plaintiff's adoption made by her on the 25th July, 1914, is invalid."

Their Lordships, while not disagreeing with the reasoning of either of the Indian Courts on this question, think that the same result is to be arrived at in another way.

The parties being Muhammadans, there is no power to adopt under their personal law, and it is only conferred by s. 29 of the Act, and must be confined strictly within the limits there laid down. The section is as follows:—

"Every Muhammadan *Talukdar*, grantee, heir or legatee, and every widow of a Muhammadan Talukdar or grantee, heir or legatee, with the consent in writing of her deceased husband, shall, for the purposes of this Act, have power to adopt a son whenever, if he or she were a Hindu, he or she might adopt a son."

The power is thus exercisable by the widow of the *talukdar* only under such circumstances that if she were a Hindu she would be entitled to adopt. It can, their Lordships think, hardly be doubted that a Hindu widow could not, after re-marriage, make a valid adoption to her former husband. Indeed, this is conceded by Mr. Dube, who has presented the appellant's case with ability and restraint. Their Lordships think that it necessarily follows that the Muhammadan *Talukdar* has, under the terms of the section, no power to adopt a son after her re-marriage, and that, therefore, the adoption of the appellant was invalid and conferred upon him no right to the Nanpara estate.

For these reasons their Lordships think that this appeal fails and that the appellant's suit was rightly dismissed by the trial Judge, and they will humbly advise His Majesty accordingly. The appellant must pay the costs of the appeal.

A. *Appeal dismissed.*

Solicitors for the Appellant.—Messrs. *Hy, S. L. Polak & Co.*

Solicitors for the Respondents.—Messrs. *Barrow Rogers & Nevill.*

PRIVY COUNCIL.

Consolidated Appeals from the Oudh Chief Court.

March, 8, 1932.

LORD TOMLIN, LORD THANKERTON, LORD SALVESEN, SIR GEORGE LOWNDES AND SIR DINSHAH MULLA.

DULAHIN JADUNATH KUAR—
APPELLANT
versus
Raja BISHESHAR BAKHSH SINGH—
RESPONDENT.

Hindu Law—Succession—Gotraja sapinda, *meaning of*—'Gotra', *meaning of—Oudh Estates Act (I of 1869), s. 22 (10)*—'Male agnate', *meaning of—Test of determination.*

The meaning of *'male agnate'* in s. 22 (10), Oudh Estates Act, cannot be determined without recourse to the ordinary law which would govern the succession apart from the statute.

In order that a person may be *male agnate* or *gotraja-sapinda* of the propositus it must be proved, first, that he is of the same *gotra*, that is, of a common patriarchal stock and, secondly, that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males.

In the absence of challenge on this point, it might well be that proof by a person that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but, on his being challenged on this point, it is for him to satisfy the court that he complies with this condition also, before he can succeed in his claim to the succession. [p 748, col 2.]

The term *"agnate"* is not a term of art in the English legal system; in the English language, though not in frequent use, it is a known term, used to indicate relationship on the father's side or exclusively through males and it is a word expressive of relationship similar to "son" or "brother." [p 742, col. 2]

The word *'gotra'* has only one meaning and denotes descent from common patriarchal stock.

Messrs. *A. M. Dunne*, K. C., and *J. M. Parikh*, for the Appellant.

Messrs. *Upjohn*, K. C., *L. DeGruyther*, K. C., and *W. Wallach*, for the Respondent.

Lord Thankerton.—In accordance with the view expressed in the judgment of this Board dated the 4th December, 1930, the issue raised in the third appeal has been re heard before a fuller Board. By that judgment it was decided that the succession to the *taluka* Gangwal is governed by the Oudh Estates Act, and in particular by s. 22 (10), which, as amended in 1910 is as follows:—

"(10) Or in default of or on the death of such mother, then to the nearest male agnate according to the rule of lineal primogeniture, subject as aforesaid."

The last *talukdar* was Raja Suraj Prakash Singh, and the plaintiff's pedigree shows Bhaya Partap Singh as their common ancestor, and in accordance with the previous judgment the plaintiff must be held to have established that, in blood relationship, he is the nearest male blood relation according to the rule of lineal primogeniture of Raja Suraj, the last male holder of the *taluka*. It is clear from the context that this finding relates to physical blood relationship and does not exclude the possibility—raised by the issue in the third appeal—of the legal right of succession, so far as expressed as blood relationship, having been lost, *e. g.*, by adoption.

The sole question in the third appeal is whether the plaintiff has proved that he is an "agnate" of the propositus within the meaning of s. 22 (10): if so, he is admitted to be the nearest male agnate according to the rule of lineal primogeniture.

In the first place, their Lordships are clearly of opinion that the meaning of 'male agnate" for the purposes of the section cannot be determined without recourse to the ordinary law which would govern the succession apart from the statute—in this case the Hindu Law of succession according to the rules of the Mitakshara. The term "agnate" is not a term of art in the English legal system; in the English language, though not in frequent use, it is a known term, used to indicate relationship on the father's side or exclusively through males. In their Lordships' opinion, it is a word expressive of relationship, similar to "son" or "brother," to which the rule of construction laid down in *Raghuraj Chandra* v. *Subhadra Kunwar* ( ) falls to be applied. The only express prescriptions of the Act relative to "male agnate" are that it denotes only legitimate relatives (s. 2), and that it applies only to *najib-ul-tarfain, i. e*, those of noble birth on both sides (s. 21). Subject to these qualifications, the meaning of "male agnate" falls to be ascertained by the personal law of the individual, to whom the succession is to be established.

Turning to the law of the Mitakshara, their Lordships have no doubt that "male agnate" denotes a *gotraja sapinda*, as to which an authoritative exposition is to be found in *Bhyah Ram Singh* v. *Bhyah Ugur Singh* (2) Sir Robert Phillimore, in delivering the judgment of this Board says (page 396*:)

"The Mitakshara, in the 5th and 6th sections

(1) 108 Ind. Cas. 673; 55 I. A. 139; A. I. R. 1928 P. C. 87; 5 O. W. N. 443; 26 A. L. J. 609; 30 Bom. L. R. 829; 3 Luck 76; 32 C. W. N. 1009 (P. C.).

(2) 13 M. I. A. 373 at p. 391; 5 B. L. R. 293; 2 Suther 330; 14 W R P. C. 1; 2 Sar. 566 (P. C.).

* Page of 13 M. I. A.—[*Ed.*]

of the second chapter, recognises two successive classes of heirs: first, 'Gentiles', next, *Bandhoos*; after them it places certain special persons, and after these last the State, the *ultimus hoers*. Whatever descent prevails, and even where the State takes by escheat, in the duty of some ceremonial performance to the deceased is still enjoined. The family is the cherished institution of Hindoos. Individual separate ownership is less the subject of the general remarks of Commentators on the Hindu Law than the associated aggregate community, the family. In this respect an analogy is observed between family ownership and that of the old village community. Consequently, family union or connection derived from a common head, the founder of the family, may reasonably be regarded, amongst a patriarchal people, as the source of the entire class from which a succession of heirs may be derived. Again, as males are preferred to females in succession from religious reasons, this same class may be reasonably subject to the condition that the descent be generally derived from males, who, for the same reason, may obtain a constant preference. The text of the whole of the 5th and 6th sections of the 2nd chapter of the Mitakshara is in the strictest conformity to these principles. The Gentiles, or *Gotraja* (from the *Gotra*) are described as descending from one common stock, a male, and derived generally through males, as forming a family, though embracing, possibly, many families, and such original bond of union is regarded as necessary to the constitution of the *Gotra*. These conditions are all that are stated as necessary to the constitution of the class of Gentiles. As regulating prerefence of succession amongst them, the law of succession amongst Gentiles classifies them further, as *sapindas* and *samanodacas*; the first it treats as prior to the second, but excludes neither, within limits wide enough to include the present plaintiffs. As the plaintiffs, then, in this case show a common ancestor, a *Gotra* a community of family, a descent which extended to the deceased and themselves, they appear to satisfy every condition of the text."

From this it is clear that, in order to qualify as a male agnate, or *gotraja-sapinda* of the propositus, the plaintiff must satisfy two conditions, *viz.*: (*a*) that he is of the same *gotra*, or, as it may be expressed, of a common patriarchal stock, and (*b*) that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males.

It is now settled that *sapinda*-ship under the Mitakshara Law arises from the community of corporal particles, and is not dependent on the right to participate in the offering of funeral oblations; the latter may be of importance in settling the order of preference of heirs in the same class, but is not relevant in a question of exclusion from a class of heirs. *Lulloobhoy Bapoobhoy* v. *Cassibai* (3) and *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (4). It may further be noted that the *bandhus*, or cognates, have a technical meaning in the system of the Mitakshara and signify the *bhinna-gotra sapindas*, that is, those not belonging to the same *gotra* or family (*Ramchandra*, *supra cit* 4.)

The pedigree of the plaintiff in the present suit shows his community of corporal particles with the propositus through a common ancestor, Bhaya Partap Singh, traced through males, and, to that extent, the pedigree has been held proved, as already stated. He has, therefore, satisfied one of the two requisite conditions, *i. e.*, that he is a *sapinda* of the propositus; but the main issue in the third appeal is whether the plaintiff has proved that he satisfies the other condition, namely, that he is of the same patriarchal stock or *gotra*. In the absence of challenge on this point, it might will be that proof by the plaintiff that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but, on his being challenged by defendant No. 2 on this point, it is for the plaintiff to satisfy the court that he complies with this condition also, before he can succeed in his claim to the succession.

Defendant No. 2 maintains in this appeal that it is established on the evidence that the *gotra* of the propositus was Vaiyaghra, and the plaintiff's *gotra* being admittedly Atri, they cannot be related as agnates (*gotraja sapinda*) under the Mitakshara Law, and that, in any event, the plaintiff has failed to prove that the propositus, like himself, belonged to the Atri *gotra*. The plaintiff maintains that the evidence sufficiently establishes that he was of the same *gotra* as the propositus, but that, if this conclusion is not justified, the case should be remitted for further enquiry on this point, as the issue was not fairly or fully raised in its present form at the trial or in the courts below.

It was ultimately agreed by both parties (*a*) that, if in fact the propositus was of the Vaiyaghra *gotra* and the plaintiff was of the Atri *gotra*, this difference of *gotra* necessarily led to the conclusion that the plaintiff is not an agnate, *i. e.*, *gotraja sapinda*, of the propositus, and (*b*) that such difference of *gotra* could only be ac-

(3) 7 I. A. 212; 5 B. 110; 7 C. L. R. 445 (P. C.)

(4) 25 Ind. Cas. 290; 41 I. A. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384 (P. C.).

counted for by adoption into a different *gotra*, of the plaintiff or one of his paternal ancestors since the common ancestor, Bhaya Partap Singh.

In the previous judgment their Lordships expressed the view that this issue had not been clearly or adequately placed before either of the lower courts, and, after reconsideration before a fuller Board, their Lordships are confirmed in this view.

The question of *gotra* was not raised in the pleadings, written or oral. Defendant No. 2 put the plaintiff to the proof of his pedigree, and his only express contention was that Jugarj Singh, the younger son of Partab Singh, died childless. The only issue that could be held to cover this point was No. 7, which is as follows: "Is the plaintiff the nearest heir under the Act by the rule of lineal primogeniture to Suraj Prakash Singh, or under the custom applicable to the family?"

At the trial, *gotra* was first mentioned during the cross examination of the plaintiff, when he stated, "My *gotra* is Atra *gotra*"; he was not further examined on this point by either side. It is next referred to in cross examination, for defendant No. 2, of two witnesses for defendants Nos. 1 and 3 (D. W. No. 15 and D. W. No. 18), and is dealt with by a series of witnesses for defendant No. 2 About halfway through this latter body of witnesses a statement by plaintiff's Counsel is recorded to the effect that the plaintiff did not admit that the *gotra* of the Gangwal family was Vaiyaghra, but that the Gangwal family belonged to Atri *gotra*.

It seems reasonably clear from the judgment of the trial Judge that difference of *gotra* was only used before him as affecting the question whether Jugraj Singh had died childless, in other words, as involving a break in the blood relationship of the plaintiff with Jugraj Singh. There appears no trace of an argument that, granted the blood relationship, the difference of *gotra* would still negative the plaintiff's claim to be the nearest agnate.

The learned trial Judge held it proved by the defendants' witnesses that the Gangwal *talukdars* were of the Vaiyaghra *gotra*, though he thought that this conclusion was weakened by the fact that that point was not put to the plaintiff or his witnesses in cross examination; he also thought it possible that the plaintiff might have stated his *gotra* incorrectly or his ancestors might have forgotten to what *gotra* they belonged and then taken whatever *gotra* was suggested by their *prohits* or priests. On consideration of Sastri's Treatise on Hindu Law and Dr. Gour's Hindu Code, he came, apparently reluctantly, to the conclusion that it is possible that persons descended in the male line from a common ancestor can belong to two different *gotras*, and stated "whatever the explanation of the difference of *gotras* may be, I am not prepared to accept this difference as conclusive proof that the plaintiff and his family are not agnatic relations of the *talukdars* of Gangwal in the manner claimed. Counsel for defendant No. 2 should have put his case to the plaintiff in cross-examination. Probably he feared that if he did so the plaintiff might be able to explain the apparent difficulty. I think it is impossible to explain away the admissions made by Raja Sitla Bakhsh Singh and his *mukhtar* to which I have referred above." The admission referred to was made in a suit in 1868 by Sheo Nath, the plaintiff's father, against Raja Sitla, the first *talukdar* of Gangwal, claiming that certain villages had been given as *bhayai* to the plaintiff's ancestors: in his answer the Raja stated "The plaintiffs do belong to the defendant's family, but these villages were not given to them as a *bhayai*, *i. e.*, portion. Defendant's ancestors gave Gularia to plaintiff's ancestor in 1244 as *jagir*." The learned Judge also referred to the conduct of Rani Itraj Kuar in 1900, when Sheo Nath Singh made an application to have the estate taken under the Court of Wards on the ground of mismanagement by Rani Itraj Kuar and the detriment to himself as next reversioner, and the omission of the Rani to suggest that Sheo Nath Singh was in no way related to the *talukdar's* family and therefore had no *locus standi* to present the application. The learned trial Judge concludes:—

"In my opinion, therefore, the plaintiff has satisfactorily established his agnatic relationship to Raja Suraj Prakash Singh in the manner set forth in his pedigree."

Their Lordships are satisfied that the admissions of Raja Sitla and conduct of Rani Itraj Kuar do not involve any admission as to identity of *gotras* between the two families.

The Chief Court, in their judgment, say:—

"On the question of the plaintiff's relationship with Raja Sitla Bakhsh Singh [? Raja Suraj Prakash Singh] "the case put forward and argued before us on behalf of Lal Harihar Partab Bakhsh Singh, the defendant-appellant in Appeal No. 19, is that Jugraj Singh the second son of Partap Singh, died issueless, or at

least that the plaintiff has failed to prove that he is the descendant of Jugraj Singh. It was not disputed that Jugraj Singh was one of the two sons of Partap Singh. We agree with the trial Court that the plaintiff has succeeded in establishing the fact that he is the descendant of Jugraj Singh according to the line of descent indicated in the pedigree above set forth The evidence seems to be overwhelming and there is no evidence worth the name in rebuttal."

After dealing with the evidence, including the admissions of Raja Sitla about 1818, the learned Judges state:—

"In agreement with the trial Court, we therefore hold that the plaintiff has succeeded in establishing the fact that he is an agnate of the late Suraj Prakash Singh.

It is obvious that the word "agnate" is loosely used in that finding, for after disposing of a question as to the seniority of the plaintiff's line, which was not in dispute before this Board, the judgment proceeds:—

"Against the broader question of relationship, which we have decided in agreement with the trial Court in favour of the plaintiff, the only argument advanced on behalf of the defendants and particularly Lal Haribar Pratap Bakhsh Singh, defendant No. 2, is that the plaintiff and Raja Suraj Prakash Singh could not be held to each other, in spite of all the evidence to the contrary, on the ground that the two belonged to different *gotras*. On the face of it the argument is highly technical and its pursuit has landed us into the region of Hindu tradition."

After quoting the first part of the passage cited above from the judgment of this Board in *Bhyah Ram Singh's case* (2), the learned Judges state:—

"Technically and *prima facie*, therefore, if the plaintiff and the *talukdar* of Gangwal are descended from a common ancestor, they should have one and the same *gotra*."

Differing from the trial Judge's view of the evidence as to the *gotra* of the *talukdar* of Gangwal, the learned Judges considered that the matter was not free from doubt, and suggested that there were two meanings of *gotra*, one technical and the other popular. They seek to attribute to the plaintiff's use of the term *gotra* a so-called popular meaning as referring to his being a Sombansi, and they conclude as follows: "On these grounds we are unable to give effect to this argument as sufficient to outweigh the direct and positive evidence as to the relationship of the two families."

As already indicated, their Lordships are of opinion that *gotra* has only one meaning and they find it difficult to believe that, if the question now raised had been clearly in issue *ab initio*, there would have been any difficulty in producing evidence to identify beyond judicial doubt or speculation the *gotras* of the plaintiff and Raja Suraj Prakash Singh. Their *gotras* must be well known to relatives who attended the *Sraddh* ceremonies, at which the *gotra* of the three paternal ancestors is recited, and such evidence is conspicuous by its absence. There should be no need to resort to the "region of Hindu tradition"

Their Lordships are therefore of opinion that the case should be remitted to the Chief Court in order that the plaintiff may have the opportunity of establishing the identity of his *gotra* with that of Raja Suraj Prakash Singh; upon this issue his success or failure in his claim to the *taluka* will now depend

In accordance with the previous judgment of this Board, dated the 4th December, 1930, and this judgment, their Lordships will humbly advise His Majesty as follows:—That the decree of the trial Judge dated the 4th January, 1927, be recalled except in so far as it dismisses the plaintiff's claim in respect of the property mentioned in Schedules B, C, E and F appended thereto, that the decrees of the Chief Court in Civil Appeals Nos 19 and 24 of 1927 be recalled; that the First Appeal (No. 102 of 192) be dismissed, the appellant (defendant No. 1) to pay the plaintiff's costs of the appeal and of Civil Appeal No. 24 of 1927; that the second appeal (No. 103 of 1929) be allowed, the appellant's costs to be paid by defendant No. 1; that the Third Appeal No. (104 of 1929) be allowed without costs, and the case be remitted to the Chief Court as above proposed, the costs of all parties in the trial Court, of the parties in Civil Appeal No. 19 of 1927, and of further procedure to be adjudged by the Chief Court.

A. *Order accordingly.*

Solicitors for the Appellants:—Messrs. *Watkins & Hunter* and *Douglas Grant & Dold*.

Solicitor for the Respondent:—Mr. *H. S. L. Polak*

PRIVY COUNCIL.

Appeal from the Allahabad High Court.

December 15, 1931.

VICOUNT DUNEDIN, SIR LANCELOT SANDERSON AND SIR GEORGE LOWNDES

FAQIR CHAND AND OTHERS—APPELLANTS

versus

AZIZ AHMAD KHAN AND OTHERS—RESPONDENTS

Transfer of Property Act (IV of 1882), s. 82—Several properties securing a mortgage—Valuation for contribution purposes—Determination of—'Incumbrance,' meaning of.

To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, the amount of all prior incumbrances upon such properties must be ascertained and deducted. Where properties A, B and C are all made security for one mortgage, if property A is subject to a prior encumbrance jointly with properties X, Y and Z, the rateable share to be attributed to A under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. It is not correct to say that all that would be necessary in such a case would be to see what was the total amount of prior incumbrance to which A was liable, irrespective of the question whether that liability was to be shared by X, Y and Z. [p. 754, cols 1 & 2.]

"Incumbrance' is a term of wider connotation than "mortgage." [*ibid.*]

Messrs. *A. M. Dunne, K. C.* and *J. M. Parikh*, for the Appellants.

Sir George Lowndes.—This appeal is concerned with a tangle of mortgages made over a number of years by one Jamil-ul-Rahman. He owned or had interests in a variety of immoveable properties which were scattered over the different transactions. Some have been brought to sale by one mortgagee or another; some have been redeemed by puisne mortgagees for the protection of their own interests, and subsequently transferred to other parties subject to the rights of prior incumbrancers; in some cases arrangements have been made as to the contribution due by the purchaser of this or that property; but no final settlement as between all the parties concerned has ever been come to either in or out of court.

The mortgage with which the present proceedings are directly concerned was dated the 23rd September, 1899. It was the sixth in the series in order of date and comprised ten different properties, eight of which were also included in one or other of prior or subsequent mortgages.

In 1911 the mortgagee under this deed sued upon his mortgage. A preliminary decree in the usual form was made on the 20th September, 1912, and a final decree for sale on the 16th May, 1914.

Thereupon one Chotey Lal, the first defendant in the suit, a puisne mortgagee in respect of one of the properties which had been ordered to be sold, known as Nagla, satisfied the decree by a payment of Rs. 20,000 odd, and by a deed of the 15th July, 1920, transferred the rights which he had thereby acquired to the first respondent and the predecessor-in-title of the other respondents.

Chotey Lal's object was apparently to free Nagla from further liability, and having regard to similar arrangements which he had made with other parties who were also incumbrancers of Nagla, to provide for the realisation of the moneys due under the decree from two other properties known as Shadipur and Inayetpur.

In pursuance of the terms of this deed the respondents Nos 1 to 8 on the 25th April 1922, instituted the suit out of which this appeal has arisen. They impleaded thirty-six defendants as persons having an interest in the mortgaged properties, and prayed that in default of payment of the sum of Rs. 26,972 8 0 with further interest, the amount claimed as due under the decree transferred to them by Chotey Lal, the Shadipur and Inayetpur properties should be sold. In the alternative they prayed for an account and contribution.

Nine different statements of defence were filed by different sets of defendants, but this appeal is concerned only with two of them, *viz.*, that of the appellants Nos. 1-4, who are interested in Shadipur, and that of appellant No. 5, who is interested in Inayetpur.

The trial Judge held that the plaintiff-respondents' claim to realise their dues from Shadipur and Inayetpur only was not maintainable. This claim was abandoned in the Court of Appeal and may therefore be disregarded.

On the alternative claim for contribution which he thought must necessarily involve a detailed examination of all liabilities affecting each of the properties, he held that the plaintiffs had failed to bring all the parties concerned on the record, and had also failed to put before him materials sufficient to enable him to work out the account. He accordingly dismissed the suit, his decree being dated the 13th November, 1923.

The plaintiffs appealed to the High Court at Allahabad, the learned Judges of which disagreed with the trial Judge as to the basis upon which the contribution fell to be assessed. They were of opinion that

"the learned Judge of the Court below was wrong in believing that it was incumbent on him to find out, in the case of each prior mortgage, what were the properties mortgaged along with any of the items mortgaged under the sixth transaction, what were the values of those properties, who were the owners of those properties, and so on."

They, therefore, set aside the decree of the trial Judge, and remanded the suit to be disposed of by him in accordance with the remarks contained in their judgment. He was also directed to bring on the record any parties whose presence before him he should still find to be necessary.

Of the parties who defended the appeal in the High Court, only the present appellants have come up to His Majesty in Council to support the decree of the trial Judge The respondents have not appeared.

The right to contribution in this case is governed by s. 82 of the Transfer of Property Act, 1882 A new section has now been substituted by an amending Act (XX of 1929), but it is not necessary for their Lordships to refer to the changes which have been effected by it.

The first paragraph of the section in question is the material one. It is in the following terms:—

"Where several properties, whether of one or several owners, are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage, after deducting from the value of each property the amount of any other incumbrance to which it is subject at the date of the mortgage."

To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, it is clear that the amount of all prior "incumbrances" upon such properties must be ascertained and deducted. Their Lordships are in agreement with the High Court that "incumbrance" is a term of wider connotation than "mortgage," but they are unable to follow the learned Judges in the argument they base upon this proposition. Where properties A, B and C are all made security for one mortgage, if property A is subject to a prior incumbrance jointly with properties X, Y and Z, their Lordships think that the rateable share to be attributed to A under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. In the view taken by the High Court all that would be necessary in such a case would be to see what was the total amount of the prior incumbrance to which A was liable, irrespective of the question whether that liability was to be shared by X, Y and Z Their Lordships are unable to adopt this view of the meaning of s. 82. It would no doubt greatly simplify the enquiry in such a case as the present, but simplification would only be attained by a sacrifice of what they regard as the principle involved.

The view taken by the trial Judge upon this part of the case was, in their Lordships' opinion, the right one, and as it does not appear to have been contended in the High Court that, upon this basis, there were sufficient materials before the court to work out the necessary account, their Lordships think that the suit was rightly dismissed. If it had been merely a question of non-joinder of parties their Lordships would, having regard to the provisions of O. I, r. 9, of the Civil Procedure Code, have agreed with the learned Judges of the High Court that the defect could be remedied in the way pointed out by them.

Their Lordships have not found it necessary to deal with a question of limitation which was discussed at considerable length in the High Court, and the finding upon which has been contested by the appellants' Counsel before the Board. The question is one of considerable complexity, and they think it undesirable to make any pronouncement upon it in an *ex parte* appeal.

For the reasons given their Lordships think that the appeal should be allowed; that the decree of the High Court should be set aside, and that of the trial Judge, dated the 13th November, 1923, restored. They will humbly advise His Majesty accordingly. The respondents Nos. 1 to 8 must pay the costs of the appellants both in the High Court and before this Board.

A. *Appeal allowed.*

Solicitors for the Appellant.—Messrs. *Douglas, Grant & Dold.*

SIND JUDICIAL COMMISSIONER'S COURT.

Criminal Revision Nos. 156, and 166 of 1931.

December 22, 1931.

FERRERS, J. C., AND RUPCHAND BILARAM, A. J. C.

KHAIRATIRAM—APPLICANT

versus

EMPEROR—OPPONENT

Approver—Corroboration—Nature of evidence required—Corroboration as against some, effect of—Criminal Procedure Code (Act V of 1898), s. 110, orders under—Revision—Interference.

Evidence in corroboration of an accomplice's evidence must be independent testimony which affects the accused by connecting or tending to connect him with the crime It must be evidence which implicates him, that is, which forms in some material particular not only the evidence that the crime has been committed but also that he personally committed it. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime. [p. 755, col. 2.]

Where there is one witness of bad character (an accomplice) giving evidence against two prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore, there is a corroboration applicable to one prisoner, it may be taken as against him; but unless it exists with regard to both it would be unjust to give it a general effect. *King* v. *Baskerville* (1), followed. [*ibid.*]

Though in cases under s. 110, Criminal Procedure Code, the Court of the Judicial Commissioner, Sind, does not sit as a Court of appeal, nevertheless when there appears anything unsatisfactory or unusual in the proceedings of the lower court, that court will look into the record to satisfy itself that an order under s. 110 has been properly passed. [p. 754, col. 1.]

Messrs. *Motiram Iaanmal* and *Santdas Idanmal*, for the Applicants.

Mr. *C. M. Lobo*, Public Prosecutor, for the Crown.

Ferrers, J. C.—The facts underlying this application are as follows:

On the 15th of September 1930 at the City Police Station, Karachi, something exploded. What this thing may have been is uncertain. The defence call it a cracker. The prosecution prefer to describe it as a bomb. To justify the more formidable appellation no evidence has been led. It is agreed however that in fact there was no harm done; not even a pane of glass broken. The incident became the subject of a Police investigation and on the 23rd of September 1930 the Inspector came in touch with a man called Ishwarchand who from that time forward was working as a Police spy. On the 16th of October, 1930, the Deputy Superintendent of Police searched the shop of Bhojraj Nevandram on the Marriot Road. He took possession of a cyclostyle machine and a bundle of copies of a paper headed "Balvo" Bulletin. Bhojraj is the father of Jethanand accused No. 3, but neither Bhojraj nor Jethanand was present at the search. Neither of them lives in the place in which these things were found. On the 2nd of November, 1930 the Inspector Gholam Kader searched the house of accused No. 2. In it there was found a pocket diary containing certain entries which will be referred to later. The house of accused No. 3 was again searched the same day but nothing was found. On the 2nd of November, the Poster which is Ex. 17 was found stuck up in several places. This poster is written in misshapen letters by an unpractised hand. It is in the following words:

"As Karachi C. I. D, is roaming hither and thither like *Blind ones*, so in order to give them some right trace we hereby declare that on *every Sunday Night* at 12-30 a. m., we *Manufacture Bombs* on the Ocean Bank near *Clifton*. If Police want to arrest the party they should come there preparing themselves to face, the Red Flashes and hot wounds of Bomb and Bullets.

Note.

Public is also informed that the Bombs are sold in Gandhi Garden at 4 a. m. on Saturday night at the rate of 8 annas each.

By order of Commander of *Revolutionary Party in Sind.*

The Poster is signed by a sketch of a sickle and a hammer.

On the 7th of November, there was a second explosion at the same place as the first and with no more result. On the 9th of November, Ishwarchand who had been acting since the 23rd of September as a Police Spy made a statement in writing. He declared that eight persons who he named were all members of a Revolutionary Party in Karachi. All these 8 were arrested on the 10th November. It was apparently at first intended to prosecute the prisoners under the appropriate sections for some specific offence or offences. A remand was applied for and granted. At the expiration of that remand on the 24th of November the Inspector of Police prayed the court to take action against the accused under ss 110 and 117, Criminal Procedure Code. His allegations were that they were all working in concert and were so desperate and dangerous that their remaining at large was hazardous to the Public. The accused were at that time in custody. On the 26th of November the Magistrate made an order directing each of the accused to execute a bond for Rs. 20,000, with two respectable sureties owning landed property worth Rs. 20,000 each for maintaining good behaviour, until the conclusion of this case. In Magistrate's Court the case

came to a conclusion on the 7th of March 1931. On that day accused Nos. 1, 4 and 7 were discharged under section 119 Criminal Procedure Code and an order was made that accused Nos. 2, 3, 5, 6, and 8 should enter into a bond for Rs. 10,000 each with two respectable sureties owning landed property in the same amount for their good behaviour for 12 months.

Against this order the persons affected appealed to the Sessions Court. In that court their appeal was duly heard and on the 12th of August 1931 the Judge set aside the order of the Magistrate so far as it affected Nos. 5, 6, and 8. The order in respect of 2 and 3 was upheld.

No. 3, who is Jethanand, has furnished. the security which was required of him, No. 2 Khairatiram is in custody. No further appeal was competent but Khairatiram and Jethanand have come to this court in revision.

In cases under s. 113 *this court* does not sit as a Court of Appeal. The responsibility of administering the provisions of that section does not rest upon us. Nevertheless when there appears anything unsatisfactory or unusual in the proceedings of the Lower court *a High Court will look* into the record to satisfy itself that an order under s. 110 has been properly passed.

Now in the present case it is distinctly stated by the learned Magistrate that the principal evidence against the applicants is that of the approver Ishwarchand. The learned Magistrate might have gone further. It would not be too much to say that the whole case rests entirely upon the testimony of this man Ishwarchand. It is necessary therefore to see what manner of man he is, and what the evidence is which he gives.

(The learned J. C. referred to the evidence on the point and continued:)

We think therefore that even if we accept all the findings of fact which appear to have been accepted by the learned Judge there is still nothing which can be said to form a sufficient corroboration of the allegation made by Ishwarchand. We are perfectly satisfied that without corroboration this man Ishwarchand is altogether unworthy of credit.

For these reasons we discharge the order made by the learned Magistrate. Khairatiram who is in Jail will be set at liberty and the security bond given by Jethanand will be discharged.

Rupchand, A.J.C.— Police Inspector, Sind C. I. D., lodged information before the Additional City Magistrate, Karachi, against the appellants Jethanand and Khairatiram and six others under s. 110 cl (*f*) Criminal Procedure Code, alleging that they were members of a revolutionary party formed for the purpose of destroying Government buildings, injuring Government Officers and committing robberies, and that this party was responsible for (*a*) throwing of bombs over the City Police Station on September 15, and November 17, 1930, (*b*) the issue of the 'Balvo' Bulletin containing revolutionary articles and (*c*) the sticking of posters advertising the sale of bombs. He prayed that pending the inquiry the suspects should be ordered to furnish security under the provisions of s. 117 cl. (3). Criminal Procedure Code.

On that information the learned Additional City Magistrate passed orders under ss. 112, and 117, (*c*) fixing the amount of security at Rs. 20,000, in the case of each suspect and called on them to show cause why they should not be bound down to be of good behaviour for a period of 12 months.

It will be convenient to refer here in their chronological order to certain events connected with this case.

It is said that on September, 15, 1930, a bomb was thrown at the City Police Station which however caused damage to any person or property. About that time a poster is said to have been discovered by the Police headed "Sale of bombs in Karachi".

Towards the end of that month, one Ishwarchand, a *Punjabi* who is said to be one of the revolutionaries, was employed by the Police as a spy, and on information supplied by him, the Police kept a watch on the movements of these eight suspects and actually shadowed both by day and night the applicant Khairatiram and two others who are not now before us.

On October, 16, the Police searched certain premises belonging to the father of Jethanand and secured from there a cyclo-style machine, a number of copies of certain pages of a magazine headed, 'Balvo' Bulletin (*i. e.* Mutiny or Revolutionary Bulletin). They also secured from the pocket of a coat lying there pieces of paper which contained extracts from Mill's History on British India Vol. VII, page 358 and their translations.

On November 2, 1930, the Police secured a poster said to be revolutionary in it natured. On the same day they searched the house of Khairatiram and secured

from him a diary to which reference will be made later.

On November 4, 1930, another poster also said to be revolutionary in its nature, was secured by the Police from a garden.

On November 7, a second bomb is said to have been thrown near the Police Station which likewise did no damage.

On November 9, Ishwarchand made a statement Ex. 2-A in the case before the Police implicating these eight persons as members of a revolutionary party, which he said, had been organised by a Bengali Senji.

It is not necessary to refer to what he said with regard to the suspects who are not now before us.

With regard to Jethanand he said : (*a*) that he was the person entrusted with enrolling of new members, (*b*) that he supplied the purse, (*c*) that he published the Congress Bulletin, (*d*) that on one occasion he had asked the witness to translate for him a piece of English from Mill's History of British India, Vol. VII, page 308, but that he had refused to do so, (*e*) that he had published a revolutionary article (Ex. 5) written by Khairatiram, and (*f*) that he was responsible for putting up one of the alleged revolutionary posters.

With regard to Khairatiram, he said (*a*) that his duty was to prepare bombs and teach the method of making bombs to others, (*b*) that about a month before that date Khairatiram had noted a prescription for making bombs in his diary, (*c*) that he was responsible for putting up one of the posters, and (*d*) that he had thrown one of the bombs.

On the same day, namely, November 9, all the eight suspects were arrested and charged with criminal conspiracy and throwing bombs in pursuance thereof. After obtaining two remands, the Police dropped that case, and lodged information which is the subject-matter of the present inquiry.

At the trial, the Crown mainly relied on the evidence of the approver. The learned Additional City Magistrate held that in regard to several particulars the evidence of the approver was hardly believable and that such of his evidence as was not found to be false could not be safely relied upon unless it received material corroboration from other evidence. He accordingly discharged the rule against three out of the eight suspects but passed orders against the remaining five including the two applicants. He, however, reduced the amount of their security from Rs. 20,000 to Rs. 10,000.

On appeal to this court on its Sessions Courts Side, the learned Judicial Commissioner (Mr. Milne) also experienced some difficulty in accepting the evidence of the approver with regard to three out of the five suspects who had been ordered to furnish security, as the evidence of the approver was, in his opinion, not corroborated by other evidence. He accordingly discharged the rule as against them. With regard to the applicants he remanded the case to the lower Court to enable the Crown to prove and exhibit certain documents which had been secured from the house of Jethanand at the search held on October 16, and after that evidence was certified, he dismissed their appeal. They have now come to us in revision.

Now in this case there is no question whatsoever of accepting the uncorroborated testimonies of Ishwarchand under the provisions of s. 133 of the Act. Apart from the fact that he is an approver and was employed as an spy for over 2 months his antecedents are far from satisfactory and on the top of it he has been held by the learned Magistrate to be false in some particulars.

The leading English case on the nature of corroborative evidence required to support the evidence of an accomplice is that of the *King* v. *Baskerville* (1). In that case Lord Reading, C. J. has said at page 667:*

"We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime In other words, it must be evidence which implicates him, that is, which forms in some material particular not only the evidence that the crime has been committed but also that he personally committed it..... The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime".

And while dealing with the further question whether the evidence of an accomplice against the prisoners corroborated as to one prisoner's participation in the crime but not as to the other, his Lordship has said at page 669:

"We think the law is correctly stated by *Alderson B. in Reg.* v. *Jenkins*, (2). The learned Baron said where there is one witness of bad character giving evidence against *both* prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore *you find* there is a corroboration applicable to one prisoner, take it as against him; but unless it exists with

(1) (1916) 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 S. J. 696.

(2) (1857) 1 Cox. C. C. 177.

*Page (1916) 2 K. B.—[*Ed.*]

regard to both, *it seems to me* it would be unjust to give it a general effect."

These principles of law are equally applicable in India The Crown had therefore to give corroborative evidence on two points:

(1) that there was a revolutionary party in Karachi, and (2) that each of the applicants was a member of such party.

In dealing with the case of Jethanand, the learned Judicial Commissioner (Mr. Milne) has said that the evidence of the approver receives corroboration by the finding of the cyclo-style machine and copies of certain pages of a cyclo-styled bulletin headed the 'Balvo' Bulletin, the get up of these pages being similar that of Ex 5 produced by the approver; and has further said at page 18, line 910 of the paper-book:

"There is sufficient proof then of the existence of a revolutionary party in Karachi, the throwing of bombs, the publication of revolutionary posters, the issue of revolutionary bulletins. The evidence of the approver shows this. There is also sufficient evidence accused's connection with it"

It is worthy of note that notwithstanding the great array of Criminal acts which were attributed by the approver to Jethanand, the only piece of corroborative evidence relied upon by the learned Judicial Commissioner is of what was found at the search and nothing more.

Now, the copies of the bulletin found at the search held on October 16, 1930, and exhibited after the order of remand, have, for reasons best known to the Crown, not been officially translated. The learned Judicial Commissioner (Mr. Milne) has not relied upon anything contained in them. All that he appears to have relied upon is the fact that these bulletins are headed 'Balvo' which he has translated as 'Revolution'.

We asked the Public Prosecptor to draw our attention to anything contained in the body of the pages exhibited which is said to be of a revolutionary character, but he has discreetly declined to do so. It would therefore not be rash for us to assume that these sheets contain no revolutionary articles. With regard to the name by which the bulletin was styled, it would without further evidence be difficult to presume from its name that the paper was a revolutionary paper and more so, to presume that it was a paper owned and published by a revolutionary party whose object was the throwing of bombs, the publication of revolutionary posters and the committing of dacoities.

It is also clear that the cyclo-style machine and the copies of the bulletin found in the premises of Jethanand's father were not secured subsequent to the date on which Ex. 2-A was recorded but twenty-five days before. It is difficult to presume that the approver did not know of the search or what was found at the search at the time he gave his statement to the Police especially when in that statement he has mentioned the page and volume at Mill's History of British India. It is hardly likely that he could have remembered these particulars when according to his own admission he had declined to translate the papers and had returned the papers to Jethanand.

It is also difficult to identify the cyclo-style machine and the 'Balvo' Bulletin found at the search with Ex. 5, is not dated but it purports to be a 'Divali Parcho' (sheet) probably published on the *Divali* Day which fell, as ascertained from the court diary, on October 20, 1930, that is to say, four days later than the search. The only copy of the *Divali Parcho* or sheet exhibited in the case is Ex. 5. The approver cannot say where it was published and where and when he got the copy; and no attempt was made to secure other copies. It had also not been seriously contended that Ex. 5 was printed and published before the day of the search. On the contrary, it has been conceded that it was probably printed and published after that day; and that is more probable. It does not purport to be one of the missing pages of the bulletin found at the search. The fact that no replica of Ex. 5 were found at the search is in itself considerable evidence of Ex. 5, having been impressed elsewhere and at a subsequent time. That being so, Ex. 5, has nothing to do with the cyclo-style machine or the 'Balvo' Bulletin found at the search. Our attention has not been drawn to any evidence on the record to prove that the get up of Ex. 5 and of the bulletins found in the search identical, and it is difficult to form any opinion on that point by a mere comparison of one with the other. The only thing which the prosecution can possibly rely upon is that Ex. 5 was also headed 'Balvo'. Assuming therefore that the posters are not a *hoax* as alleged and that Ex. 5 which is not the work of the approver or of some evil-minded person bent upon mischief, and that they are as a matter of fact revolutionary in their nature, and are the work of a revolutionary party, there is no evidence which can be called corroborative evidence, much less independent evidence to connect Ex. 5 with

Jethanand or to connect Jethanand with such revolutionary party. The circumstances that a cyclo-style machine and pages of a bulletin called 'Balvo' Bulletin or papers containing extracts from Mill's History of British India were found at the search is equally consistent with Jethanand being a member of the Congress Party wedded to the plea of non-violence which he claims to be. The case against the accused Khairatiram is still weaker. The only corroboration relied upon is, that the diary found at the search of his house contained the following note on one of its pages:

"Potash chloras,"
"Potash nitras,"

These words by themselves denote nothing. All that is alleged is that no doubt these ingredients are used for several purposes but along with several other ingredients they are also used for the purpose of making bombs. In dealing with this point, the learned Judicial Commissioner (Mr. Milne) has said that although the entry may have been perfectly harmless, it was an unusual entry and that the failure of of the accused to explain it was sufficient corroboration of the approver's story. With all respect, I cannot accede to that view. There is nothing on the record to show that the attention of Khairatiram was invited to this alleged piece of corroborative evidence, or that although he was afforded an opportunity of explaining it, he had failed to do so. There is nothing in his examination under s. 342, Criminal Procedure Code, to suggest that his attention was drawn to it, nor is there anything in the information lodged by the Inspector which has been referred to above or in the order passed under s. 112, Criminal Procedure Code, to invite his attention to it. The order under s. 112, Criminal Procedure Code, is as vague as it could possibly be. It reads as follows:—

"Whereas it appears to this court that you the abovesaid accused are working in concert, and are so desperate and dangerous that your remaining at large without security is hazardous to the public: "You the abovesaid accused are hereby required to show cause &....."

This piece of circumstantial evidence was compatible with the innocence of Khairatiram and was on the very face of it capable of an easy explanation. Had his attention been drawn to it, an explanation would have been forthcoming. The effect of this alleged corroborative piece of evidence is, in my opinion, therefore nil.

Apart from that, it would appear that, as in the case of Jethanand, the diary of Khairatiram was secured prior to the date on which Ex. 2-A was recorded, and that it is therefore more likely than not that the statement made by the approver was based upon what had been found by the Police.

Under the circumstances, it is, with all respect, difficult for me to hold that the evidence of the circumstances relied upon by the learned Judicial Commissioner (Mr. Milne) was corroborated proof of the accused being members of a Revolutionary Party.

For these reasons, I concur in the order passed by the learned Judicial Commissioner.

A. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

Suit No. 131 of 1930.
November, 6, 1931.
ASTON, A. J. C.

FAKIR MUHAMMAD—PLAINTIFF
versus
FAKIR MUHAMMAD NANJI AND OTHERS—DEFENDANTS.

Malicious prosecution—Essentials of action—Matters to be proved—Discharge, effect of—Burden of proof of innocence—Malice, necessity of—Measure of damages—Costs of defence—Danger to liberty—Witnesses, liability of.

In a suit for damages for malicious prosecution the discharge of the accused cannot by itself be considered as evidence of the groundlessness of the prosecution, but when the accused is discharged and he brings a suit for damages no obligation is imposed on him to prove affirmatively that he was innocent. *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhary* (1) and *Balbhaddar Singh* v. *Badrisah* (2), followed. [p. 759, col. 1]

Malice is a necessary ingredient in a suit for damages for malicious prosecution. *Abdul Shakur* v. *Lipton & Co* (4), followed [p. 760, col. 2.]

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding. *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhry* (1), followed. [p. 761, col. 1.]

In a suit for damages for malicious prosecution the plaintiff is entitled to legitimate expenses incurred in defending himself in the criminal Court. *Krishna* v. *Corporation of Calcutta* (5), followed. [*ibid.*]

The Court in a suit for damages for malicious prosecution can take into consideration not only the injury to the reputation of the plaintiff but also the danger to liberty. [p. 761, col. 2.]

Mr. *Fatehchand Asudomal*, for the Plaintiff.

Mr. *Srikishendas H. Lulla*, for the Defendant.

Judgment.—This is a suit filed by the plaintiff to recover Rs. 5,000 from the de-

fendants as damages for malicious prosecution. The plaintiff's case is that on or about 28th October 1929 the defendants maliciously and without reasonable or probable cause gave information to the Police that the plaintiff had caused grievous hurt to defendant No. 1. In consequence of the false information, the plaintiff was arrested on 6th December 1929 and a prosecution was launched against him, which ended in his discharge on 30th January 1930 The plaintiff lost heavily in trade; he spent large sums in defending himself, and suffered pain of body and mind. The plaintiff's particulars of the damage are as follows :

Fees to Pleaders	Rs. 1,050
Miscellaneous expenses for copies and other Court expenses	Rs. 100
Loss in karkhana	Rs. 2,350
Loss of earning	Rs. 500
Pain of mind and reputation	Rs. 1,000

The defendants in their written statement deny that the information given by the defendants or any of them was given without reasonable and probable cause; they deny that it was malicious or improbable or unreasonable. The prosecution they say was launched by the Police and such information as was given by them to the Police was in answer to inquiries made by the Police in a cognizable case; the defendants were under law bound to answer the inquiries of the Police. The defendants dispute their liability for damages; they contend the alleged damages for loss in the *karkhana*, loss in earning and pain of mind and reputation are too remote, that the Crown is a necessary party and that the suit is bad for misjoinder.

The following were the consent issues :

1. Is the suit bad for misjoinder of parties and causes of action (Covers para. 6 of W. S ?
2. Is the suit bad for non-joinder (Covers para. 7 of W. S ?
3. Was the information given by the defendant or any one of them false and malicious and without probable and reasonable cause,(Covers para. 1 of the plaint and paras. 1 and 2 of W. S)?
4. Was the arrest, if any, and prosecution on such as would afford any, ground to the plaintiff for an action of Civil liability? (Covers para 1 of W. S.)
5. Did plaintiff suffer any damages and are the same attributable to the said arrest and prosecution If so, to what damages, if any is the plaintiff entitled (Covers paras. 4, 5 and 9 of W. S).
6. Is the claim false and vexatious ? If so, are the defendants or any of them entitled to compensatory costs? (Covers para. 8 of W. S.).
7. General.

A little after 8 P.M. on the evening of 25th October, defendant No. 1 and his two sons, defendants Nos. 2, and 3, were driving home in a *buggy*. They were suddenly attacked by Khoja ruffians, disguised, as Sindhis. One of them seized the reins, another struck defendant No. 1 with a hatchet. Defendant No 1 received wounds on his forehead, on his right hand, and on his arm. As a result of one of the wounds, he received, he has permanently lost the sight of his right eye. During the cowardly attack, defendant's eldest son hit one of the assailants on the face with the carriage whip. Defendant was driven to hospital. In consequence of telephone message received by Head Constable Muhammad Shah from Dr. Khialdas that defendant No. 1 was lying dangerously ill, Inspector Arthur went to the Civil Hospital, about 9 P. M. and recorded the statement of defendant No. 1 who was in great pain. Defendant No. 1 said he had been set upon by three men who were Khojas near Banias crossing. He was struck by one of them named Meherali with an axe. Meherali was the only person he identified. So far as he could remember the other two did not strike him. The Head Constable recorded the statement of defendants Nos 2 and 3. Defendant No. 2 said that as they were driving along Soldier Bazaar Road, they saw three men near the house of Malik Sahib on the right hand side and one man on the left hand side. The man on his side seized the reins, one of the men on the side of his father struck his father blows with a hatchet. He could not identify the men as they had covered their faces. His younger brother Sharif, defendant No. 3, said his statement was the same. On the following morning Habib and Sharif were called to the Police Station and their statements were verified by Inspector Arthur. They said the same thing. Between 26th October and 30th October Sub-Inspector Sunderdas was in charge of the investigation.

The Police had discovered Sindhi's clothing lying at a distance of about 400 yards from the scene of the offence. So enquiries were made from cloth merchants whether they had sold them to anyone. Nothing resulted from this clue, but on his return the Sub-Inspector met a Makrani named Kadirbux who informed him that one Elias had told him that he had seen the incident. Elias was questioned on 28th October. He did not confirm the statement of Kadirbux, but he gave to the Police the names of Gul Muhammad and Ali Muhammad. Gul Muhammad, on being questioned said he saw the plaintiff and Meherali beating defendant. No. 1. Ali Muhammad said the plaintiff Fakir Muhammad was one of the

assailants; he did not know the names of the others. The Sub Inspector was aware of the fact, that defendant No. 1 had made a statement to Inspector Arthur on the night of the offence, stating that he had only identified Meherali. He stated in evidence that he wished to know whether defendant No. 1 would corroborate the story of Gul Muhammad and Ali Muhammad, so he went to the hospital at 2-30 P. M. on 29th October and defendant No. 1 was again questioned. On this occasion the defendant No. 1 implicated the plaintiff and Rajoo as well as Meherali. On 16th November, 1929, the papers were sent by the Police to the Public Prosecutor for opinion. His opinion was received on 25th November and on 3rd December, 1929, the A. S. P. gave orders to prosecute. The plaintiff was arrested. The three defendants gave evidence at the trial that plaintiff was one of the assailants. The plaintiff was discharged.

The decision of the Magistrate discharging the accused, considered by itself, is not evidence against the defendants of the groundlessness of the prosecution: see *Baboo Gunesh Dutt Singh* v. *Mugneeram Chowdhary* (1). On the other hand the obligation is not imposed on the plaintiff to prove affirmatively that he was innocent: *Balbhaddar Singh* v. *Badri Sah* (2).

It is open to me to adopt the reasons set forth in the judgment of this court, on its appellate side, in the criminal revision application of Meherali Lalji, see Ex. 9, to the extent that they are applicable to the evidence in this case

For the reasons so clearly set forth in that judgment, I am of opinion that it is established that defendant No. 1 and his sons, defendants Nos. 2 and 3, failed to identify any of the assailants on the night of 25th October. It was a dark night; there was no moon; the street light was at a considerable distance; there were only two candles in the carriage lamps, the Khoja assailants were disguised as Sindhis and were wearing "ajraks." Had any of the assailants been identified his name would been mentioned, while the party were driving to hospital, and the boys would have mentioned his name to the Police.

(1) 11 Beng. L. R. 321; 17 W. R. 283 (P. C.).
(2) 95 Ind. Cas. 329; A. I. R. 1926 P. C. 46; 1 Luck 215; 29 O. C. 163; 24 A. L. J. 453; 3 O. W. N. 499; 43 C. L. J. 521; 28 Bom. L. R. 921; (1926) M. W. N. 482; 51 M. L. J. 42; 30 C. W. N. 866; 7 P. L. T. 591 (P. C.).

Defendant No. 1, who alleged that he had identified Meherali, clearly told Inspector Arthur, that he had failed to identify any one else, and he explained the reason why. The evidence shows that he was specifically questioned on the point. It was suggested, that defendant No 1 was incapable, owing to the injuries which he had received, of giving a correct statement to the Inspector. I am of opinion that this suggestion is incorrect The statement of defendant No. 1 to Mr. Arthur (Ex. 5), except as regards his alleged identification of Meherali, was in my opinion substantially a true statement. And the same applies to the statements made by defendants Nos. 2 and 3 to the Head Constable on 25th October and to Inspector Arthur on 26th October.

I also agree with the view expressed in the judgment to which I have referred that the three assailants were probably persons who objected to the reforming activity of defendant No. 1.

The evidence shows that there are two parties in the community. The orthodox party are followers of His Highness the Agha Khan. Plaintiff belongs to this party and his father is a prominent member of it, for he is a member of the Council of the Khoja community. Defendant No. 1 belongs to the party of reform. Before the date of the cowardly attack on him, he was ex-communicated, on the complaint of one Mulji Ghulam Ali, because of his views and because he filed a suit against His Highness and against the Council of the Khoja community. So high did feeling run against reformers, that when the father of defendant No 1 died, members of the orthodox party actually objected to defendant No. 1 accompanying his father's body to the burial ground, and put down the corpse on the road. The matter was not settled until defendant No. 1 agreed to accompany the body only as far as the burial ground, and then return without entering the burial ground. The evidence does not appear to establish enmity on the part of defendant No. 1 against plaintiff's family. The fact that he filed a suit ten years ago against the plaintiff's father, for a trifling amount *viz.*, Rs. 20 or so, would not give cause, to defendant No. 1 to feel enmity. An attempt was made by plaintiff to prove that defendant No. 1 was excommunicated on the complaint of plaintiff's father, but this is not established. On the contrary Ex. 23 shows the complaint was made by Mulji Ghulam Ali

There is nothing to show that plaintiff or his father joined in the objection to defendant No. 1 carrying the corpse of his father. Even if it is true, as plaintiff alleges, that he went to call the Police, this would not give cause for enmity to defendant No. 1. He was doing nothing wrong. It was in his interest, that the Police should come, in order that fighting and bloodshed might be averted.

Why then defendant No. 1 in the subsequent statement he made to the Sub-Inspector on 29th October and in his evidence in the Magistrate's Court implicate the plaintiff? I think the answer is to be found in the fact, that defendant No. 1 believed that the assailants were members of the orthodox party. Plaintiff is the son of a prominent member of that party; there was also the fact that defendant's son had hit one of the assailants in the face with the carriage whip and plaintiff was seen in these days going about with a mark on his face. Sub-Inspector Sunderdas noticed the mark but he did not question plaintiff about it, fearing to rouse his suspicion.

My conclusions, therefore, on the evidence are as follows: Defendant No. 1 did not set the law in motion against the plaintiff nor did his sons. The Police investigation was due to the telephonic message sent by Dr Khialdas. When questioned by Inspector Arthur in hospital on 25th October defendant No. 1 made a substantially true statement, except as regards the alleged identification of Meherali. Defendant No. 2 and defendant No. 3 also told a true story to the Head Constable on the 25th and to Inspector Arthur on 26th October. None of the defendants implicated the plaintiff. Had the case rested there, no action would have been taken against the plaintiff, but in the course of their investigation the Police obtained from one Elias the name of Gul Mahomed and Ali Mahomed. The persons alleged they witnessed the occurrence and both of them implicated the plaintiff. The plaintiff had been seen to bear a mark on his face and the Police were informed that defendant's elder son had struck one of the assailants on the face with the carriage whip. In a further statement made by defendant No. 1 to Sub-Inspector Sunderdas on 29th October and in the evidence given by defendants Nos. 2 and 3 in court they implicated the plaintiff. The statement of defendant No. 1 to Sub-Inspector Sunderdas and the evidence given by defendants in court to the effect that they had actually identified plaintiff as one of the assailants was in my opinion false. The false statement and the false evidence however was not in my opinion given in consequence of malice. I am of opinion that defendants believed that their relative the plaintiff was one of the assailants.

The facts established appear to me to come short of the fact, which a plaintiff has to prove, to entitle him to damages for malicious prosecution. It cannot be said in the present case as in *Gaya Prasad Tewari* v. *Bhagat Singh* (3) that defendants were directly responsible for any charge at all being made against the plaintiff. It cannot be said as in that case that they took the principal part in the conduct of the case. Again the facts in this suit are distinguishable from those in *Balbhaddar Singh* v. *Badri Sah* (2) inasmuch as it was not the information given by the defendants to the Police, which naturally led to the prosecution of the plaintiff. From the Police point of view the evidence available from defendants Nos. 1, 2 and 3 against the plaintiff was at the best weak corroborative evidence contradicted by their prior statements to the Police. The evidence of defendant No. 1 was liable to be contradicted by his own allegations in what an appellate Bench of this court has held to be a first information. The evidence of all the defendants besides was liable to be contradicted, if the accused or their Pleader were vigilant enough to exercise their right under the Criminal Procedure Code of requesting the court to read the statements made by the defendants to the Police and to supply the defence with a copy of them. The evidence of Sub-Inspector Sunderdas itself shows that he regarded the information, at best, as corroborative. Knowing the prior statement of defendant No. 1 he went to hospital on 29th October after having received information from Gul Mahomed and Ali Mahomed, to see whether defendant No. 1 would corroborate the witnesses. In addition to the above facts there was in my opinion an absence of malice on the part of defendants and malice is a necessary ingredient: see *Abdul Shakur* v. *Lipton & Co* (4).

No evidence was given as regards the alleged subsequent statements of defendants

(3) 30 A. 525; 35 I. A. 189; 3 A. L. J. 456 (P. C.).
(4) 72 Ind. Cas. 411; A. I. R. 1924 Lah. 1; 6 Lah. L. J. 1.

Nos. 2 and 3 to the Police. On behalf of the plaintiff the court was asked to draw an inference from the written statement that these defendants falsely implicated the plaintiff. The written statement however is not clear on the point. There is a denial of para. 1 and the use of the words "if any" appears to me to negative the suggestion that defendants admitted that they made the statement imputed implicating plaintiff. So far as their evidence is concerned, it is settled law that witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding: see *Baboo Gunnesh Dutt Singh* v. *Magneeram Chowdhry* (1).

As regards issue No. 1 there appears to me no force in the plea of misjoinder. The defendants were together at the time of the assault, they all failed to implicate plaintiff when first questioned and they implicated him subsequently. My finding is in the negative.

With regard to Issue No. 2, the Crown is not a necessary party in a suit for malicious prosecution. My finding is in the negative.

My finding on issue No. 3 is that the information given by defendant No. 1 on 29th October and the evidence given by defendants implicating plaintiff was false and without reasonable and probable cause but not malicious. It is not the case of defendant No. 1 that he made a complaint to Sub-Inspector Sunderdas against plaintiff believing the information given by Gul Muhammad and Ali Muhammad and influenced by the fact that the surrounding circumstances indicated that members of the orthodox party had been the assailants and by the further fact that plaintiff had a mark on his face. This is not the defence. Both Sub-Inspector Sunderdas and defendant No. 1 deny that defendant No. 1 was informed of the statements of Gulam Muhammad and Ali Muhammad before his father's statement was recorded.

For the reasons which I have already set forth, my finding on issue No. 4 is in the negative.

Issue No. 5 does not arise, but in case my findings on the other issues are wrong, my finding on issue No. 5 is as follows:

Plaintiff undoubtedly suffered damage. He had to engage a Pleader to defend him. He is entitled to legitimate expenses incurred in defending himself: see *Krishna* v. *Corporation of Calcutta* (5). The alleged offence with which he was charged is punishable with seven years' rigorous imprisonment. The claim for Rs. 50 for the fees of Mr. Thadani is not pressed. The claim of Rs. 1,000 for the fees of Mr. Partabrai and of Rs. 50 or Rs. 60 for *gharry* hire and copies appear to me excessive.

In *G N. Gajapati* v. *Narasing* (6) the High Court of Madras held that the expenses of Counsel did not constitute a proper element in damages in a suit for malicious prosecution. There was no necessity in the present suit for plaintiff to engage a Pleader whose fee was Rs. 1,000. I am of opinion that Rs. 250 as a Pleader's fee and Rs. 25 for out of pocket expenses would be reasonable. As regards the alleged loss in the *karkhana* no books have been produced, and losses due to the prosecution are not in my opinion proved. Plaintiff's case is that he spent Rs 3,000 on the business and after four years recovered only Rs. 650 when he was forced to sell donkeys in order to pay lawyer's fees. The ordinary life of a cheap donkey however such as is required for plaintiff's business is only four or five years provided it is well fed. Spades, pickaxes, baskets, buckets and sieves are also subject to wear and tear. In addition to this there was no necessity for plaintiff in my opinion to spend Rs. 1,160 on lawyers and sundry expenses There was no need for him, therefore, to have disposed of his donkeys and stock in the manner referred to by him.

With regard to the item "loss of earnings" the evidence shows that there were 10 or 12 hearings of the suit. In addition to this there would be the time spent in instructing his Pleader and a criminal prosecution is not conducive to the prosperous conduct of business On the other hand the evidence shows that it was not the time of the year when there was much business

A sum of Rs 150 would in my opinion be a reasonable amount to allow for loss of earnings. Plaintiff does not press his claim for the cost of medical attendance for his mother. He has claimed Rs. 1,000 for pain of mind and reputation. The court in a suit for damages for malicious prosecution can take into consideration not only the injury to the reputation of the plaintiff but also the danger to liberty. The offence, the subject of the charge, was punishable with seven years' rigorous imprisonment. The claim of Rs. 1,000 in the circumstances does not appear unreasonable. The total damages, therefore, had the the plaintiff established the ingredients necessary to entitle him

(5) 31 C. 406; 8 C. W. N. 329.

(6) 6 M. H. C. R. 85.

to damages for malicious prosecution would in my opinion be Rs. 1,425.

With regard to issue No 6 my finding is in the negative. Defendants Nos. 2 and 3 made an ambiguous and evasive reply in the written statement. The claim was not in my opinion false and vexatious. All the defendants in my opinion gave false evidence against plaintiff and defendant No. 1 in his statement on 29th October falsely implicated him. I dismiss the suit but in view of the conduct of the defendants, I make no order as to costs.

A. *Suit diimissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

Miscellaneous Application No. 113 of 1929.

October 15, 1931.

MILNE, J. C. AND RUPCHAND, A. J. C.

FIRM OF KHEMCHAND RAMDAS—APPLICANTS

versus

COMMISSIONER OF INCOME-TAX—OPPONENT.

Income-Tax Act (XI of 1922), s. 66 (3)—Refusal to state case on the ground that application is time-barred—High Court's power to order reference—Specific Relief Act (I of 1877), s. 45.

The power of the High Court under s. 66 (3), Income-Tax Act, to require the Commissioner to state a case is limited to a case of refusal on the ground of no question of law arising; the section cannot be construed as covering a refusal on some other grounds, such as that the application was barred by limitation. *In re Madhavdas Jethabhai* (2), followed. *Kumar Sarat Kumar Roy* v. *Commissioner of Income-Tax* (1), referred to. [p. 763, col. 1.]

[The serious inconvenience and failure of justice which is likely to arise in consequence of the powers under s. 45, Specific Relief Act, not being conferred upon the Judicial Commissioner's Court of Sind pointed out].

Mr. *Kimatrai Bhojraj*, for the Applicants.

Mr. *C. M. Lobo*, for the Opponent.

Rupchand, A. J. C.—This application purports to be an application under s. 66, cl. (3), Income-Tax Act, and is made under the following circumstances.

The applicant assessee received a letter by post on 9th November, 1928, intimating to him that an adverse order had been passed against him by the appellate Officer of Income-tax; that order was dated 7th November, 1928, and the intimation was issued from the Income Tax Officer on the following day. He made an application for a copy of the order on 22nd November, and received the copy on 10th December. He then made an application to the Commissioner of Income-Tax for a reference to this Court under s 66 (2) and made the necessary deposit. The Commissioner rejected his application on the ground that it was made on 9th December, more than a month after the date on which the appellate order was passed and that it was, therefore, out of time. The assessee has now come to us with a prayer that the Commissioner be ordered to refer to us for our decision the questions of law arising out of the appellate order.

The application is opposed *inter alia* on the ground that it does not fall within the purview of cl. (3), s. 66, as that clause is limited in its scope to a refusal by the Commissioner to state the case on the only ground that no question of law arises out of the appellate order complained against.

Section 66 (2) of the Act was amended by Act I of 1930. It now provides for an application by the assessee to the Commissioner for a reference being made "within 60 days" of the date on which he is served "with notice" of the order complained against. Prior to the amendment the clause provided for a period of one month from "the passing of" the order complained against.

It is not seriously disputed that even according to that clause prior to its amendment the applicant's petition to the Commissioner was within time, as the period of one month should have been computed from the date of which intimation reached the assessee and not from the date when the order was signed, and that exemption for the period occupied by the assessee in obtaining a copy of the order should also have been allowed to him in view of the provisions of s. 29, Limitation Act. But it is suggested that cl. (2) had not received a judicial interpretation at the date of the order passed by the Commissioner and that he had made a *bona fide* error in holding that the application was barred by limitation; and it is urged that although the order passed by the Commissioner was wrong, we have no jurisdiction to review it or to compel a reference under the powers vested in us by cl. (3) of that section.

In the course of argument, a question was put to the learned Government Pleader whether in the event of the assessee withdrawing the present petition, the Commissioner would review his previous order and refer to us such questions in the appellate order as are questions of law, but he has intimated to us that the Commissioner would not be prepared to do so and

wants a ruling on the preliminary objection raised by him.

However much I may be in sympathy with the applicant, I am afraid, I must decide this objection in favour of the Commissioner.

The point now in issue was first raised in *Kumar Sarat Kumar Roy* v. *Commissioner of Income-Tax* (1) but was left undecided.

This point again came up for decision before the Bombay High Court in *In re Madhavdas Jethabhai* (2). In that case their Lordships refused to entertain an application of this nature under s. 66 (3) and said:

"It seems to us impossible to construe sub-s. 3 in a way that would be directly contradictory to its express terms. The Legislature having chosen to limit sub-s. (3) to a case of refusal on the ground of any question of law arising, it would obviously be beyond our province to construe that section as covering a refusal on some other grounds, especially as another remedy is open to the applicant under s. 45, Specific Relief Act, as is shown, for instance, by the Privy Council case of *Alcock Ashdown & Co.* v. *Chief Revenue Authority, Bombay* (3)."

It would, therefore, appear that so far as the High Courts specified in s. 45, Specific Relief Act, are concerned, an assessee may, in befitting cases, obtain relief under that section although not under s. 66 (3), Income Tax Act. This court is not one of the courts specified under that section, and in view of the ruling in *Indian Life Insurance Co., Ltd.* v. *Commissioner of Income Tax* (4), a person who is assessed to income-tax by an Income Tax Officer in Sind cannot even ask the Bombay High Court to help him under that section.

The result, therefore, of our declining jurisdiction under s. 66 (3), Income Tax Act, in cases of this kind is that it might lead to injustice, the assessees in Sind being apparently left without a remedy.

It is urged, and not without some force, that it could never have been the intention of the Legislature to place assessees in this province in a less favourable position than those who are assessed by officers amenable to the jurisdiction of High Courts referred to in s. 45, Specific Relief Act, and to deprive them of their indubitable right to have questions of law arising out of orders of appellate officers of income-tax decided by a Court of Law merely and solely because the Commissioner refuses to state a case on certain fanciful and unfounded grounds. But my difficulty is that the clause in question is not capable of being extended so as to confer jurisdiction in matters other than those mentioned therein. It purports to confer summary jurisdiction in certain matters and in no others. It follows, therefore, that such summary jurisdiction cannot be extended to other matters. The clause does not purport to deal with the ordinary jurisdiction of the courts and if in the exercise of its ordinary jurisdiction this court cannot grant relief to an assessee resulting in inequity or injustice, it is for the Legislature to remedy the same either by extending the provisions of s. 45, Specific Relief Act, to this Court or by amending the provisions of s. 66 (3), Income Tax Act. Our functions are *jus dicere* and not *jus dare*, and it is not within our competence either to reform the clause according to the supposed intention of the Legislature or to make the law reasonable.

In another case, I had occasion to draw attention to the serious inconvenience and failure of justice which is likely to arise in consequence of the powers under s. 45, Specific Relief Act, not being conferred upon this Court, which is the highest Court of Justice in this province. There is no apparent reason why no court in or outside Sind should be vested with jurisdiction to compel public officers and public bodies in Sind to perform their duties, and I can only express a hope that this want of jurisdiction will be cured at an early date. As cl. (3) does not vest jurisdiction in us to deal with the present application, I have no other option but to dismiss it, but under the circumstances I would make no order as to costs.

Milne, J. C. —It is not contended before us that the application was time-barred as held by the Commissioner. It follows that the assessee has been deprived of the remedy to which by law he is entitled.

One would have expected the Income Tax Authorities in view of their mistake to allow the applicant his remedy. That would have been a fair and straightforward course But the position taken by the authorities is that on purely technical grounds they cannot be compelled to

(1) 96 Ind. Cas. 702; A. I. R. 1926 Cal. 998; 2 I. T. C. 279.

(2) 113 Ind. Cas. 619; A. I. R. 1928 Bom. 434; 30 Bom. L. R. 1114.

(3) 75 Ind. Cas. 392; A. I. R. 1923 P. C. 138; 50 I. A. 227; 74 B. 742; 25 Bom. L. R. 920; 21 A. L. J. 689; (1923) M. W. N. 557; 33 M. L. T. 267; 45 M. L. J. 592; 18 L. W. 918; 39 C. L. J. 302; 28 C. W. N. 762 (P. C.)

(4) 130 Ind. Cas. 593; A. I. R. 1931 Bom. 150; 33 Bom. L. R. 36; Ind. Rul. 1931 Bom. 273.

render to the applicant the justice which is his due.

The question then is whether we can direct the Income Tax Commissioner that the application not being time barred a case should be stated thereon if the application involves any point of law. I agree with my learned brother Rupchand that we cannot do so. But I still hope that the Income-tax Authorities will take a reasonable view of the situation and consider the applicant's claim on the merits.

A. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

Divorce Petition No. 4 of 1930.

October 5, 1931.

MILNE, J. C.

GLADYS BOURKE—PETITIONER

versus

RICHARD EDMUND BOURKE—RESPONDENT.

Divorce Act (IV of 1869), ss. 14, 16—Petition by wife for divorce—Wife guilty of adultery—Granting of divorce—Adultery caused by husband's cruelty—Discretion of Court.

In dealing with divorce cases where it is found that the woman has been guilty of adultery and that her adultery has resulted from the husband's conduct towards her, the court should make allowance in treating her case with leniency. Where the husband deserted his wife without making any provision for her maintenance and the wife who was living in her father's house after her desertion by the husband cohabited with a person living as a guest in the father's house:

Held, that as the conduct of the husband in deserting his wife and making no provision for her, conduced greatly to the wife's adultery it was a fit case in which the court should exercise its discretion by granting to the wife a decree *nisi* under the provisions of s. 14 of the Divorce Act. *Pretty* v. *Pretty* (5), relied on. *Wyke* v. *Wyke* (1), *John* v. *Mary Anne* (2), *Burdon* v. *Burdon* (4), *Wilson De Roze* v. *Wilson De Roze* (6), referred to. [p.765, col.2; p. 766, col. 1.]

Mr. *Khemchand Gopaldas*, for the Petitioner.

Judgment.—This is a petition for divorce by one Mrs Gladys Bourke, Christian, resident of Karachi, against Richard Edmund Bourke, Anglo-Indian Christian, formerly employed in Telegraph Department in Karachi, and now residing at Maymyo, Burma. The parties married on 15th September, 1912, and there were five children by the marriage. The parties were Christians by religion, and were domiciled in British India. The grounds alleged are cruelty and adultery.

The marriage certificate produced proves the alleged marriage and shows that the parties were domiciled in British India. The evidence on record shows that the parties were and are domiciled in British India. The respondent is now residing in Maymyo (Burma) and the summons in this matter was served on him there. The respondent has not appeared though duly served and the petitioner has filed affidavits in proof of her case.

F. J. Bernard, an employee in the Government Telegraph Office, in receipt of Rs. 325 a month, gives evidence of admissions by the respondent of misconduct with prostitutes and of cruelty by respondent to the petitioner. Respondent once followed the petitioner into the house of the witness who lived near them, picked up a curry stone and would have hit her had the witness not intervened. On another occasion respondent chased the petitioner to the witness' house with a bread knife in his hand and the witness had to prevent him from injuring her. Witness had seen respondent knocking at the door of the house occupied by Dondhin in the servants' quarters; Dondhin was a servant of the petitioner and respondent with whom it is alleged respondent committed adultery.

D. O'Donnel is also employed in the Government Telegraph Office; he came to live with the petitioner and her father in 1923 after her husband had deserted her; he was their paying guest. He made advances to the petitioner which she resisted for about 12 months; thereafter he used to cohabit with the petitioner unknown to her father but when her father came to know about this he left them in anger. Since then the petitioner has been living with him and he has had a second child by her; he is willing to marry the petitioner if she is granted dissolution of marriage.

P. Hanighan is the father of the petitioner. He gives evidence of respondent's cruelty to the petitioner. Respondent struck the petitioner with a lighted lamp; when the respondent deserted his wife, the petitioner came to stay with the witness but as he could not maintain her, he had to take O'Donnel as a paying guest. About 20 months thereafter he became aware of the petitioner's pregnancy and left them. About a year before the witness gave his evidence he obtained definite evidence that the respondent had been in the habit of committing adultery with prostitutes. He got this evidence from one Critchell.

The petitioner has given evidence of cruelty of the respondent; she suspected him of adultery with the servant Dondhin

but she had no actual proof of it. She mentions the incidents of cruelty mentioned by the other witnesses. Her husband deserted her in 1923 without leaving any particulars of his whereabouts. She did not make the application before as she was ignorant of the law of divorce and had no means to take the proceedings

T. P. Critchell a clerk in the office of Messrs. Ralli Bros., was a companion of the respondent. They used to visit houses of prostitutes together; respondent frequently committed adultery in those houses. He gives evidence that the respondent admitted to him that he was on intimate terms with a young Ayah who was his servant.

There is sufficient evidence then to prove cruelty and adultery. Two questions, however, remain to be considered. The first is the question of the delay in presenting this petition. But it appears that it is only recently that the petitioner had sufficiently definite information to prove adultery. In the circumstances then the delay may be excused.

The more serious question is the admitted adultery of the petitioner. Under proviso 1, s. 14, Divorce Act, the court is not bound to pronounce a decree *nisi* when it finds that the petitioner has during the marriage been guilty of adultery. It was held in *Wyke* v. *Wyke* (1), that the court must find as a fact that the petitioner's misconduct was caused directly by the matrimonial offence or offences of the respondent and in *John* v. *Mary Anne* (2) that there must be special circumstances attending the commission of adultery to justify the exercise of the court's discretion. In *Constantinidi* v. *Constantinidi* (3) the respondent committed adultery with a prostitute after his wife had left him with the co respondent: it was held that he was entitled to a decree *nisi*. In *Burdon* v. *Burdon* (4) the court granted a divorce to a wife guilty of adultery; it was held that the adultery had been conduced to by the cruelty, threats and misconduct of her husband.

The petitioner relies in particular or the case of *Pretty* v. *Pretty* (5) and *Wilson De Roze* v. *Wilson De Roze* (6). In the latter case the respondent treated his wife with great brutality and subsequently deserted her without making any provision for her maintenance or that of the surviving child of the marriage, and thereafter frequently visited brothels; the wife driven desperate by want, to maintain herself and her children, adopted the life of a prostitute and, having saved some money, gave up the said mode of livelihood, and then filed a petition for dissolution of her marriage: in the pleading as well as at the trial she did not conceal anything from the court; it was held that this was a fit case in which the court should exercise its discretion.

In the present case the petitioner was not a prostitute from want. In the case above quoted the petitioner had adopted the life of a prostitute only for such period as was necessary for her to raise the funds to institute divorce proceedings. In *Pretty* v. *Pretty* (5) it was held that the conduct of the husband had conduced to his wife's subsequent adultery; the court exercised its discretion in favour of the wife and allowed the decree to be made absolute notwithstanding the fact that at the time of the petition the petitioner had said nothing about her adultery and desertion. I quote a passage from the judgment:

"Some people think they must treat men and women on the same footing. But this court has not taken, and I hope will never take, that view. I trust that in dealing with these cases it will ever be remembered that the woman is the weaker vessel; that her habits of thought and feminine weaknesse are different from these of the man; and that what may perhaps be excusable in the case of the woman would not be excusable in the case of men. Where you find that the woman has been guilty of adultery and that her adultery has resulted from her husband's conduct towards her, this court does and I hope always will make allowance in treating her error with leniency."

The conduct of the husband in the case of *Burdon* v. *Burdon* (4) quoted above was perhaps more objectionable than the conduct of the husband in the present case. But bearing the above quotation in mind I must hold that the conduct of the husband in desering his wife and making no provision for her did conduce greatly to the petitioner's adultery. The petitioner lived in the same house with a person who had been taken in as a paying guest. She was more exposed on that account to temptation and for that her husband was directly responsible. He deprived her of his support and countenance and left her in an exceedingly difficult position. It is true that after her father left the house she continued her adulterous association

(1) (1904) P. 149; 73 L. J. P. 38; 90 L. T. 172; 20 T. L. R. 193.
(2) 8 B. H. C. R. 48.
(3) (1905) P. 253; 74 L. J. P. 122; 93 L. T. 651; 54 W. R. 121; 21 T L. R. 651.
(4) (1901) P. 52; 69 L. J. P. 118.
(5) (1911) P. 83; 80 L. J. P. 19; 104 L. T. 79; 27 T. L. R. 169.
(6) 129 Ind. Cas. 426; A. I. R. 1930 Cal. 729; 57 C. 891; Ind. Rul. (1932) Cal. 202.

with the man O'Donnel, but she had then no choice; she had to maintain herself in some way and the continuance of the adulterous association was perhaps a less voluntary act than its original inception. I am, therefore, of the opinion that this is a case in which the court should exercise its discretion and subject to confirmation by the High Court grant a decree *nisi* under the provisions of s. 14, Divorce Act.

A, *Decree granted.*

SIND JUDICIAL COMMISSIONER'S COURT.

Criminal Revision Application No. 5 of 1931.

August 31, 1931.

MILNE, J. C.

JETHMAL LALCHAND—APPLICANT

versus

EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 195 (1) (c)—Penal Code (Act XLV of 1860), s. 477-A—Prosecution under s 477-A—Necessity of sanction.

The provisions of s. 477-A, Penal Code, are not covered by the provisions of s. 195 (1) (c), Criminal Procedure Code, consequently, no sanction is required for institution of a prosecution under s. 477-A with regard to a document produced in Court. *Teni Shah* v. *Bolahi Shah* (1), not applied. [p. 767, cols. 1 & 2.]

Criminal Revision Application for revision of an order of the Special First Class Magistrate, Karachi.

Mr. *Motiram Idanmal*, for the Applicant.

Mr. *Taraohand Khimandas*, for the Opponent.

Mr. *C. M. Lobo*, Public Prosecutor, for the Crown.

Milne, J. C —The complaint in this case was lodged against the accused under ss 465 and 477-A, Indian Penal Code. Process was issued under s. 477-A. It was alleged that accused was first a servant and subsequently became a partner of the complainant. It was accused's duty to write up the books of account. In *Sambat* 1985 accused was asked to complete the books. But instead of doing so he left the partnership. The complaint against him is that he falsified an entry in the firm's books relating to a deposit made by himself on the 13th of *Akhar* 1985, so as to make it appear that the deposit was made in the name of his brother-in-law Udernomal. The firm had suffered losses and if the deposit remained in the name of the accused he would not have been able to recover the money. The allegation is that he falsified the books to show that the deposit was made by his brother-in-law. His brother-in-law Udernomal sued the firm and recovered this deposit in addition to another deposit made by him. The accused was discharged by the learned Special First Class Magistrate, Karachi, and the complainant has now come to this Court in revision.

The complaint is based on three entries Exs. 2-B, 1-C and 1-D in the complainant's books relating to the deposits made by the accused, on the 13th of *Akhar*. The entry Ex. 2-B is made in the *yadasht* which does not appear to be a regular account book but simply a note book kept of entries to be made in the *katcha rokar*. The entry in the *yadasht* shows that the deposit of Rs. 200 was made by accused and so does the entry in the *katcha rokar* Ex. 1-C and in the *pacca rokar* Ex. 1-D. The entry in Ex. 1-D was however subsequently written over; the name of Udernomal being written over. This is a transaction which obviously requires explanation. The deposit which was originally shown as having been made by the accused was subsequently shown in the *pacca rokar* as a deposit made by Udernomal. The accused admits that he made this correction and the explanation given by him is that the deposit was really made by Udernomal—that complainant's brother Hemandas told him that Udernomal had asked for the amount and Hemandas had written to him promising to pay the amount; that when payment was made Udernomal said that the chit had been lost and the accused accordingly made the change at Hemandas' request so that Udernomal should not claim the amount a second time. But it would have been a simple matter for Hemandas to have taken a receipt from Udernomal clearly stating the facts of the transaction when the re-payment was made so that there could have been no possibility of Udernomal's producing the letter in support of a claim for any re-payment a second time. No reasonable ground has been urged why this simple ordinary procedure should not have been followed instead of making the false entry in the complainant's book, the purpose of which has not even now been clearly explained.

The learned Special First Class Magistrate has held that the allegations now made were not made when Udernomal sued in the Small Cause Court for the return of both the deposits. Exhibit 1-F is the written statement of the defendant

(now complainant) in the Small Cause Court suit. In para 3 he made allegations of bad faith against his partner Partabrai. He did not specifically allege the falsification of accounts—the subject of the present complaint. The finding in the Small Cause Court suit was that both the deposits were made by Udernomal. The learned Magistrate was of opinion that the court was precluded from trying the same question again. But even if complainant was lax in his conduct of the case in the Small Cause Court, if as matter of fact there had been falsification of the accounts, it is still open to him to lodge a criminal complaint on the facts alleged. It may be a difficulty in his case but he did not raise that contention in the civil proceedings. But so far as the present complaint is concerned, there are plain alterations in the complainant's books of account which the accused admits were made by him, which show that a certain deposit was first shown as made by the accused and the entry was subsequently altered to show the deposit was made by Udernomal, his brother in-law; no reasonable explanation has been given why this change in the account was made and the accused should not have been discharged until the Magistrate had had before him some satisfactory explanation of the change in the accounts. It may be noted that the explanation given by the accused in his statement to the Court was not put to the witness Hemandas; it was the accused's case that the change was made under instructions from Hemandas.

A further point has been taken that the sanction of the Small Cause Court is required for this prosecution. The Small Cause Court suit was a suit against the firm in which, according to the complaint accused is a partner. Accused was examined as a witness in the case and produced the entries complained of. The opponent relies on *Teni Shah* vs. *Bolahi Shah* (1), in which it was held that s. 463, Indian Penal Code, referred to in s. 195 (1) (c) of the Criminal Procedure Code covers forgery of the description for which a penalty is provided under s. 467 of the Indian Penal Code Applicant contends in the first place that opponent was not a party to the suit; he was not served as a party; nor did he appear as a party. But without going into this question I would hold that the provisions of s. 477-A are not covered by the provisions of s. 195 (1) (c). Section 195 (1) (c) refers in the first place to offences punishable under s. 463 (forgery) and that would no doubt include the various offences of which forgery was an element. The definition of forgery is given in s. 463 and would cover the various sections in which the word forgery is used. But s. 477-A does not contain any reference to forgery. It contains its own definition of the offences enacted therein and the ruling *Teni Shah* v. *Bolahi Shah* (1) would therefore not apply.

I hold therefore that the accused has given no reasonable explanation of the admittedly false entries in the complainant's books which he admits have been made by him. I am of opinion that he was improperly discharged and I therefore direct the District Magistrate by himself or by any Magistrate subordinate to him (I would suggest a Magistrate other than the Magistrate who has tried the case) to make further enquiry into complaint against the accused.

N. K. & A. *Application allowed.*

(1) 5 Ind. Cas. 879; 14 C. W. N. 479; 11 Cr. L. J. 280.

SIND JUDICIAL COMMISSIONER'S COURT.

Criminal Revision Application No. 87 of 1931.

September 14, 1931.

MILNE, J. C. AND RUPCHAND, A. J. C.

HASHIM MOOSA—APPLICANT

versus

MRS. G. BOOTH—OPPONENT.

Criminal Procedure Code (Act V of 1898), s. 203—Statement on oath of complainant—Whether and when necessary—Complainant already examined under s. 200.

A Magistrate is not bound to examine the complainant on oath under s. 203, Criminal Procedure Code, when he has already been examined on oath under s. 200, unless the Magistrate considers it desirable to do so. Where the witnesses examined on behalf of the complainant have said nothing which requires any further explanation from the complainant, he need not be examined again under s. 203. *In re Ningappa* (1), discussed.

Application for revision of an order of the Additional City Magistrate, Karachi.

Mr. *P. K. Vaswani*, for the Applicant.

Mr. *Ramchand Jethmal*, for the Opponent.

Mr. *C M. Lobo*, Public Prosecutor, for the Crown.

Milne, J. C—This is a complaint filed under s. 420, Indian Penal Code, by the applicant against one Mrs. Booth who had purchased certain goods from the applicant The applicant held six pro-notes executed

by the accused. The accused had been pressing for a further loan of Rs. 400 to which the applicant agreed provided that her husband joined in the execution of the pro-note for the entire amount of Rs. 1,3000 including the previous advances. The accused agreed to this The complainant went to her house. The accused showed him a pro note which she said was signed by her husband and asked the complainant to hand over the previous pro-notes. The applicant insisted on the accused also signing the pro-note. He then delivered to the accused the six previous pro notes and paid her the sum of Rs. 400. The accused and her husband subsequently denied the execution of the pronote. They repeated their denial through their Pleaders when called upon by the applicant's Pleader to pay the amount.

The complainant was examined; he verified his complaint. A preliminary inquiry was held by the Magistrate who examined the complainant's witnesses who did not give any evidence in support of the charge, and the complaint was dismissed under s. 203 as there was no evidence to prove that the accused had committed any criminal offence.

The ground which the applicant has taken in this Court is one of law. It is his proposition that he should have been examined on oath under s. 203 in addition to his examination under s. 200 before his complaint could be dismissed. For this proposition he relies on the case of *In re Ningappa* (1). There Macleod, C. J. refers to the Magistrate as being bound to examine the complainant under s. 203, but it appears from the judgment of Shah, J. that the complainant was not examined at all in that case.

The complainant has been examined in this case, and it appears from the use of the words "if any" in s. 203 that there is no necessity for the Magistrate to examine the complainant and on oath under that section unless he considers it desirable to do so.

We therefore dismiss this application.

Rupchand, A. J. C.—The learned Counsel has argued that the learned Magistrate should not only have examined the complainant on oath at the time the complaint was presented by him as required by s. 200, but that he should have examined him further after he had recorded the evidence of the witnesses cited by the complainant. In support of his argument he has urged that the expression "Statement on oath" in s. 203 is something different from the examination on oath of the complainant under s. 200 of the Code. He has however lost sight of the words "if any" in s. 203, Criminal Procedure Code.

These words clearly show that there need not be any examination on oath by the complainant other than that provided by s. 200

In *In re Ningappa Rayappa* (1), the complaint had been referred by the Magistrate to the Police for investigation, and it is not clear either from the Editorial note or from the judgment of the learned Chief Justice if the Magistrate had examined the complainant on oath as required by s. 200 before he sent the papers to the Police for investigation. It is true that the learned Chief Justice has said:

"The Magistrate without examining the complainant, as he was bound to do under s. 203, Criminal Procedure Code, dismissed the complaint."

But it is possible that reference to s. 203 in the above passage is a mistake for s. 200, because in his concurring judgment Shah, J. has said:

"The order dismissing it under s. 203, Criminal Procedure Code, is clearly wrong as the complainant was not examined at all."

As the complainant had not been examined at all, there was no occasion for their Lordships to decide if it was incumbent on the Magistrate to examine the complainant a second time.

I can quite conceive of cases where something might transpire in the course of the evidence of complainant's witnesses which requires an explanation, and in that case it might perhaps be arguable that the Magistrate should have examined the complainant further, in order to enable him to explain what was said by the witnesses. But there is no such allegation in the present case as the witnesses who were examined on behalf of the complainant have said nothing which requires any further explanation from the complainant.

There is therefore no substance in this argument, and I accordingly concur with the learned Judicial Commissioner that this application should be dismissed.

N. K. & A. *Application dismissed.*

(1) 81 Ind. Cas. 608; 48 B. 360; 26 Bom. L. R. 183; A. I. R. 1924 Bom. 321; 26 Cr L. J. 960.

MADRAS HIGH COURT.

Civil Revision Petition No. 1033 of 1930.

July 30, 1931.

CURGENVEN, J.

GURUVAMMAL—PETITIONER RESPONDENT

versus

ARUMUGA PADAYACHI AND OTHERS RESPONDENTS

Madras Hindu Religious Endowments Act (II of 1927), s. 78—Ex parte *order for delivery—Objection by aggrieved party—Power of Court to reconsider its order—Inherent powers.*

Where an order is passed *ex parte* by the Court under s. 78 of the Madras Hindu Religious Endowments Act, 1927, directing delivery of some trust property and it is objected to by a person who is prejudicially affected thereby, the Court can reconsider the *ex parte* order, inasmuch as such an order carries with it an implication that it will be subject to any objections to which the act of delivery may give rise. [p. 771, col. 1.]

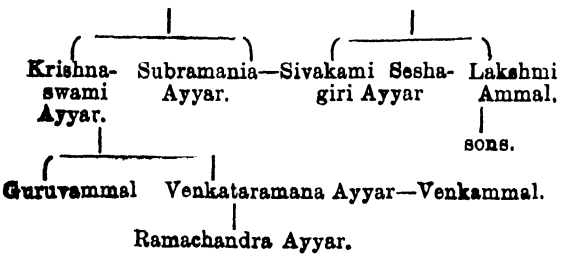
In a proceeding under s. 78 of the said Act the Court acts not merely administratively but judicially, and on cause being shown, may refuse to enforce the Board's order. *National Telephone Company Limited* v. *Postmaster-General* (1), *Painter* v. *Liverpool Gas Co.* (2), *Harper* v. *Carr* (3), *Krishnasami Pani Konden* v. *Ramasami Chettiar* (4), *Debi Bakhsh Singh* v. *Habib Shah* (5), *Syud Tuffazzool Hossein Khan* v *Raghunath Pershad* (6), referred to. [p. 770, col. 1.]

Petition under s. 114 of Act V of 1908 and s. 107 of the Government of India Act praying the High Court to revise an order of the District Court, South Arcot, dated the 16th April, 1930 and made in M. P. No. 173 of 1927 in O. A. No. 79 of 1926 on the file of the Board of Commissioners for the Hindu Religious Endowments, Madras.

Mr. *T. V. Ramanatha Ayyar*, for the Petitioner.

Mr. *S. T. Srinivasagopalachari*, for the Respondents.

Judgment.—The following table shows how the parties whose names occur in these proceedings are connected:



Subramania Ayyar died in 1899 leaving a will bequeathing the land now in dispute to his nephew Venkataramana Ayyar. By a codicil he gave his widow Sivakami a life-interest in it. Another bequest was of a sum of money to form a trust fund, of which Sivakami was during her life-time the self-constituted trustee. The widow survived Venkataramana Ayyar, and she too made a will, and in it she declared that Venkataramana Ayyar had told her, before his death, that she might include the land in the trust already created. After her death in 1924, on the strength of the allegation in this will that the property was trust property, Venkataramana Ayyar's sister Guruvammal applied to the Religious Endowments Board for an order under s. 42 of the Act (II of 1927) appointing her to discharge the duties of the trustee, and under s. 77, for an order allocating the income of the endowment between religious and charitable purposes. The Board passed orders accordingly. The order appointing Guruvammal was challenged a little later by Sivakami's brother's widow and her sons, on the ground that Sivakami had nominated them as trustees in her will; but the order already passed in Guruvammal's favour was substantially confirmed. This lady then proceeded to apply to the District Court, under s. 78 of the Act, to be put in possession of the trust property. In her application she named a number of respondents, among them being Sivakami's brother's widow and her sons, who had contested her appointment before the Board, and one Arumugam Padayachi, said to be the lessee of the property now in dispute The learned District Judge ordered notice to the respondents, but no notice was issued, because he subsequently acceded to a representation of the petitioner's Vakil that no notice was necessary. *Ex parte* orders were accordingly passed directing delivery, symbolical in the case of the property now in question, which was in the occupation of a tenant.

Then arose opposition from another quarter. Matters had proceeded so far on the footing that the property was trust property. Venkataramana Ayyar's widow and her alleged adopted son disputed this, denying that Sivakami had received from Venkataramana Ayyar any such permission as her will alleged to treat the property as trust property. These persons claimed the land as their own, and not unnaturally complained that the proceedings before the Board and the District Court had taken place behind their backs. They accordingly asked the District Judge to set his previous order aside and dismiss Guruvammal's application. The matter came before the successor to the learned District Judge who had passed the previous order. He has treated the application as

sustainable upon the analogy of O. XXI, r. 100 of the Civil Procedure Code, and has posted the case for evidence. Against this order Guruvammal has preferred this Civil Revision Petition, and the point for decision is whether the District Judge was right in re-opening the matter.

Now it is in the first place apparent that neither the order of the Board appointing Guruvammal, nor the order of the District Court directing delivery to her, is binding upon the respondents, who were no parties to these orders. The respondents' learned Advocate would go further and criticise both orders as improper, the Board's, because it did not satisfy itself that the property was in fact a religious endowment, the District Court's, because it failed to exercise judicially the discretion vested in it by s. 78. As the Board's order is not under direct attack, I do not propose to examine its jurisdiction to pass such an order. As regards the order of the learned District Judge, s. 78 lays down that the Court may order delivery to a person producing the Board's order of appointment when such person "is resisted in, or prevented from, obtaining possession." It is unfortunate, I think, that the learned District Judge was prevailed upon to pass his order without notice to any of the respondents named in the application. The section appears to me to give the Court the opportunity of deciding upon the merits of the resistance which, in order to get such an order, the applicant has to allege. This is conceded on behalf of the petitioner here, the Court acts not merely administratively but judicially, and on cause being shown may refuse to enforce the Board's order. Such a position was in fact impliedly conceded by the presence of an array of respondents in the application. It is noteworthy, however, that the names of the present respondents were conspicuous by their absence, and I cannot absolve the petitioner from attempting to get possession of the property without raising the eminently disputable question of the allegation of entrustment contained in Sivakami's will. Although these persons were ignored, however, included among the respondents was Arumugam Padayachi, whom they claim as their own tenant, and it seems probable that had notice gone to him the question of title might still have been brought up for inquiry.

The question then is, an order having been passed in these circumstances, whether the Court has jurisdiction to re-open it and adjudicate upon the respondents claims. There are no doubt technical difficulties in the way of holding that O. XXI, r. 100, Civil Procedure Code, will operate *proprio vigore*, nor does the learned District Judge invoke it otherwise than by analogy. His Court is charged with the duty of executing the Board's orders and if an order in execution results in the dispossession of a third party, it should be within his competence to investigate the matter and pass such orders as may appear appropriate. When a duty of a particular character is cast upon an established Court it imports, in the words of Lord Haldane, L.C., in *National Telephone Company Limited* v. *Postmaster-General* (1), 'that the ordinary incidents of the procedure of that Court are to attach.' But I think his right to take such a course may, at least in the circumstances of the present case, be put upon still broader grounds. I take it that the applicant should have made the respondents parties to her application, and that the District Judge should have issued notice to them. There is ample authority for the view that an order passed in the absence of such preliminaries is voidable or void as against them. In *Painter* v. *Liverpool Gas Co.* (2), it was held that a distress warrant issued without notice was illegal, Lord Denman, C. J., referring to *Harper* v. *Carr* (3), where Lord Kenyon said,

> 'It is an essential rule in the administration of Justice that no man shall be punished without being heard in his defence; the party must be summoned before a warrant of distress is granted ... ...; and on that summons many circumstances may appear to show that a warrant of distress ought not to be granted.'

In *Krishnasami Panikondar* v. *Ramasami Chettiar* (4), the Privy Council had to consider the effect of an order passed *ex parte* excusing the delay in presenting an appeal, and decided that it was open to the respondent to obtain a reconsideration of the order. 'It must therefore in common fairness be regarded as a tacit term of an order like the present that though unqualified in expression it should be open to reconsideration at the instance of the party prejudicially affected.' So here we may, I

(1) (1913) A. C. 546; 109 L. T. 562; 57 S. J. 661; 29 T. L. R. 637.

(2) (1836) 111 E. R. 478; 3 A. & E. 433; 6 N. & M. 736; 2 H. & W. 233; 5 L. J. (N. S.) M. C. 108; 42 R. R. 423.

(3) (1797) 7 Term. Rep. 270; 4 R. R, 440.

(4) 43 Ind. Cas. 493; 41 M. 412; 7 L. W. 156; 34 M. L. J. 63; 4 P. L. W. 54; 16 A. L. J. 57; 23 M. L. T. 101; 27 C. L. J. 253; 2 P. L. R. 1918; 22 C. W. N. 481; 21 Bom. L. R. 541; 11 Bur. L. T. 121; (1918) M. W. N. 906; 45 I. A 25 (P. C.).

think, read into the District Judge's *ex parte* order the implication that it will be subject to any objections to which the act of delivery may give rise. Another Privy Council case which declares the inherent power of the Court to rectify a mistake inadvertently made is *Debi Bakhsh Singh* v. *Habib Shah* (5). I do not think that it will do for the Court to refuse to take such a course on the ground that the party damnified may recover his legal rights by suit. As was laid in *Syud Tuffuzzool Hossein Khan* v. *Raghunath Pershad* (6), it is the duty of the Court to give redress. I think accordingly that the learned District Judge has acted rightly in entertaining the respondents' application, and I dismiss the Civil Revision Petition with costs.

N. S. & A. *Petition dismissed.*

(5) 19 Ind. Cas. 526; 35 A. 331; 17 C. W. N. 8[illegible], 11 A. L. J. 625; 18 C. L. J. 9; 15 Bom. L. L. 640; 14 M. L. T. 33; (1913) M. W. N. 566; 25 M. L. J. 148; 16 O. C. 194; 40 I. A. 150 (P. C.).

(6) 14 M. I. A. 40; 7 B. L. R. 186; 2 Suther 434; 2 Sar. 656.

MADRAS HIGH COURT.

Appeals against Orders Nos. 455 and 456 of 1930.

April 13, 1931

RAMESAM AND CORNISH, JJ.

VYTHILINGA PANDARASANNADHI—APPELLANT

versus

THE BOARD OF CONTROL, *Sri* THIAGARAJASWAMI DEVASTHANAM, TIRUVARUR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XLI, r. 1,—Scheme—Creation of Board of Control with right to call upon trustees for collections—Board's right to execute scheme—'Decree-holder', meaning of—Appointment of Receiver, propriety of—Order XLI, r. 1, scope of.

Where a scheme framed by the Court for the management of a temple constitutes a Board of Control and confers upon the Board the right of calling upon the trustees to remit the collections, the Board though created by the scheme itself, may be regarded as a decree-holder competent to execute the provisions of the scheme. A decree-holder need not be a party to the decree. It is enough if the decree confers upon him some right enforceable under the decree. *Varadaiah Chetti* v. *Narasimhulu Chetti* (2), followed. *Ramanatham Chettiar* v. *Balayee Ammal* (1), referred to. *Sivaram Dubai* v. *Rajagopala Misra* (3), *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar* (4) and *Veerapa* v. *Padmanabha* (5), distinguished. [p. 772, col. 1.]

The proviso to O. XLI, r. 1, Civil Procedure Code, refers to a case where the person in possession is a third party and the parties to the suit have no present right to disturb him. Where the dispute is between parties to the suit, if it is just and convenient for the purpose of enforcing or carrying out the directions in the decree, a Receiver can be appointed even where the party in possession is not liable to be removed. *Kumaraswami Pillai* v. *Pasupathia Pillai* (6), relied on. [p. 773, col. 1.]

Appeals against an order of the Court of the Subordinate Judge, Negapatam, dated the 17th November, 1920 and made respectively in E. P. Nos. 11 and 84 of 1930 in O. S. No. 125 of 1921 (E. P. No. 6 and 51 of 1930 respectively on the file of the Court of the Subordinate Judge, Tiruvarur).

Messrs. *K. Rajah Aiyar* and *R. Sundaralingam* for the Appellant.

Messrs. *S. Varadachariar* and *A. Swaminatha Aiyar* for the Respondent.

Judgment.—These are appeals under s. 47 of the Code of Civil Procedure against the orders of the Subordinate Judge of Negapatam in E.A. Nos 11 and 84 of 1930 in O. S. No. 125 of 1921 which was a suit filed for the framing of a scheme for the temple of Sri Thiagarajaswami at Tiruvarur in East Tanjore District. The matter came up to the High Court before Spencer, J. and myself and a scheme was framed. Under cl. (8) of the scheme the trustee of each Kattalai was directed to submit a budget to the treasurer of his expected receipts and expenditure and the treasurer was directed to consolidate the budgets of all the Kattalais and place them before the Board for their approval and orders. Under cl. (13) of the scheme the trustees of the respective Kattalais were directed to hand over all the cash proceeds of their property to their treasurer who had to keep them in a safe within the temple premises, enter them in a book to be kept with separate pages for each Kattalai for that purpose and furnish the trustees with receipts for the same and be responsible for their safe custody, and the treasurer was directed to put the trustees in funds from the amounts in his hands to their respective credits whenever they apply for disbursements according to the budget. In pursuance of the scheme, the President of the Board of Control insisted on the trustees of the Kattalais sending complete budgets of receipts and expenditure and on their failing to do so he applied for attachment of their property or their arrest. The Subordinate Judge dismissed the petition. There was an appeal to the High Court. That appeal came on before this Bench and it was held on an objection that the decree in the original suit was not an executable one, that the directions in cls. (8) and (13) of the scheme were executable

and not merely declaratory. Our judgment was reported as *Ramanatham Chettiar* v. *Balayee Ammal* (1). The present application is by the Board of Control acting through their President for the appointment of a Receiver for the properties under the control of 12th defendant who is the trustee of Abisheka and Annadhana Kattalais for the purpose of carrying out the duties which the trustees have to perform under cls. (8), (13) and (16) of the scheme, alleging default on the part of the trustees in regard to their duties The petitions were actually pressed before the Subordinate Judge in respect of only cl. (13). The complaint made against the trustee is that he had persistently not been making remittances nor sending accounts showing collections from *Fasli* 1338 downwards. The Subordinate Judge found that the appellant was guilty of continuous and persistent defiance not only of the directions in the scheme to make remittances of money collections but also the orders of Court made from time to time and that he paid only a small portion of the money received by him. In para. 6 of the judgment there is a table showing the actual income and remittances to the treasurer. The appellant admitted on 2nd September, 1929, that he received a sum of nearly Rs. 5,000 between 29th March and 23rd August, 1929, but did not remit it to the treasurer and spent it himself. Other defaults are mentioned by the Subordinate Judge in the same paragraph. Similar complaints were made in 1928 and also in 1929. Nothing further was done on the ground that an undertaking was given by him (*vide* Exs. E and E-1). In the present petition he was required to produce all the accounts. He has not done so. The Board of Control made a rule that he should send monthly budgets, but this was not done. Accordingly the Subordinate Judge appointed a Receiver. It is against this order that the present appeals are filed.

In appeal the point strenuously pressed is that the appointment of a Receiver is not a proper remedy, on various technical grounds. First, it is argued that the Board of Control was not a party to the decree itself and could not be a party; therefore, it cannot be a decree-holder and cannot execute the decree. The reply to this argument is that a decree-holder need not be a party to the decree. It is enough if the decree confers some right enforceable under the decree upon some persons mentioned in it. The right of calling upon the trustees to remit the collections is conferred upon the Board of Control. The Board may therefore, be regarded as a decree-holder. Vide *Varadaiah Chetti* v. *Narasimhulu Chetti* (2) and cases cited therein. The decision in *Sitaram Dubai* v. *Rajagopala Misra* (3), does not help the appellant as it did not relate to matter in execution. We have already held in *Ramanatham Chettiar* v. *Balayee Ammal* (1), that these clauses of the scheme may be regarded as executable. The decision in *Ranganatha Thathachariar* v. *Krishnaswami Thathachariar* (4) and *Veerappa* v. *Padmanabha* (5) are distinguishable as the applications in those cases related not to matters in execution but to other matters.

It is then argued that the proper method of compelling the trustee of Annadhana and Abisheka Kattalais to obey the directions in the scheme is by attaching the property or arresting him and not appointing a Receiver. It may be that attachment of property and arrest of the judgment-debtor are two modes of enforcing obedience by the judgment-debtor to the directions in the decree. But in the present case the object of the application is not only to compel obedience on the part of the judgment debtor but also to obtain the collections made on behalf of the Kattalais, and to ensure the production of accounts as regards collections. The learned Advocate for the appellant argued that the appointment of a Receiver is a mode of equitable execution under the English Law and referred to English authorities to show that it cannot be justified in circumstances like these. We have nothing to do with those authorities. Even in England a wider discretion is conferred upon Courts by the Judicature Act but in practice even under the Judicature Act the Court would appoint Receivers only in cases where these could have been appointed prior to the Act. But under the Civil Procedure Code we are not restricted by considerations of this kind. According to s. 51 Civil Procedure Code, one of the modes of obtaining execution

(1) 107 Ind. Cas. 36; 27 L. W. 32; 39 M. L. T. 579; A. I. R. 1928 Mad. 61.

(2) 134 Ind. Cas. 60; 60 M. L. J. 173; 34 L. W. 149; 54 M. 345; (1931) M. W. N. 586; Ind. Rul. (1931) Mad. 812; A. I. R. 1932 Mad 41.

(3) 128 Ind. Cas 515; 54 M 315; 67 M. L. J. 514; 32 L. W. 603; A. I. R. 1930 Mad. 918; Ind. Rul. (1931) Mad. 83.

(4) 75 Ind Cas. 189; 47 M. 139; 18 L. W. 237; A. I. R. 1924 Mad. 369.

(5) 119 Ind Cas. 469; A. I. R. 1929 Mad. 625; Ind. Rul. (1929) Mad. 965.

is by the appointment of a Receiver and under O. XL, r. 1, Civil Procedure Code, a Receiver can be appointed wherever it is just and convenient, and it is provided that a Receiver shall not be appointed so as "to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove." This proviso clearly refers to a case where the person in possession is a third party and the parties to the suit have no present right to disturb him. This was the view taken by Sadasiva Aiyar, J, in *Kumaraswami Pillai* v *Pasupathia Pillai* (6). We agree with that view. Where the dispute is between parties to the suit, if it is just and convenient for the purpose of enforcing or carrying out the directions in the decree we think a Receiver can be appointed even where the party in possession is not liable to be removed. It is true that in the present case the Board of Control has no right to remove the trustees. Their petition was not for the purpose of removing the trustees but for the purpose of compelling them to carry out the duties according to the scheme. This has been held to be *intra vires* in *Veeraraghavachariar* v. *Advocate-General Madras* (7) The effect of the present order of the Subordinate Judge is not the removal of the trustee. Defendant No. 12, who is the trustee of Annadhanam and Abishekam Kattalais, will continue to discharge his duties as trustee in all other matters untouched by this order. He will settle the budgets, obtain disbursements from the treasurer and incur the expenditure necessary for the carrying out of the Kattalais. Only in the matter of collecting the income and remitting the cash collections to the treasurer a Receiver is appointed to attend to these duties. As will appear lower down this order must necessarily be of a temporary character and does not amount to a permanent dispossession of the trustee. In a suit brought by a mortgagee against a mortgagor for the purpose of obtaining a mortgage amount where the property belongs to a *mutt* and a sale is considered not desirable, a Receiver was appointed for the purpose of collecting the income of the mortgag property and paying the amount due to the mortgagee. *Vibhudapriya* v. *Lakshmindra*(8). A similar order was passed in *Niladri Sahu* v. *Mahant Chaturbhuj Das* (9). We do not see therefore any objection to the appointment of a Receiver in this case for the purpose of ensuring remittances of the collections from the properties of the two Kattalais to the Board of Control. On the merits we do not see any reason why we should disturb the order of the Subordinate Judge having regard to the persistent conduct of the trustee in question.

As I have observed, it is not desirable that a Receiver should be appointed permanently. There should be some time-limit; otherwise the Court will have perpetually to superintend the affairs of the Kattalais. In the first instance we may limit the period to two years. If the Subordinate Judge is satisfied at the end of this period with the conduct of the trustees, or if the present trustee is removed, after his removal, the Receiver may be discharged, or the term of the Receiver may be extended from time to time.

Subject to this modification the appeals are dismissed with costs.

N. S. & A. *Appeal dismissed.*

(6) 61 Ind Cas. 605: 12 L. W. 254.

(7) 106 Ind. Cas 665; 51 M. 31; 53 M. L. J. 792; 1927) M. W. N. 816; 39 M. L T. 422; 26 L. W. 728; A. I. R. 1927 Mad. 1073 (F. B.).

(8) 101 Ind. Cas. 545; 54 I. A. 228; 50 M 497 at p. 508; 53 M. L. J. 196; A. I. R. 1927 P. C. 131; 29 Bom. L. R. 955; 45 C. L. J. 613; (1927) M. W. N. 507; 25 A. L. J. 697; 31 C. W. N. 1021; 39 M. L. T. 45 (P. C.).

(9) 98 Ind. Cas. 576; 53 I. A. 253; 6 Pat. 139 at p. 154; 51 M. L. J. 822; A. I. R. 1926 P. C. 112; (1926) M. W. N. 857; 28 Bom L. R. 1418; 44 C. L. J. 494; 31 C. W. N. 221; 25 A. L. J. 8; 38 M. L. T. 24; (P. C.).

MADRAS HIGH COURT.

Civil Appeal No. 27 of 1930.

October 15, 1931.

CORBETT, J.

SETHURAMA AYYAR—APPELLANT

versus

T. B. VARADARAJA AYYAR—RESPONDENT.

Hindu Law—Widow—Decree against widow, when binding on reversioner—Tests—Frame of suit—Consent to payment of decree amount, whether amounts to acknowledgment that it is binding on estate.

Where a decree is obtained against a limited owner such as a Hindu widow whether or not the debt was binding on the estate during the life-time of the limited owner, the decree-holder can proceed against her interest in the property. Therefore, consent by the reversioners to a stipulation reserving an amount for payment to the holder of a decree against a limited owner does not amount to an acknowledgment that the debt is binding not only upon the limited owner's interest but also upon the reversioners. [p. 774, cols. 1 & 2.]

In order to construe a suit against a widow as a representative suit, some indication however slight,

must be found to show that the creditor intended so to frame it and unless such indications are present and if the suit is in form only a simple money claim against the widow although in point of fact the debt may have been contracted for necessary purposes the reversionary interest could not be held to be bound by the decree against her. [p. 775, cols. 1 & 2.]

(Case-law discussed).

Appeal against an order of the Small Cause Court Judge, Kumbakonam, dated the 18th March 1929, in A. S. No. 80 of 1928.

Messrs. *S. Panchapagesa Sastri* and *K. R Krishnaswami Ayyar*, for the Appellant.

Messrs. *M. S. Venkatarama Aiyar* and *V. Srinivasa Aiyar*, for the Respondent.

Judgment—This appeal is against an order bringing the appellant on record in O. S. No. 343 of 1923 on the file of the District Munsif's Court of Mannargudi as the legal representative of the judgment-debtor, a woman named Vedathammal. The respondent is the decree-holder and he obtained a money-decree against Vedathammal and attached a house in which she enjoyed a limited estate. While it was under attachment she and her father as next reversioner joined in selling it under Ex. D. to the appellant. The latter filed a claim petition during the pendency of which the judgment-debtor died. Subsequently the appellant obtained another sale-deed from the same reversioner. The question is whether as purchaser of the property he can be brought on as her legal representative.

The learned District Munsif considers that the decree in O. S. No. 343 of 1923 may be construed as against Vedathammal in her representative capacity and not merely against her presonally. The lower Appellate Court has differed from this view, but considers that the appellant is estopped by certain conduct from contesting his liability for the decree. I will deal with this latter point first. The learned Judge of the Court of Small Causes has disposed of it very briefly in para. 13 of his judgment and has not given with any clearness the reasons which support the view he takes. But the fact he apparently relies upon is that under Ex. D a sum of money was reserved to pay the decree holder if the decree was eventually confirmed on appeal. The inference drawn from this argument, that the reversioner thereby acknowledged that the debt was of such a character as to be binding upon the reversion, appears to me wholly to misconceive the position. Whether or not the debt was so binding, during the life time of the limited owner, the decree-holder could proceed against her interest in the property, and so long as she lived the purchaser held it subject to this risk. It was perfectly reasonable therefore that he should only buy it on the condition that so much of the purchase-money as was necessary should be reserved for payment of the debt in case of need, and it is clear that a stipulation to this effect involved no acknowledgment that the debt was binding not only upon the limited owner's interest, but also upon the reversionary interest. No question of estoppel therefore arises.

The next question is whether the suit was so framed as to enable the decree-holder to proceed against the absolute interest now enjoyed by the appellant as the reversioner's representative. The suit was against the limited owner only; it was a simple money claim upon a debt, and no issue was raised as to whether the debt was binding on the estate. Can the decree-holder show in execution of such a decree that the debt was in fact binding so that he may bring on the appellant as representative of the reversionary interest and proceed against the property in his hands? There is no doubt that the answer to this question depends upon the view taken of the frame of the suit, whether it may be construed as aimed at the whole estate by virtue of the binding character of the debt or whether the plaintiffs did not look beyond the interest of the limited owner. There is a quantity of case law upon this subject. In one line of cases, of which *Nugender Chander Ghose* v. *Kaminee Dossee* (1) *Bai Jun Doobey* v. *Brij Bhookun Lall Anusti* (2), *Deendyal Lal* v. *Jugdeep Narain Singh* (3) and *Lalita Mohan Pal* v. *Dayamoyi Roy* (4) may be cited as examples, the principle is stressed that it is incumbent upon the plaintiff so to frame his suit as to make it clear that he asks for a decree against the whole interest. In the case last cited above, the Privy Council quote with approval a passage in the judgment of the High Court of Calcutta to the effect that in order to make the estate liable a creditor must frame his suit in the proper manner, whereas in the instance then under

(1) 11 M. I. A. 241; 8 W. R. 17: 2 Suther 77; 2 Sar. 275 (P. C.).

(2) 1 C. 133; 2 I. A. 275; 24 W. R. 306; 3 Sar. 541; 3 Suth. 207 (P. C.).

(3) 3 C. 198; 4 I. A. 247; 3 Sar. 730; 3 Suth. 468 (P. C.).

(4) 105 Ind. Cas. 469; A. I. R. 1927 P. C. 41; (1927) M. W. N. 95; 52 M. L. J. 426; 29 Bom. L. R. 759; 25 L. W. 709: 45 C. L. J. 404 (P. C.).

consideration all that he asked and the Court granted was a personal decree against the debtor. There was no indication that the debtor was a party to the suit as representative of the estate. Another line of cases, while conceding that the actual frame of the suit is an important factor in the decision, take also other facts into consideration in attempting to arrive at the plaintiff's intention

Instances of cases in which the frame of the suit was not regarded as decisive are *Jugul Kishore* v. *Jotendro Mohun Tagore* (5), *Nanomi Babuasin* v. *Modhun Mohun* (6), *Simbhunath Pande* v. *Golap Singh* (7), *Radha Kissen* v. *Nauratan Lall* (8) and *Veerabadra Aiyar* v. *Marudaga Nachiar* (9). The judgment in *Devji* v *Sambu* (10) has been cited as another decision on the same lines, but I do not think that the facts were really analogous, because the case was one of a mortgage executed by a mother who had minor sons, and the only way in which the creditor could have got any title at all was by virtue of an intention that the estate should be bound. So far as this Court is concerned it is unnecessary for me to look further than to the judgment in *Veerabadara Aiyar* v. *Marudaga Nachiar* (9), which passes a number of previous decisions in review. The stage at which the question arose there was after sale. But some of the tests applied will serve equally in the present circumstances.

"In investigating this question," the learned Judges say, "the Court is not confined to any one fact. The sale certificate is no doubt the most important document as the instrument conferring title, but is not conclusive. The frame of the suit, the judgment, the decree, the execution proceedings, the advertisements for sale, the adequacy or inadequacy of the purchase-money and the conduct of the parties are all circumstances which may legitimately be considered in an inquiry of this nature."

Of course in the present case we can only consider the frame of the suit, the judgment and the decree; and I think it is clear from the observations quoted above that in order to construe it as a representative suit some indication, however slight, must be found to show that the creditor intended so to frame it. In the case under reference, the learned Judges look for and succeed in finding such indications. No other case that I have seen goes further in placing a liberal construction upon the creditor's intentions, and I think therefore that it may safely be said that, unless such indications can be pointed to, and if the suit is in form only a simple money claim against the limited owner, although in point of fact the debt may have been contracted for necessary purposes, it would be going beyond any reported decision to hold that the reversionary interest could be bound. This has been clearly and as a summary of the case law I think correctly, stated by Mayne (Edn. 9, page. 641), where speaking of a female heir, he says:

"Where the suit is founded upon a purely personal debt or contract of her own, the decree can only be against her own person and property, and a sale in execution will only convey her own interest in the property. But even though the foundation of the decree be a liablility which might bind reversioners, that alone is not sufficient. The suit must be so framed as to show that it is not merely a personal demand upon the female in possession, but that it is intended to bind the entire estate, and the interests of all those who come after her. The reason of this is that, although in a suit brought to recover, or charge an estate of which a Hindu female is the proprietress she will, as defendant, represent and protect the estate, as well in respect of her own as of the reversionary interest; still and on this very account, the plaintiff is bound to give notice that he is seeking so large a remedy, in order to put those who may be ultimately affected upon their guard, to enable them to protect themselves."

Turning now to the facts of the present case, there is only one recital in the plaint which can by any stretch of construction be interpreted as a reference to the binding character of the debt. The promissory note upon which the suit was brought recited purposes to which the money was to be applied, which no doubt would be binding upon the reversioner; and this passage in the plaint refers to the promissory note the value of which "as per details in cash" the defendant is alleged to have received. The learned District Munsif has accepted his reference to the contents of the promissory note as a sufficient expression of the plaintiff's intention to proceed against the absolute estate

"by stating that the loan under the pro-note sued on was borrowed by the defendant as per detail set out in the pro-note."

The learned Judge of the Court of Small Causes is unable to follow him in this and however much the decree holder's claim may enlist one's sympathy I think that even if we had no external help to the construction of the plaint, it would be impossible to hold that the required intention was disclosed by this passage. There is however a piece of evidence which seems to me to destroy any presumption upon this point. The respondent has admitted that at the

(5) 10 C. 985; 11 I. A. 66; 4 Sar. 553 (P. C.).
(6) 13 C. 21; 13 I. A. 1; 4 Sar. 682; (P. C.).
(7) 14 C. 572; 14 I. A. 77; 5 Sar. 5 (P. C.).
(8) 6 C. L. J. 490.
(9) 8 Ind. Cas. 1072; 34 M. 188; (1910) M. W. N. 799; 9 M. L. T. 235; 21 M. L. J. 320
(10) 24 B. 135; 1 Bom. L. R. 627.

time the money was borrowed he believed that Vadathammal enjoyed an absolute interest in the property, and so far as appears he was under this misapprehension even when he filed the plaint. That being so I do not see how it is possible to hold that he framed or intended to frame the suit in the manner required to bind ulterior interests in the property. The argument has been advanced that although he may have been under this misapprehension, the suit did in fact contemplate the liability of the whole property and so the necessary condition was fulfilled. I am unable to agree. In a suit framed on the supposition that the estate was not limited it was not even necessary to assert the binding character of the debt and the suit was purely one for a personal decree for the money against the debtor. When the suit was so indisputably of this character it is certainly idle to look for any indications of the creditor's intention to frame it in such a way as would be appropriate in the case of a debt contracted by a limited owner and binding on the whole estate. And I think it would be going beyond any reported decision to hold that a suit brought in such circumstances may be deemed to be so framed as to enable the reversionary interest to be proceeded against. I cannot accordingly find that the appellant is representative of any interest bound by the decree and I must allow the appeal, set aside the lower Court's orders and dismiss the application with costs throughout.

N. S. & A. *Appeal allowed.*

MADRAS HIGH COURT.

Civil Revision Petition No. 1117 of 1928.

September 9, 1931.

WALSH, J.

CHATHU KUTTI NAIR—PLAINTIFF—PETITIONER

versus

KUNDAN APPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 202—Interest, meaning of—Junior member of tarwad, *interest of, in* tarwad *property—Malabar Law.*

A junior member of the *tarwad* who has been given a power-of-attorney by the *karnavan* to collect rents of the *tarwad* property being entitled to be maintained out of such property, has an interest in the property within the meaning of s. 202, Contract Act.

Petition under s. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Cannanore, dated the 2nd March 1928, in S. C. S. No. 1304 of 1927.

Mr. *O. T. G. Nambiar*, for the Petitioner.

Mr. *C. Sridharan*, for the Respondents.

Judgment—The petitioner brought a suit to recover rents from defendants Nos. 1 to 3 who had attorned to him under a marupat. The plaintiff is the *karnavan* of the *tarwad*. The 5th defendant is a junior member to whom the plaintiff had given a power-of-attorney to collect the rents. The plaintiff says that he had revoked this power-of-attorney on 22nd September 1927 and that the payment of rent made by the defendants in December 1927 to 5th defendant was consequently invalid. Two pleas were raised in defence that the defendant had mortgaged the property to D. W. No. 1 with instructions to pay the rent to the 5th defendant and that D. W. No. 1 was not aware of the cancellation. The second is that the cancellation itself was illegal. I have not considered it necessary to call on the respondents to answer the first point because on the second I think the decision is correct.

The petitioner contends that the cancellation is valid, that if it was made before the time fixed in the power-of attorney for its termination the only remedy is one by way of damages under s. 205 of the Indian Contract Act and that the 5th defendant had no interest in the property as described in s. 202. The question therefore is whether the 5th defendant had any such interest in the property as is contemplated under s. 202. The 5th defendant is a member of the *tarwad* and entitled to be maintained out of the *tarwad* property. The rents are part of the *tarwad* property and he in my opinion has a clear interest in the rents before and after the grant to him of the power-of attorney. Under s. 202, Pollock and Mulla state with regard to 'authority coupled with interest' that in England the word 'coupled' implies beyond the mere fact of the agent having an interest in the subject-matter, some specific connection between the authority and the interest. They quote from *Smart* v. *Sandars* (1) as follows.—

"We think this doctrine—*i. e.*, the rule of the present section—applies only to cases where the authority is given for the purpose of being a security, or as part of the security, not to cases where the authority is given independently, and the interest of the donee of the authority arises afterwards, and incidentally only, as, for instance, in the present case

(1) (1848) 5 C. B. 895 at p. 917; 17 L. J. C. P. 258 12 Jur. 751; 75 R. R.. 849 ;136 E. R. 1132.

goods are consigned to a factor for sale. This confers an implied authority to sell. Afterwards the factor makes advances. This is not an authority coupled with an interest but an independent authority, and an interest subsequently arising."

It appears to me from this that in English Law if the interest was previous to the authority, it would be such an interest as is contemplated in s. 202. Under the heading 'Indian authorities' at page 675 the cases quoted are ones where the agent had no interest antecedent to the authority.

I must hold in the present case that the 5th defendant (agent) had an interest in the property namely the rents due to the *tarwad* and that the cancellation of his authority was illegal, the conditions of such cancellation not having been complied with as pointed out by the lower Court.

The petition fails and must be dismissed with costs.

N. S. & R. L. *Petition dismissed.*

MADRAS HIGH COURT.

Civil Revision Petition No. 511 of 131.
September 23, 1931.

CURGENVEN, J

P. KRISHNASWAMI SASTRI—DEFENDANT —PETITIONER

versus

Syed AHMED AND OTHERS—PLAINTIFFS —RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 80—'For any act purporting to be done', meaning of—Act merely contemplated or threatened—Notice, necessity of.

The words 'in respect of any act purporting to be done by such public officer in his official capacity' in s. 80, Civil Procedure Code, refer to a past act and not to any action merely contemplated or threatened. *Arunachelam Chetty* v. *David* (1), followed; *Bhagchand Dagadas* v. *Secretary of State for India* (2), explained and distinguished; *Kashi Bai* v. *Chunilal* (3), referred to.

Where the suit was confined to obtaining payment of a share in respect of future collections and not in respect of the monies, if any, collected in the past by the Receiver:

Held, that s. 80 did not apply, and the suit was not bad for want of notice to the Receiver.

Petition under s. 115 of Act V of 1908 and s. 107 of the Government of India Act, praying the High Court to revise the findings on issues of the Court of the Subordinate Judge, Madura, dated the 30th January, 1931 and recorded in O. S No 9 of 1930.

Mr. *T. M. Ramaswami Ayyar*, for the Petitioner

Messrs. *B. Sitarama Rao, B. Pocker* and *P. S. Narayanaswami Ayyar*, for the Respondents.

Judgment.—The Civil Revision Petition is filed by the 19th defendant, a Receiver in a pending mortgage suit, against the finding of the Subordinate Judge under the 20th issue, 'whether the suit is bad for want of notice under s. 80, Civil Procedure Code.' The contention is, of course, that the Receiver is a public officer, and that has not been disputed before me. But the point in issue is whether the suit is against him "in respect of any act purporting to be done by such public officer in his official capacity." I think it is clear that those words refer to a past act and not to any action merely contemplated or threatened. This has been held by a Bench of this Court in *Arunachalam Chetty* v. *David* (1), which was a suit for a prepetual injunction restraining an Official Receiver from selling certain property which vested in him in insolvency. I am asked to hold that the later Privy Council case, *Bhagchand Dagadas* v. *Secretary of State for India* (2), renders that decision no longer good law. But I cannot find that their Lordships have held anything more than that s. 80 will apply to any kind of suit, whatever the relief sought, including a suit for an injunction. But, of course, it may very well be that a suit for an injunction may be based upon past acts, and not merely upon an apprehension of future action. That in fact was the case there, because the relief asked for was in the first place a declaration that certain official notices and orders were *ultra vires* and invalid and, secondly, for an injunction permanently restraining all executive action thereunder. Their Lordships expressly say that unless the right to the first relief was made out, the prayer for the second necessarily failed, and it is apparent that the first relief could not have been claimed against the defendants unless they had had notice under s. 80. There is not even any discussion with regard to the expression "for any act purporting to be done," and I cannot accordingly read into the decision any construction of that phrase. It has also been held in *Kashi Bai* v *Chunilal* (3) that a suit, for instance, by a mortgagee against a Receiver as representing a mort-

(1) 99 Ind Cas. 284; 50 M. 239; 24 L. W. 730; 51 M. L. J. 671; A. I. R. 1927 Mad. 166.

(2) 104 Ind. Cas. 257; 53 B. 725; 26 L. W. 809; 53 M L J 81, A. I. R. 1927 P. C 176; 25 A. L. J. 641; 29 Bom. L R. 1227, (1927) M. W. N. 561; 46 C. L J. 76; 1 Luck. Cas. 291; 32 C. W. N. 61; 54 I. A. 338 (P. C.).

(3) 122 Ind Cas. 857; A. I. R. 1930 Bom. 11; 31 Bom. L. R. 1199; Ind. Rul, (1930) Bom. 185

gagor would not be subject to the provisions of s. 80. The case law is discussed in this decision, and grounds are given for distinguishing between the two classes of cases. In the latter class only when the suit is founded upon some act by the official defendant which is complained of is notice required. In the present case, I have found considerable difficulty in discovering why the Receiver has been impleaded. It cannot very well be said that his appointment was illegal having been made in due course of law, and when I asked the learned Advocate appearing for the petitioner what act of the Receiver, it was intended to impugn he was only able to reply that it was not an act but an omission (which no doubt stands upon the same footing) to pay the plaintiff his one-twelfth share in the income of the properties which he claims. A reference to the plaint, however, will show that that is not the subject-matter of the suit and that it is confined to obtaining that payment in respect of future collections and not to requiring that the monies, if any, collected in the past should be liable to contribute towards it. In these circumstances, I cannot say that the learned Subordinate Judge is in error in holding that s. 80 does not apply and I dismiss the revision petition with costs of the plaintiff-1st respondent.

N. S. & A. *Petition dismissed.*

MADRAS HIGH COURT.

Second Civil Appeal No. 2340 of 1927.

February 11, 1931.

KRISHNAN PANDALAI, J.

MUTHAYYA CHETTIAR—PLAINTIFF—APPELLANT

versus

AR. RM. V. AR. LAKSHMANAN CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Attachment before judgment of co-parcener's interest—Right of survivorship, if defeated.

An attachment before judgment of a co-parcener's interest when not followed by a decree during the said co-parcener's life-time does not operate to defeat the right of survivorship. *Ramanayya* v. *Rangappayya* (1), followed. *Muthusami Chetty* v. *Chinnammal* (2), *Sankaralinga Mudaliar* v. *Official Receiver of Tinnevelly* (3), *Sadayappan* v. *Ponnanna* (4), referred to.

Second Appeal against the decree of the District Court, Ramnad at Madura, in A. S. No. 103 of 1924, preferred against the decree of the Court of the Subordinate Judge, Ramnad at Madura, in O. S. No. 6 of 1922.

Messrs. *S. Vardachariar* and *C. S. Swaminathan*, for the Appellant.

Messrs. *T. R. Venkatarama Sastriar*, and *M. Murugappa Chettiar*, for the Respondents.

Judgment.—The question which arises in this Second Appeal which if decided against the appellant would be conclusive is whether an attachment before judgment of a co parcener's interest when not followed by a decree during the said co-parcener's life-time operates to defeat the right of survivorship. This question is governed by direct authority in this Court *Ramanayya* v. *Rangappayya* (1). It was a decision of the year 1893. Not only has no doubt been since cast upon that decision in this Court but the view there taken has been reinforced by the converse case which is illustrated by the decisions in *Muthusami Chetty* v. *Chinnammal* (2) and *Sankaralinga Mudaliar* v. *Official Receiver of Tinnevelly* (3). These latter decisions are to the effect that where the co-parcener whose interest is attached before judgment survives the decree, the attachment takes precedence over the right of survivorship; in other words, the creditor can avail himself of the attachment in order to realise his decree as against the surviving co-parceners. This being the state of authority in this Court on this question, learned Counsel for the appellant has addressed to me an argument founded upon the grounds stated in the earliest case, *Ramanayya* v. *Rangappayya* (1) to show that the reasoning is not quite logical and is not supported by the decision which is referred to there, namely, *Sadayappan* v *Ponnanna* (4). On these grounds he asks me to post this case before a Bench. I do not think I should be justified at this distance of time in attempting to examine the logic of the decision in *Ramanayya* v. *Rangappayya* (1) or to say whether the decision in *Sadayappan* v. *Ponnanna* (4) does really support the proposition which is founded upon it. I think I should not be justified in attempting to cast a doubt upon a doctrine which has been accepted in this Court for practically 40 years. It is, I think, very important that in such matters, whatever the ultimate deci-

(1) 17 M. 144.
(2) 24 Ind. Cas. 320; 26 M. L. J. 517.
(3) 92 Ind. Cas. 504; 49 M. L. J. 616; (1925) M. W. N. 832; A. I. R. 1926 Mad. 72.
(4) 8 M. 554.

sion of the Courts might be, it should be definite and well-settled and I think it would be a misfortune if I were understood as casting any doubt upon a matter which has been so settled as this. I am therefore, unable with very great respect to accede to the request made by Counsel for the appellant. The Second Appeal fails and must be dismissed with costs.

N. S. & A. *Appeal dismissed.*

MADRAS HIGH COURT.

Criminal Appeal No. 442 of 1931
November 10, 1931.

JACKSON AND CUBGENVEN, JJ.

In re RAVANAPPA REDDI—ACCUSED—APPELLANT.

Criminal Procedure Code (Act V of 1898), ss. 195 (1) (b), 476, 537—Penal Code (Act XLV of 1860), ss. 193, 467—Complaint of offence under s. 193—Conviction under s. 467—Absence of complaint by Court, effect of—Validity of conviction.

Where it was alleged in a complaint that the accused fabricated a pro-note and induced *A* to file a suit against *B* and obtained a fraudulent decree with the object of getting the house of *B*, and the accused was convicted under ss. 467 and 109, Penal Code :

Held, that the complaint disclosed an offence under s. 193, Indian Penal Code, of intentionally fabricating false evidence for the purpose of being used in a stage of judicial proceedings, and a Court confronted with such a complaint by private person and not preferred under s. 476, Criminal Procedure Code, had no jurisdiction to take cognizance of it and the conviction was, therefore, illegal.

Where a Court proceeds upon a complaint which is no legal complaint at all, the error cannot be corrected under s. 537, Criminal Procedure Code, nor has s. 532 any relevancy to such a case.

Criminal Appeal against an order of the Court of Sessions of the North Arcot Division at Vellore, in Case No. 6 of the Calendar for 1931.

Mr. *A. S. Sivakaminathan*, for the Appellant.

The Public Prosecutor, on behalf of the Crown.

Jackson, J.—The appellant has been sentenced to three years' rigorous imprisonment for abetting the forging of a promissory note.

On the facts there seems to be no doubt that the appellant is guilty under ss. 467, 109, Indian Penal Code. The evidence of the Christian Schoolmaster P. W. No. 9 proves that the accused asked him to write the draft of the promissory-note, Ex. C, after the death of its alleged maker Krishna Reddi, obviously for the purpose of a fraudulent execution.

Section 467 has no necessary connection with any Court proceeding, and when the committal order came before me upon an application to have it cancelled, I declined to interfere as there was sufficient evidence to establish a *prima facie* case against the accused. But now that the whole record is before us, the matter is not quite so simple. In the complaint Ex. J, it is alleged that the accused fabricated a pro-note and induced one Vata Goundan to file a suit against Krishna Reddi in the *panchayat* Court, and obtained a fraudulent decree. The complainant was ignorant of all this until the execution of the decree was begun in the District Munsif's Court....." The object of bringing about these forged and fabricated transactions is to get the house of the late Krishna Reddi."

This is clearly the offence under s. 193, Indian Penal Code, of intentionally fabricating false evidence for the purpose of being used in a stage of judicial proceeding.

The Court may think the forgery a clearer count than the fabrication of evidence because on the facts of this case it is doubtful if there was any proceeding before the *panchayat* at all, but nevertheless the allegation is plainly stated in the complaint, and it is the allegation which attracts the mischief of s. 195 (1) (b) Criminal Procedure Code.

A Court confronted with a complaint like Ex. J, by a private person and not preferred under s. 476, Criminal Procedure Code, must refuse to take cognizance. It cannot even examine the complainant upon oath and then note that it is only taking cognizance of the offences not referred to in s 195, Criminal Procedure Code; because the examination of the complainant on oath under s. 200 is after cognizance has been taken. But nothing of that sort was attempted in this case. The Court recorded a short sworn statement, and evidently took cognizance of every offence alleged in the written complaint.

The effect of this is that the Court proceeded upon no legal complaint at all; which is much more than a mere irregularity in the complaint. Therefore the error cannot be corrected under s. 537, Criminal Procedure Code, nor has s. 532 any relevancy to the matter; for that only validates commitments legal in themselves but made by a Magistrate not empowered to commit.

In these circumstances the conviction must be set aside as being without jurisdiction. The bail is released.

Curgenven, J.—Section 195 (1) (*b*) of the Code forbids a Court to take cognizance of an offence under s 193, Indian Penal Code, when it is alleged to have been committed in, or in relation to, any proceeding in any Court, except upon the complaint of that Court. Such an offence so committed, is undoubtedly alleged in the complaint in the present case, and indeed the section of the Penal Code is quoted. The Court was precluded from taking cognizance of that offence, that complaint being a private one. The conviction was actually of abetment of forgery of a valuable security under ss. 467, 109, Indian Penal Code, but in *Perianna Muthirian* v. *Vengu Ayyar* (1), I have already given my reasons for holding that, this being only another way of dealing with what was in effect the same offence,—fabricating false evidence,—it is not open to a Court to permit the provisions of s. 195, Criminal Procedure Code, to be evaded in this manner. I agree therefore that upon this ground the conviction must be set aside, the proceedings being without jurisdiction.

N. S. & A. *Conviction set aside*

(1) 114 Ind. Cas. 360; 28 L. W. 687; A. I. R. 1929 Mad. 21; (1929) M. W. N. 196; 30 Cr. L. J. 322; 56 M. L. J. 208.

MADRAS HIGH COURT.

Criminal Revision Case No. 294 of 1931
and
Criminal Revision Petition No. 263
of 1931.
October 21, 1931.
JACKSON J.

SUBRAMANYAM—PETITIONER
versus
VEERARAGHAVULU—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 436, 437—Penal Code (Act XLV of 1860), s. 463—Forgery—Discharge of accused—Pendency of Civil suit—Power to order further inquiry.

Where a person accused of forgery is discharged and the Sessions Judge is moved under ss. 436 and 437, Criminal Procedure Code, the Judge, if he thinks further inquiry necessary, should proceed under the said section and if he does not, he should dismiss the application. He has full discretion in the matter and the circumstance that the accused has lodged a civil suit in respect of the same matter is irrelevant to the question whether the discharge of the accused should or should not be set aside.

Forgery is an offence of too grave a public importance to be made merely triable by Subordinate Magistrates.

Criminal Revision from an order of the Sessions Judge, Guntur Divison, dated the 15th January, 1931, and made in Criminal Revision Petition No. 13 of 1930.

Messrs. *V. Govindrajachari* and *K. Krishnamurthy*, for the Petitioner.

Mr. *Konda Kottayya*, for the Respondent.

The Public Prosecutor, for the Crown.

Order.—The petitioner complained against the counter-petitioner for forgery; the counter-petitioner then filed a civil suit in regard to the same matter. The Sub-Magistrate discharged the accused, and the Sessions Judge when moved under ss. 436 and 437, Criminal Procedure Code, was apparently disposed to order further inquiry but did not do so because the prosecution of the complaint would be "embarrassing to the Civil Court" without being "conclusive or even useful." The matter "had better be left to the Civil Courts in the first instance" with a strong precept that if the Civil Court thinks the criminal charge substantiated, it will have "no compunction" in taking criminal action.

This order has little merit. If the Judge thinks further inquiry necessary, he should proceed under s. 436 or s. 437; and if he does not he should dismiss the application. As he says himself, he has a full discretion in the matter. But to such a matter the comparison between Civil and Criminal Courts is quite irrelevant. If a man accused of forgery lodges a civil suit it cannot be said that his trial should be stayed because it may embarrass the Court that tries the suit. In the first place it will not embarrass it and in the second, it is entirely immaterial to the administration of criminal justice whether it embarrasses it or not. Of course a criminal conviction duly upheld is both conclusive and useful. There is no justification for the view that Civil Courts are a better forum than Criminal Courts for judging issues of fact. Therefore, the circumstance that this accused person has chosen to lodge a civil suit is absolutely irrelevant to the question which was before the Judge, whether his discharge should or should not be set aside.

Turning to the real question it is found that the complainant and the accused settled their account with no mention at all of the lists which subsequently appeared and are impugned as forgeries As the learned Judge says Exs F, S and K go a great way towards showing that Exs. O and P cannot be genuine transactions. That being so, the Court of committal was not in law justified in discharging the

accused. Forgery is an offence of too grave a public importance to be made merely triable by Sub-Magistrates.

The learned Judge is directed to proceed under s. 437, which is really the logical conclusion of his fifth paragraph and have the case brought up to the Sessions. It may be observed as this Court has had occasion to remark before that the matter will then be tried by the same person as would in the ordinary course be ultimately seised of it on the civil side. So long as the District and the Sessions jurisdiction is vested in the same person these invidious comparisons between Civil and Criminal Courts are utterly beside the point.

The petition is allowed.

N. S. & A. *Petition allowed*

MADRAS HIGH COURT.

Criminal Revision Case No. 508 of 1931.
Criminal Revision Petition No. 451 of 1931.
December 10, 1931.
WALLACE J.

In re P. SEENAPPA CHETTY—ACCUSED—PETITIONER.

Explosives Act (IV of 1884)—Rules 3, 10—"Throw downs" and Chinese crackers, whether "explosives".

Even 'throw downs' and Chinese crackers are explosives within the meaning of rr. 3 and 10 under the Explosives Act.

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise an order of the Court of the Sub-Divisional Magistrate, Bellary, in C. C. No. 6 of 1931.

Mr. *A. Visvanatha Ayyar*, for the Petitioner.

The Public Prosecutor, on behalf of the Crown.

Order.—There can be no doubt that, under the amendments to rr. 3 and 10 under the Explosives Act even "throw downs" and Chinese crackers are "explosives." The previous rulings of this Court to the contrary were based on an oversight of the amendments, and cannot be regarded as now applicable.

Technically then, the petitioner is guilty of the offence. But in the circumstances Petitioner may be forgiven for not possessing more knowledge on the point than learned Judges of the High Court. It would have been sufficient if he had been warned not to repeat the offence. That I cannot do now, as he is absent. The fine is reduced to rupee one. The balance if paid will be refunded.

N. S. & A. *Fine reduced.*

MADRAS HIGH COURT.

Criminal Revision Case No. 599 of 1931.
(Criminal Revision Petition No. 540. of 1931.)
November 12, 1931.
CURGENVEN, J.

THE PRESIDENT, DISTRICT BOARD, TANJORE—PETITIONER—COMPLAINANT
versus
ADAM GHANNI ROWTHER—ACCUSED—RESPONDENT.

Madras Local Boards Act (XIV of 1920 as amended by Act XI of 1930), ss. 166 (1), 207, 223—Plying motor bus for hire without licence—Complaint—Three months' period, computation of.

If a person does an act for which a licence is required, and fails to obtain a licence, he may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current. The period of three months referred to in s. 223, Madras Local Boards Act, is not, therefore, to be reckoned from the commencement of the offence where the offence is a continuing one as in the case of plying without licence a motor car. *Arthur* v. *Appavu Velan* (3) followed, *King-Emperor* v. *U Thin Ohn* (1) and *Emperor* v. *Bechardas* (2), commented upon. [p. 782, col. 2.]

Petition under ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the 2nd Class Magistrate, Nidamagalam, in C. C. 38 of 1931

Mr. *P. Venkataramana Rao*, for the Petitioner.

Mr. *K. Swaminathan*, for Mr. *A. Viswanatha Sastri*, for the Respondent.

The Public Prosecutor on behalf of the Crown.

Order.—This petition has been filed by the President of the District Board, Tanjore, against a judgment acquitting the respondent of the offence of using a motor vehicle for hire without a licence. Such an act is prohibited by s 166 (1) of the Madras Local Boards Act (Madras Act XIV of 1920 as amended by XI of 1930), and is rendered punishable by s. 207 read with Sch. VIII. The lower Court has found indeed that the respondent used his motor bus for hire

without taking out a licence, but it considers that complaint was not made within the time prescribed by s. 223.

The question turns upon the construction of that section. It provides that no person shall be tried for an offence under the Act, 'unless complaint is made by the Police, or the president of a Local Board, or by a person expressly authorised in this behalf by the Local Board or its President within three months of the commission of the offence.' To the section is added this proviso:

"Provided that failure to take out a licence or obtain permission under this Act shall for the purpose of this section be deemed a continuing offence until the expiration of the period, if any, for which the licence or permission is required, and if no period is specified, complaint may be made at any time within twelve months from the commencement of the offence."

It is urged for the petitioner that, the offence being a continuing one until the 31st December 1930, when the period expired for which the licence was required, a complaint made within three months of that date, as was the case here, would be in time. For the respondent I am asked to hold with the lower Court that time must be reckoned from the commencement of continuing offence *i. e.*, from the date, 1st October, from which the licence, which was issued quarterly, should have been taken out.

In *King Emperor* v. *U. Thin Ohn* (1) a question of this kind arose under the City of Rangoon Muncipal Act in connection with a case of keeping a private market without a licence: but I have been unable to apply the reasoning there employed, because the learned Judge who decided the case based his decision upon the date when the Commissioner of the Corporation came to know that the offence was being committed. I have not seen the Rangoon Act; but such a test will not, I think, accord with the terms of the Madras Act. There is however this principle recognised in the decision, that time has not to be counted from the point when commission of the offence began. That was the view taken in *Emperor* v. *Bechardas* (2) The prosecution there was for allowing to remain undemolished a house constructed in contravention of Municipal regulations, and the learned Judges point out that any other construction placed upon provisions of this character would in such circumstances enable the Municipality to prosecute the owner of a completed building after any period whatever. The same considerations certainly do not arise here, where the owner of the motor bus breaks the law every time he uses it without a licence. On the other hand, I have been referred to a case of this Court, 108 Ind. Cas. 411, *Arthur* v. *Appavu Velan* (3), where Devadoss, J., held that a person who kept an unlicensed potter's kiln was liable to prosecution at any time within three months of the expiry of the during which the licence, if it had been granted, would have been current

This last case is, I think, clear authority for the view put forward for the petitioner. It is objected that, on the wording of the proviso, it is not possible to apply it to the circumstances of such a case as the present; that the offence does not really consist, as the proviso would require, in a failure to take out a licence, but in an act, or a series of acts, of using a motor vehicle without licence; and that the section without the proviso requires that the period of three months should embrace that act or series of acts. Verbally, no doubt, there is some ground for a criticism of this kind. But I think that the intention of the section, read with its proviso, is clear. The essential part of the offence, from the point of view of the District Board, is a failure to take out a licence, on the part of a person who has by his conduct obliged himself to do so, for the period under reference—here the last quarter of 1930. It is not very material when and on how many occasions he used his bus during that quarter. Even if he used it only once he was no less bound to obtain a licence for the whole quarter. The terms of the proviso support this view by allowing in such cases a period of three months from the date when the licence would have expired for complaint to be made. The rule accordingly is simply this: If a person does an act for which a licence is required, and fails to obtain a licence, he may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current. That, I think, is what the proviso, read with the section, means, and so construed it does not seem to afford undue opportunity for delay in taking action.

I conclude therefore that the complaint in the present case was within time. Since the learned Second Class Magistrate has

(1) 117 Ind. Cas. 250; 7 R. 23.; A. I. R. 1929 Rang. 122; 30 Cr. L. J. 754.

(2) 127 Ind. Cas. 181 32 Bom. L. R. 768; A. I. R. 1930. Bom. 340; Ind. Rul. (1930) Bom. 501; 31 Cr. L. J. 1159; (1930) Cr. Cas. 172.

(3) 108 I. C. 411.; 29 Cr. L. J. 388; 10 A. I. Cr. R. 52.

not recorded any finding upon the facts I allow the petition, set aside his order of acquittal and direct him to dispose of the case in the light of the foregoing observations.

N. S. & A. *Petition allowed.*

MADRAS HIGH COURT.

Second Civil Appeal No. 1199 of 1927.
September 18, 1930.
SUNDARAM CHETTY, J.

GURUSAMI THEVAN—DEFENDANT—APPELLANT
versus
GANAPATHI CHETTI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage — Usufructuary mortgage — Mortgagee deprived of possession before expiry of period—Right to interest till date of redemption—Interest, whether chargeable on property—Civil Procedure Code (Act V of 1908), s. 100—Finding of fact—Interference—Question, whether presumption is rebutted, whether question of law.

Where a usufructuary mortgagee who is entitled under the deed of mortgage to enjoy the mortgaged property in lieu of interest for a period is deprived of his possession without payment of the principal, he is entitled to interest even subsequent to the period fixed for redemption and the same can be made a charge on the mortgaged property. *Manikchand Manganchand* v. *Rangappa Kondappa* (1), distinguished. *Linga Reddi* v. *Sama Rau* (2) and *Sita Nath Ghose* v. *Thakurdas Chakravarthy* (3), relied on. [p. 784, col. 2.]

The question whether a presumption is rebutted or not is a question of fact to be determined according to the circumstances of each case. [p. 783, col. 2.]

It is open to the lower Court to appreciate the evidence in the best manner according to its discretion, and where evidence has been properly admitted on both sides, even if its conclusion on a question of fact is erroneous, it cannot be interfered with in second appeal. [p. 784, col. 2.]

Second Civil Appeal against the decree of the Sub-Judge, Ramnad, in A. S. No. 62 of 1926.

Mr. *C. A. Seshagiri Sastri*, for the Appellant.

Mr. *K. V. Krishnaswami Ayyar*, for the Respondents.

Judgment.—Defendant No. 5 is the appellant and his appeal arises out of a suit brought by the deceased plaintiff, whose legal representative is the present respondent No. 1 for the recovery of a sum of money alleged to be due on a registered usufructuary mortgage bond dated 30th December, 1912, and executed to the plaintiff by defendants Nos. 1 to 3 and by defendant No. 1 as the guardian of defendant No. 4 for Rs. 700. The mortgagee was to enjoy the mortgaged property in lieu of interest for a period of five years. Defendant No. 5 is a subsequent purchaser of the mortgaged property. The main point in dispute in the suit is one relating to the discharge of the suit mortgage debt. The original suit mortgage deed was not produced by the plaintiff but it has come to Court from the custody of defendant No. 5 The plaintiff has set forth his version as to how defendant No. 5 came by this document, whereas defendant No. 5 has pleaded that this document was got back after discharging the mortgage debt. The mortgage bond, Ex. 1, purports to bear an endorsement of discharge signed by the plaintiff. In view of the facts disclosed in the pleadings, the trial Court, taking a correct view of the presumption of law in a case of this kind framed issue No. 1 in a proper way, so as to throw the incidence of the burden of proof upon he plaintiff. Issue No. 1 framed by that Court is, whether the suit mortgage deed remained undischarged.

On this question, both sides adduced oral and documentary evidence and after a full and careful view of the entire evidence and the probabilities, the trial Court came to the conclusion that the mortgage bond remained undischarged. On that footing it gave a decree in plaintiff's favour. The lower Appellate Court also came to the same conclusion and confirmed the decree of the first Court. There being a concurrent finding on this question of fact by both the Courts, it is not possible to reject that finding, unless it is shown that it is vitiated by any of the flaws contemplated in s. 100, Civil Procedure Code. The way in which the lower Appellate Court has dealt with this question indicates to my mind that it has given due weight to the circumstances disclosed in the evidence which favour one side or the other; and after weighing the evidence and probabilities on both sides it has thought fit to believe the plaintiff's version as true and more probable. All that can be said in favour of defendant No. 5 in this case is, that he starts with an initial presumption in his favour. That is a rebuttable presumption and the question whether a presumption is rebutted or not is a question of fact to be determined according, to the circumstances of each case. An attempt has been made by the learned Advocate for

the appellant to canvass the evidence adduced in this case, in order to show that the lower Appellate Court was not quite correct in preferring one kind of evidence to the other. It is open to that court to appreciate the evidence in the best manner according to its discretion, and where evidence has been properly admitted on both sides, even if its conclusion on a question of fact is erroneous, it cannot be interfered with in second appeal. It is unnecessary for me to review the evidence as in a first appeal and come to a conclusion on this question of fact. I consider that the finding of both the Courts below on this question is entitled to acceptance and I accordingly confirm that finding.

One other point had been taken for the first time in this second appeal, and that relates to the award of interest to the plaintiff on the mortgage amount for the period subsequent to his dispossession. Somehow, defendant No. 5 failed to take an issue on this point and it does not appear that he took up this objection even in the appeal preferred by him against the decision of the first Court. No doubt, in para. 12 of his written statement he has taken the plea that no damages are payable by him to the plaintiff as claimed in the plaint. The courts below have thought fit to award interest at 12 per cent. for the subsequent period as a fair and reasonable rate of interest. The question is, whether under the terms of the mortgage deed, Ex I, interest is allowable to the plaintiff after the period of five years fixed for redemption. The deed recites that after the expiration of this period the principal amount of Rs. 700 should be paid to the plaintiff and the mortgage redeemed. If without the payment of the principal amount to the plaintiff, he is deprived of possession of the mortgaged properties, is he not entitled to reasonable interest by way of damages on grounds of equity? I take it that the lower court have allowed interest on equitable grounds. The rate fixed is not unduly high and there is no reason to reduce that rate. But the question is, whether the interest so awarded can be claimed along with the principal amount of the mortgage and made chargeable on the mortgaged property.

As to this, reliance is placed on the appellant's side on the decision in *Manikchand Manganchand* v. *Rangappa Kondappa* (1). In that case, the mortgage bond itself recites that after the stipulated period, the principal amount was to be recovered without interest by sale of the mortgaged property. In the mortgage deed in question in the present case, there is no such express provision negativing the right of the mortgagee to interest after the period fixed in the deed. On the other hand, the decisions in *Linga Reddi* v. *Sama Rau* (2) and *Sita Nath Ghose* v. *Thakurdas Chakravarthy* (3), referred to by the learned Advocate for respondent No. 1 show that interest is allowable in a case of this kind and it can be made also a charge on the mortgaged property. The observation in the Madras case is to the effect that, if the plaintiff was entitled to the usufruct of the mortgaged property in lieu of interest, it is premissible to award a reasonable rate of interest as damages which may be more or less equivalent to the usufruct of the land. The learned Judges further observed that such interest when allowed can be made a charge upon the property The same view has been held in the Calcutta case also. I am, therefore, of opinion that there is nothing illegal in allowing interest to the plaintiff subsequent to the period of five years fixed in the mortgage bond and in the direction to make this interest also recoverable by the the sale of the mortgaged property.

In the result, the second appeal fails and is dismissed with costs of respondent No. 1. In view of the undertaking given by the appellant when obtaining a stay order in C. M. P. No. 4498 of 1927, subsequent interest on the amount due under the mortgage-decree will be taken to be nine per cent. per annum instead of six per cent. from 5th January, 1928.

N. S. & A. *Appeal dismissed.*

(1) 59 Ind. Cas. 765; A. I. R. 1921 Bom. 28; 45 B. 523; 22 Bom. L. R. 1435.

(2) 17 M. 469; 4 M. L. J. 143.

(3) 52 Ind. Cas. 433; 46 C. 448.

MADRAS HIGH COURT.

Second Civil Appeal No. 388 of 1928.
April 9, 1931.
RAMESAM, J.

C. R SUBRAMANIA AIYAR—
PLAINTIFF—APPELLANT

versus

PANCHANADA ODAYAR AND ANOTHER—
DEFENDANTS—RESPONDENTS

Mortgagee—Possession—Failure to deliver possession—Right to damages—Limitation.

Where a mortgagor is guilty of the breach of the covenant to deliver possession, the mortgagee is entitled to fall back on the claim for interest whether it is described as interest or described as damages for breach of the covenant to deliver possession. It cannot be said that it is the business of the mortgagee to get into possession and if he does not get possession he is not entitled to interest or damages. *Linga Reddi* v. *Sama Rau* (2), *Sita Nath Ghouse* v. *Thakurdas Chakravarthy* (3), *Mahadaji* v. *Joti* (4), *Manikchand Maganchand* v. *Rangappa Kondappa* (5), explained. [p. 786, col. 1.]

In such a case claim for damages remains unbarred so long as the claim for the principal is also unbarred. *Mathura Das* v. *Rajah Narindar Bahadur* (7), *Nityananda Patnayudu* v. *Sri Radha Chairana Deo* (8), applied. [p. 786, col. 2.]

Second Civil Appeal against the decree of the Sub-Judge, Tanjore, in A. S. No. 27 of 1927.

Messrs. *C. S Venkatachariar* and *S. Ramaswami Ayyar*, for the Appellant.

Mr. *C. A. Seshagiri Sastri*, for the Respondents.

Judgment.—The plaintiff is the appellant in this case The suit is filed upon a mortgage bond, Ex. A, dated 31st August, 1912. It was executed for Rs. 400, but the plaintiff admits that only Rs. 300 out of the consideration was advanced and the other Rs. 100 was not advanced to defendant No. 1. The mortgage purported to be a mortgage with possession of certain properties of defendant No. 1, but as a matter of fact possession of the properties was not delivered to the plaintiff The plaintiff therefore claims damages in the shape of mesne profits for three years, which he claims to be Rs. 285 at the rate of Rs. 95 a year. Defendant No. 1 pleaded that the mortgage was not supported by consideration. Both the lower Courts found that it was supported by consideration to the extent of Rs. 300. Mr. Seshagiri Sastri, the learned Advocate for the respondents, repeated the argument that the document was merely nominal and was not supported by consideration. He has not filed any cross-objections but has mentioned this point merely for supporting the decree so that I may not give the additional relief which the appellant seeks. However, I do not see any reason why I should not accept the finding of the both the court below that the document is supported by consideration to the extent of Rs. 300. The courts below disallowed the damages claimed, namely, Rs. 285 on the ground that the plaintiff's claim for possession of the properties is now barred and therefore the claim for mesne profits of these properties is also barred. The document fixed three years for payment of the principal, but as possession of the properties was not delivered, it is true that the plaintiff's cause of action for getting possession of the properties arose on the date of the document itself, namely, 31st August, 1912 But Mr. Venkatachariar, the learned Advocate for the appellant relies on Exs. B and B 1 as acknowledgments and he relies also on a case in *Anant Ram* v. *Inayat Ali Khan* (1).

The entires in Exs. B and B 1 are merely entries showing that defendant No. 1 received Rs. 293 towards the consideration of the mortgage document. It is difficult to say that these amount to acknowledgments of the liability to transfer possession of the mortgaged properties. In the case in *Anant Ram* v. *Inayat Ali Khan* (1), it was observed that acknowledgment of a right carries with it all its consequences. Very often it may be so: but even then it is difficult to infer by the acknowledgment of the mortgage document itself that the liability to deliver possession of the properties was intended to be also acknowledged. However I do not wish to express any final opinion on this matter as the case can be disposed of on other grounds. The right to damages is merely the right to get interest. Exhibit A itself shows that the profits of the properties mortgaged and intended to be delivered were to be enjoyed by the plaintiff in lieu of interest. So the damages the plaintiff sustains by the non delivery of possession are merely interest. In *Linga Reddi* v. *Sama Rau* (2), it was observed at page 472*, it is the same interest that is awarded as damages. That case is practically on all fours to this case with this difference, that the rate of interest was mentioned in the document of that case as 10 per cent, whereas it is not mentioned in the document before us, and here the plaintiff's claim is now confined only to damages for three years The decision in *Sita Nath*

(1) (1920) 2 L. L. J. 549.
(2) 17 Mad. 469; 4 M. L. J. 143.

*Page of 17 Mad.—[Ed.]

Ghouse v. *Thakurdas Chakravarthy* (3) also supports the appellant. That case resembles the present case much more than the case in *Linga Reddi* v. *Sama Rau* (2), because the rate of interest was also not mentioned in the document there, 12 per cent was claimed as damages in that case, and the High Court observed that it was not excessive. As against these two decisions Mr. Seshagiri Sastri relies on two decisions of the Bombay High Court One is *Mahadaji* v. *Joti* (4). In that case it was observed that the plaintiff was entitled to possession in lieu of interest and if he never troubles himself to obtain possession he lost his right to interest. That sentence by itself produces the impression that the defendant in that case was willing to give possession or offered to give possession to the plaintiff, but the plaintiff did not care to take it. But I do not find in the statement of facts anything to support the suggestion that the plaintiff was not willing to take possession. If the decision in that case rests on that fact, it may be correct, *i.e*, that the mortgagee is not willing to take possession or does not want to take the trouble of taking possession and managing the properties though the mortgagor is willing to deliver them to him. It may be in such a case he is not entitled to interest, but if the mortgagor fails to deliver possession o the mortgagee in breach of the covenant in the document, in such a case, to say that the mortgagee loses his right to interest merely because the mortgagee has not taken any immediate steps to enforce possession, is not justified. This decision is followed in another decision of the same court in *Manikchand Maganchand* v. *Rangappa Kondappa* (5). That decision practially presents to me the same difficulty as the earlier decision.

Where a mortgagor is guilty of the breach of the covenant to deliver possession, the mortgagee is entitled to fall back on the claim for interest, whether it is described as interest or described as damages for breach of the covenant to deliver possession, but to say that it is the business of the mortgagee to get into possession and if he does not get possession he is not entitled to interest or damages at all does not commend itself to me A proposition of that kind gives a premium to the mortgagors to commit breaches of the covenant into which they have entered. It is observed by the Chief Justice in this case:

> "It would be a very bad precedent if we hold that a usufructuary mortgagee could lie by and not take the trouble to get into possession, relying upon his being able afterwards to make a claim before the court for damages for not having been given possession."

If it is meant that a mortgagee who is not willing to take possession even if the mortgagor is willing to offer possession is not entitled to sympathy. I agree. But if more is meant by the sentence quoted that even where a mortgagor refuses to deliver or does not deliver possession the mortgagee should lose interest because he has not immediately taken steps to get into possession is to make a person who breaks his contract not liable for the consequences of the breach, and I do not agree with it. The two Bombay decisions are in my pinion inconsistent with the decisions in *Linga Reddi* v. *Shama Rau* (2) and *Sita Nath Ghouse* v. *Thakurdas Chakravarthy* (3) and I prefer to follow the decision of this court and of the Calcutta High Court. I see that my brother Sundaram Chetty, J., is also taking the same view in his decision in *Gurusami Thevan* v. *Ganapathi Chetti* (6). He has also tried to distinguish the case in *Manikchand Manganchand* v. *Rangappa Kondappa* by an observation that in that case, the amount was to be recovered without interest according to the terms of the mortgage bond. This is not the ground upon which the learned Judges base their decision, and I prefer to express my disagreement of the decision rather than distinguish it in this way.

Mr. Seshagiri Sastri also contended that a claim for damages cannot be maintained after six years of the breach and he referred to cases of leases and sales. We have nothing to do with these cases. In the case of a mortgagee, if there is a breach of a covenant, a claim for damages remains unbarred so long as the claim for the principal is also unbarred. This is the principle stated by the Privy Council in *Mathura Das* v. *Rajah Narindar Bahadur* (7). That is a case where there is no provision for payment of interest after the due date. It is given as damages by the Privy Council and they held that it is not barred. This was followed by this court in *Nityananda Patnayudu* v. *Sri Radha*

(3) 52 Ind. Cas. 433; 46 C. 448.
(4) 17 B. 425.
(5) 59 Ind. Cas 765; A. I. R. 1921 Bom. 28; 45 B 528; 22 Bom. L. R. 1435.
(6) 136 Ind. Cas. 783; A. I. R. 1932 Mad. 173.
(7) 19 All. 39; 23 I. A. 138; 7 Sar. 88 (P. C.)

Ghairana Deo (8). I think the principle of those cases applies. By failure to deliver possession of the property the plaintiff is deprived of his interest, and the claim for such damages for failure in the shape of interest cannot be barred so long as the main claim is not barred. In this case however the plaintiff confined it to damages for three years only prior to suit. He is not entitled to get larger or very exorbitant rate of interest under the guise of a claim for mesne profits, especially as he did not care even to have the rate of interest mentioned in the mortgage bond as in the case of *Sita Nath Ghouse* v. *Thakurdas Chakravarthy* (3). I think the interests of justice will be best served by giving interest at 12 per cent. on the principal sum of Rs. 300 in addition to the sum decreed by the lower Court. The plaintiff will be entitled also to get interest at 6 per cent. from the date of the decree up to the date of payment. The plaintiff will be entitled to a decree at 12 per cent on the sum of Rs. 300 from 27th February 1922 to 6th September 1926, the date of the District Munsif's decree, and on the aggregate amount at 6 per cent. It is admitted that Rs. 300 already decreed by the courts below has been paid, so that the further interest at 6 per cent. will be calculated only on the amount of interest, *i.e*, Rs. 162 with interest at 6 per cent. from the date of the District Munsif's decree. Each party will bear his own costs throughout except in the memorandum of objections filed in the lower Appellate Court as to which the order of the lower Appellate Court will stand.

N. K. & A. *Order accordingly.*

(8) 20 Mad. 371.

ALLAHABAD HIGH COURT.

Criminal Revision Appeal No. 428 of 1931.

August 25, 1931.

SULAIMAN, J.

Musammat CHANCHAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY

U. P. Municipalities Act (II of 1916), s. 298 (1)—List I, Group H cl. (e)—Promoting or maintaining health, safety and convenience of inhabitants—Bye-law prohibiting residence of prostitutes in particular area, legality of.

The prohibition against public prostitutes from residing in a particular street or area given may be for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipality within the meaning of s. 298 (1) of the U. P. Municipalities Act and a bye-law to that effect therefore can be validily made under that section. But such a bye-law must not be discriminating in its effects. The prohibition must be aimed against the residence of public prostitutes in general and not the residence of any individual prostitutes or class of prostitutes. [p. 788, col. 1.]

Messrs. *Shiva Prasad Sinha* and *S. B. L. Gaur*, for the Applicant

The Assistant Government Advocate, for the Crown.

Judgment.—This is an application in revision from an order convicting the accused under s. 299 of the U. P. Municipalities Act for having committed a breach of a Municipal bye-law.

On 13th July, 1925, the Municipal Board of Hathras got a notification published in the Government Gazette under which the following bye-law among others, was announced:—

"No public prostitute shall reside within the areas or in the streets specified below, provided that public prostitutes who at the end of March, 1925, owned and resided in houses and streets in areas mentioned below may continue to reside in those houses."

Then followed a list of no less than 13 items containing roads, bazars, abadi, lanes, etc.

The bye-law was expressly not made applicable to public prostitutes who had owned and resided in houses and streets in the areas mentioned at the end of March, 1925. It was intended to apply to new comers only.

This notification was replaced by another notification of 27th April, 1927, which contained the same bye law.

The applicant, although she denied the fact, has been found by both the Courts below to be a public prostitute and to have been carrying on her profession as such. This finding must be accepted in revision.

There is no doubt that she has committed a breach of the bye-law mentioned above because the house occupied by her is situated in one of the streets which had been prohibited.

The learned Advocate for the applicant impugns the validity of the bye-law and urges that the conviction is illegal because the bye-law itself was invalid.

Under s. 298 (1) a Board is empowered to make bye laws applicable to the whole or any part of the municipality for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipality, and for the furtherance of Municipal administration.

Group H in the list I appended to the section provides in cl. (*e*) for

"prohibiting in any specified street or area the residing of public prostitutes and the keeping of a brothel or the letting or other disposal of a house or building to public prostitutes or for a brothel."

There is no doubt that the prohibition against public prostitutes from residing in a particular street or area given may be for the purpose of promoting or maintaining the health, safety, and convenience of the inhabitants of the Municipality, and that, therefore, such a bye-law can be validly made.

But the bye law must aim at prohibiting in specified streets or areas the residing of public prostitutes or the keeping of a brothel, etc. It must not be discriminating in its effect. It would be illegal for a Municipal Board to single out any individual prostitute and prohibit her from residing in a particular area. Similarly, it would be illegal to pick out a group of prostitutes and prohibit them from residing in a particular area. The bye-law must be general and must prohibit the residing of public prostitutes in that area. The prohibition must be aimed against the residence of public prostitutes in general and not the residence of individual prostitues or any particular class of prostitutes. It is obvious that when a discrimination is made, the object for which the bye-law was framed would be nullified and there would be no promotion or maintenance of the health, safety and convenience of the inhabitants. Such a bye-law will merely create an invidious distinction and be beneficial to one class of prostitutes and injurious to the others. I am perfectly satisfied that this is not what is contemplated by the Legislature. The prohibition must be general and of universal application within a specified street or area and must not hit particular prostitutes, while leaving other prostitutes free to ply their trade.

The language of the bye law as quoted above not only permits prostitutes who owned and resided in houses in March, 1935 to continue to live there as before but even perhaps permits prostitutes who merely resided in the streets in the areas to carry on their profession undisturbed. Such a bye-law was not in accordance with the provisions of s. 298 because it did not amount to a prohibition of the residence of public prostitutes but merely to a prohibition against a particular class of prostitutes.

(1 A. W. N. (1902) 117 ; 24 A. 439.

In *Emperor* v. *Balkishan* (1) a learned Judge of this Court declined to give effect to a bye law made by the Naini Tal Municipal Board where it appeared that an invidious and unreasonable distinction was drawn between a person who is a servant and a person of a similar degree who is not a servant.

I accordingly accept this revision and setting aside the conviction of the accused, acquit her of the offence with which she was charged and direct that the fine if paid be refunded.

The Municipal Board of Hathras would be well advised to re-draft this bye-law so as to make it of general application.

R. L. *Conviction set aside.*

LAHORE HIGH COURT.

Miscellaneous Second Civil Appeal No. 967 of 1931.

October 12, 1931.

AGHA HAIDAR, J.

BUTA SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

BALWANT SINGH—(DECREE HOLDER)—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Additional evidence in appeal—Refusal to admit—Second appeal, competency of.

Where a lower Appellate Court refuses to admit a certain material document as additional evidence in an appeal under O. XLI, r. 27, Civil Procedure Code, the High Court cannot interfere in second appeal. *Vaithinatha Pillai* v. *Kuppu Shevar* (1), *Santa Singh* v. *Bhan Singh* (2) and *Durga Prasad* v. *Jai Narain* (3), relied on. [p. 789, col. 2.]

Miscellaneous Second Appeal from an order of the Senior Subordinate Judge, Amritsar, dated the 2nd March, 1931.

Mr. *Ajit Ram*, for the Appellant.

Mr. *Harbans Singh*, for the Respondent.

Agha Haidar, J.—The appeal arises out of certain execution proceedings. The decree-holder proceeded to attach certain property. The judgment-debtor raised the plea that the property was ancestral and, therefore, was not liable to attachment. The trial Court held that the property was not ancestral and overruled the plaintiff's objection. The judgment-debtor went up in appeal. One of the grounds of appeal, that is No. 2, taken by him was that the lower Court had erred in giving its decision without examining the entries in certain revenue papers relating to the land attached.

It appears that the appellant had given these papers to his Counsel for producing

them in the case but the latter did not produce them.

The first portion of this ground of appeal is without any substance whatsoever. The document had not been placed on the record and, therefore, it was impossible for the trial Court to examine the entries in the said document relating to the land in question. These copies were produced before the lower Appellate Court and an application accompanied by an affidavit, was filed by the appellant asking the Court to admit additional evidence under the provisions of O. XLI, r. 27 of the Civil Procedure Code.

I have satisfied myself that the appellant applied for the copies on the 27th October, 1930, and that he obtained them on the same day. The next hearing of the case was on the 31st of October, when evidence had to be produced. The appellant's affidavit alleges that the copies were given by the judgment-debtor to his Counsel but that the Counsel did not produce them in Court. Now, the learned Judge of the lower Appellate Court observes as follows:—

"The appellant has now put in a copy of *jamabandi* along with the memorandum of appeal in order to prove that the land attached has been in possession of the appellant and his ancestors since 1865. The *fard* itself does not prove this and I see no reason to admit it in evidence at this stage when it was not originally produced."

In other words the learned Senior Subordinate Judge, in the exercise of his discretion, refused to admit the document. In my judgment the learned Judge of the lower Appellate Court was right To hold otherwise would be to put a premium on gross negligence of the parties and their Counsel. In this case the judgment-debtor actually obtained copies and gave them to his pleader. If the pleader was negligent and did not produce these copies at the proper time the remedy of the judgment-debtor, if any, lies in filing a suit for damages against his pleader. That matter is, however, not before me and I do not express any opinion one way or the other.

The question now is, whether, in second appeal it is open to this Court to admit additional evidence. There is a Full Bench decision of the Madras High Court reported as *Vaithinatha Pillai* v. *Kuppu Shevar* (1), where the learned Chief Justice followed the course of decisions of the Madras and Allahabad High Courts and held that no second appeal lay from a refusal by the lower Appellate Court to admit fresh evidence under O. XLI, r. 27 of the Civil Procedure Code. It is true that Mr. Justice Sadasiva Iyer gave a dissentient judgment in the Full Bench but, in my judgment the opinion of the Majority of the Full Bench seems to be consonant with the authorities and general principles. In *Santa Singh* v. *Bhan Singh* (2) Mr Justice Broadway followed *Vaithinatha Pilai* v. *Kuppu Shevar* (1) and held that where a lower Appellate Court refuses to admit a certain material document as additional evidence, in the appeal under O XLI, r. 27, Civil Procedure Code, the High Court cannot interfere in second appeal. To the same effect is a judgment reported as *Durga Prasad* v. *Jai Narain* (3) where a Division Bench held that a refusal in the exercise of discretion to admit additional evidence under O XLI, r 27, of the Civil Procedure Code, will not afford a ground for second appeal. There are a number of other decisions to the same effect which need not be referred to. In my judgment it was a matter of discretion for the lower Appellate Court to admit or to refuse to admit additional evidence. That Court had declined to admit that evidence and it cannot be said that the discretion exercised by it was either perverse or contrary to law or against the well recognised judicial principles. No other point was argued before me.

Under these circumstances I refuse to admit additional evidence and confirming the decree of the Court below, dismiss the appeal with costs.

Appeal dismissed.

(1) 53 Ind. Cas. 274; 42 M. 737; 10 L. W. 122; 37 M. L. J. 125; (1919) M. W. N. 525; 26 M. L. T. 216. F. B.).

(2) 70 Ind. Cas 830; A. I. R. 1923 Lah 30.

(3) 9 Ind. Cas. 265; 33 A. 379; 8 A L. J. 175.

ALLAHABAD HIGH COURT.

Letters Patent Appeal No. 43 of 1930.

June 30, 1931.

SULAIMAN, ACTING C. J. AND SEN, J.

HIRA—DEFENDANT—APPELLANT

versus

GAYA AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 35, Sch. II, para. 3 (2)—Reference to arbitration—Costs incurred prior thereto—Omission of arbitrators to award such costs—Court, if can award

Where the question relating to costs incurred in the litigation prior to a reference to arbitration was also referred to the arbitrators but the arbitrators left the question undecided and the Court did not remit the award on the ground that it had omitted to award costs:

Held, that as the Court was precluded from going into that matter by virtue of the provisions contained in para. 3 of Sch. II, Civil Procedure Code, it no longer had any discretion to award costs. [p. 790, col. 2]

Held, further, that as soon as the dispute as regards costs of litigation was referred to arbitration, the Court became *functus officio*, so far as this matter was concerned and could not decide this question. *Ram Charan* v. *Jasoda* (1), referred to. [*ibid.*]

Letters Patent Appeal against an order of Mr. Justice Boys, dated the 8th May, 1930.

Mr. *Mansur Alam*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

Judgment.—A suit for a declaration of their rights to fish was filed by the plaintiffs and among the reliefs claimed in the plaint was one for the costs of the suit. On the 3rd of August, 1927, the parties agreed to refer the whole case to the arbitration of five arbitrators. It was not a reference of specific points out of the whole case. There can be no doubt that the dispute in the case including one relating to costs of the litigation and that dispute also was referred to the arbitration. The arbitrators delivered an award in favour of the plaintiffs decreeing their claim but in the award they made no mention of any costs. Objections were filed to the award by the defendants but the plaintiffs did not object to the award on the ground that it was defective inasmuch as it omitted to give them costs. The learned Munsif overruled the objection and directed that a decree should be prepared in terms of the award. He, however, ordered that the plaintiffs should get two-thirds of their entire costs from the defendants who should receive one third of their costs from the plaintiffs. On appeal to the lower Appellate court by the defendants it was held that the learned Munsif had no jurisdiction to award costs when the arbitrators had failed to do so The learned Judge disallowed all costs to the plaintiffs. On appeal to this Court a learned Judge came to the conclusion that the plaintiffs were entitled to costs because the Munsif had power to grant them costs. The learned Judge pointed out that when the Court had been given an express power to grant costs of arbitration under para. 13 of Sch. II it would be manifestly inequitable that the Court should have no power to give costs actually incurred in its own Court. He also relied on s. 35, Civil Procedure Code, which gives the discretion to the Court in the matter of costs. The observations made on general grounds have great force, but we are bound by the language of the Code.

There were three stages in the suit. Costs were incurred by the plaintiffs up to the time of the reference to arbitration. We have already pointed out that having regard to the language of the agreement of reference, it included the dispute as to costs which had been expressly claimed in the plaint. The next stage was the proceeding before the arbitrators and the costs were incurred in that proceeding. There can be no doubt that under para. 13 of the Second Schedule the Court has full power to grant costs of arbitration when the award contains no sufficient provision concerning them. The third stage was when the objections to the award were filed and they were disallowed. The Court had undoubtedly power to grant costs of this proceeding to the plaintiffs.

As regards the costs incurred prior to the reference which also were referred to the arbitration, the difficulty is caused by the provisions of para. 3 (2) of Sch. II which lays down that 'where a matter is referred to arbitration the Court shall not, save in the manner and to the extent provided in this schedule, deal with such matter in the same suit'. If therefore, the question of the costs of the litigation was referred to arbitration the latter was precluded from dealing with that matter in the same suit. If the Court considered that the award was defective inasmuch as it omitted to award costs it might have remitted the award to the arbitrators for further consideration, but neither of the parties asked the Court to do that. When the award was not remitted the Court had no power to deal with the question of costs of litigation which had been referred to arbitrators and which was left undecided by them.

Section 35, Civil Procedure Code, in no way helps the plaintiffs for the discretion to award costs is subject to such condition and limitation as may be prescribed and to the provisions of any law for the time being in force. As the court was precluded from going into that matter by virtue of the provisions contained in para. 3 of Sch. II, it no longer had any discretion to award costs It may also be pointed out that as soon as the dispute as regards costs of litigation was referred to arbitration, the Court became *functus officio*, so far as this matter was concerned and could not decide this question.

The learned Advocate for the respond-

ents has in support of the view taken by the learned Judge of this Court relied on the case of *Ram Charan* v. *Jasoda* (1). The learned Judges of the Oudh Court referred to para 13 of Sch. II which would suggest that they were dealing only with the costs of the arbitration proceedings. If they meant to hold that the Court had power to grant costs of the entire litigation even if the same had been referred to the arbitrators we would not agree with that view.

We accordingly allow this appeal in part and modifying the decree of the learned Judge of this Court direct that the plaintiffs should be given costs of the arbitration proceeding if any and the taxable costs of the objections filed subsequent to the award in the Court of first instance; but that the plaintiffs should not be allowed any costs of the suit incurred up to the date of the reference to arbitration. Let the decree be modified accordingly. The parties shall receive and pay costs in proportion to their success and failure so far as the amount of costs claimed by the plaintiff and denied by the defendants is concerned.

A. *Appeal allowed.*

(1) 126 Ind. Cas. 508; A. I. R 1930 Oudh 89; 7 O. W N. 97; Ind. Rul. (1930) Oudh 380; 5 Luck. 678.

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 3 of 1931.
January 22, 1932.
SULAIMAN AND YOUNG, JJ.
Pandit NATHU RAM—OPPOSITE PARTY—APPELLANT
versus
MADAN GOPAL—OBJECTOR—RESPONDENT.

Provincial Insolvency Act (V of 1920), ss. 4, 68—Attachment by court through Receiver—Claim not preferred within 21 days—Power of court to enquire—'Act of receiver', what constitutes.

Where on an application made by a creditor, the insolvency court ordered the Official Receiver to take possession of certain property alleged to belong to the insolvent and the Official Receiver in pursuance of the said order attached this property :

Held, that the attachment was not act or decision of the Receiver, within the meaning of s. 68, Provincial Insolvency Act, and a claim put forward by a stranger to the said property could be enquired into even though it was made more than 21 days after the date of the attachment. *Bhairon Prasad* v. *S. P. C. Dass* (1), distinguished. [p. 791, col. 2]

Second Appeal from an order of the District Judge, Agra, dated the 6th December, 1930.

Messrs. *S. N. Seth* and *Raj Narain Singh*, for the Appellant.

Mr. *Nanak Chand*, for the Respondent.

Judgment.—This is an appeal arising out of an insolvency proceeding. On an application made by a creditor the insolvency court ordered the Official Receiver to take possession of certain property alleged to belong to the insolvent The Official Receiver, in pursuance of the said order, attached this property on the 8th June, 1929. On the 2nd July the son of the insolvent applied to the insolvency court alleging that the property was his own property. The insolvency court decided that the house belonged to the son, and released it from attachment In that court an objection was taken that the application to the court had been more than 21 days after the attachment by the Receiver.

An appeal was preferred to the District Judge, before whom it was urged that the application having been made more than 21 days after the date of attachment, it should not have been entertained.

The learned Judge has overruled this contention, and in our opinion rightly. The house was attached under an order of the insolvency court, and not by any independent decision of the Official Receiver. The actual attachment was a mere ministerial act done in pursuance of the order of the court. The objector was not challenging the act of the Receiver, who had no voice in the matter, but the order of attachment passed by the court *ex parte*. It seems to us that it was not an act or decision of the Receiver within the meaning of s 68. On the other hand, it was a claim put forward by a stranger to the insolvency proceedings setting up his own independent title, and it fell within the scope of s. 4 of the Provincial Insolvency Act. It was open to the court to enquire into the question of title and adjudicate upon the rights of the objector. The learned District Judge is not wrong in holding that the application was not barred by time.

The learned Advocate for the appellant relies on the case of *Bhairon Prasad* v. *S. P. C. Dass* (1) and *Husaini* v. *Muhammad Zamir Abedi* (2). But in those cases there was not any order of the court directing attachment, but the act complained against was an act of the Receiver himself. Those cases are, therefore, distinguishable.

(1) 51 Ind. Cas. 113; 17 A. L. J. 787; 1 U. P. L. R. (A). 118.

(2) 74 Ind. Cas. 802; 9 O. & A. L. R. 440; 26 O. C. 319; A. I. R. 1924 Oudh 294.

It is further urged that owing to some misapprehension on the part of the Counsel for the appellant, he did not press all the points in the grounds of appeal before the District Judge and confined his argument to this question of limitation only. The learned District Judge in refusing to re hear the case has pointed out that he does not believe that there was any misunderstanding. After arguments had been heard the case was put down for delivery of judgment and not for further hearing on the next date. In these circumstances if the Counsel did not advance any arguments on some of the grounds of appeal, it must be assumed that he had abandoned them. The appeal is accordingly dismissed with costs.

A. *Appeal dismissed*

LAHORE HIGH COURT.

Miscellaneous First Civil Appeal No. 1016 of 1931.

October 12, 1931.

AGHA HAIDAR, J.

SRI KISHAN DAS—JUDGMENT-DEBTOR—APPELLANT

versus

SAT NARAIN—(DECREE-HOLDER LACHHMI NARAIN AND OTHERS—(JUDGMENT-DEBTORS)—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47—Order accepting or refusing security bond—Appeal, competency of.

An order accepting or refusing to accept a security bond is not appealable either as a 'decree' under s. 2 (2), or under the provisions of s. 47, Civil Procedure Code. *Saraswati Barmania* v. *Golap Das Barman* (1) and *Dittu Ram Narsingh Das* v. *Dal Chand Tulsi Ram* (2), relied on.

Miscellaneous First Civil Appeal from an order of the Subordinate Judge, First Class Delhi, dated the 1st June, 1931.

Mr. *Bishan Narain*, for the Appellant.

Mr. *Kishan Dial*, for the Respondents.

Judgment. — Two respondents obtained a mortgage decree against the appellant on 25th November, 1926. In execution of that decree certain property of the judgment-debtor was put up for sale and purchased by the decree-holder for a sum of Rs. 16,500 and the sale was confirmed on the 5th of August, 1930. On the 11th of October, 1930, the judgment-debtor filed an appeal in the High Court praying that the sale may set aside. On the 25th of March 1931, a consent was passed by Jai Lal, J., to the effect that the judgment-debtor should furnish security to the satisfaction of the executing court for the deficiency which might occur in the price in the event of the property being resold. On the 20th of April, 1931, the judgment-debtor produced one Sri Ram as a surety and an *ex parte* order was passed the surety on the 21st of April.

On the 24th of April, 1931, the decree-holder who had somehow got an inkling of these *ex parte* proceedings, made an application to the executing court that the security may be cancelled as the surety was a man of straw and that the judgment-debtor had, in collusion with the aforesaid surety practised a fraud upon the court. It was brought to the notice of the court that this Sri Ram had stood a surety in a criminal case for a sum of Rs. 300 and that he was sent to the civil prison for having made a default. The court accordingly on the 1st of June, 1931, ordered the security bond to be cancelled.

The judgment-debtor has filed an appeal to this court against this order and the only point pressed before me is that the court ought not to have cancelled the security bond after it had once accepted it.

Mr. Kishen Dial on behalf of the decree-holder has raised a preliminary objection that no appeal lies. He relied upon *Saraswati Barmania* v. *Golap Das Barman* (1) and 102 Ind. Cas. 621, *Dittu Ram Narsingh Das* v. *Dal Chand Tulsi Ram* (2). In the last case a learned single Judge of this court followed *Saraswati Barmania* v. *Golap Das Barman* (1). In these cases it has been laid down that the order accepting or refusing to accept a security is not appealable either as a "decree" under s. 2 (2) or under the provisions of s. 47, Civil Procedure Code.

In my judgment this view is correct. The order passed by the executing court on the 21st April, 1931, behind the back of the decree-holder does not bind him and in any case the executing court was justified in setting aside the said order on the true state of affairs being brought to its notice. I dismiss the appeal with costs.

N. K & A. *Appeal dismissed.*

(1) 20 Ind. Cas. 72; 41 C. 160; 17 C.W.N. 1240.
(2) 102 Ind. Cas. 621; A. I. R. 1927 Lah. 527.

BOMBAY HIGH COURT.
FULL BENCH.

Miscellaneous Petition No. 78 of 1931.
July 24, 1931.
BEAUMONT, C. J., RANGNEKAR AND BARLEE, JJ.

In re PRE-AUDIENCE OF THE ACTING ADVOCATE-GENERAL.

Government of India Act, 1915 (5 & 6 Geo. V, C. 61) as amended by Government of India Act, 1916 (6 & 7 Geo. V. C. 37), s. 114—Bar Councils Act (XXXVIII of 1926) as amended by Act XIII of 1927, ss. 2 (h), 4, 8, 12—Advocate-General, meaning of—Acting Advocate-General—Pre-audience, right of.

The acting Advocate-General is entitled to a right of pre-audience over all other Advocates in respect of all business whether for the Crown or of a private nature. [p. 795, col. 2]

The expression 'Advocate-General' means the person for the time being legally entitled to exercise the powers of the Advocate-General. [p. 795, col. 1.]

Mr. *Coltman*, for Bombay Bar Association.

Mr. *Chimanlal Setalvad*, for Bombay Bar Council.

Beaumont, C. J.—This is a petition presented by Mr. Taraporewala as Acting Advocate General in which he asks the Court to give directions as to the right of pre-audience in this Court of the Acting Advocate-General. Mr. Coltman has appeared for the Bar Association and Sir Chimanlal Setalvad for the Bar Council, and though the matter has not been contested in any hostile spirit, they have been good enough to put forward the argument against the view of the Acting Advocate-General.

The petition has annexed to it a copy of a judgment of a Division Bench of this Court given in October, 1865. In that case it was conceded that, prior to the Government of India Act, 1858, no right of pre-audience at the Bar was enjoyed by the Advocate-General, and, therefore, *a fortiori* no such right was enjoyed by the acting Advocate General. But of course before the Act of 1858, the Advocate-General was the servant of the East India Company, and not of the Crown. The Court in the case to which I am referring did not decide definitely what the rights of the Advocate-General might be; the Judges only expressed the view that he would at least be entitled to equivalent precedence to that which one of Her Majesty's Counsel would be entitled to at the Bar of England. But they held that, so far as the acting Advocate-General was concerned, he had no right of general pre-audience at the Bar, but was entitled to pre-audience limited to cases in which he appeared for the Crown. Since the date of that decision, I understand that in practice a general right of pre-audience has been conceded to the Advocate-General. Probably that was done by treating his office as analogous to that of the Attorney General in England. It is not necessary for us to consider whether the right conceded to the Advocate-General was well founded or not, because the matter is now governed by Statute. So far as the Acting Advocate-General is concerned, the matter has been dealt with on the footing of the decision of this Court and he has been conceded a right of pre-audience when appearing for the Crown, but not when appearing for a private litigant. Mr. Taraporewala says that the position is now changed by recent legislation, and I agree with him that recent legislation has entirely altered the position and has made the decision given in 1865 no longer applicable.

The first Act to which it is necessary to refer is the Government of India Act, 1915. That Act provides in s. 114 that His Majesty may, by warrant under His Royal Sign Manual, appoint an Advocate-General for, amongst other places, the Presidency of Bombay. Then it provides that the Advocate-General may take on behalf of His Majesty such proceedings as may be taken by His Majesty's Attorney-General in England. Then sub s. (3) deals with an acting Advocate General. It provides:

"On the occurrence of a vacancy in the office of Advocate-General or during any absence or deputation of an Advocate-General the Governor-General in Council in the case of Bengal, and the Local Government in other cases, may appoint a person to act as Advocate-General; and the person so appointed may exercise powers of an Advocate-General until some person has been appointed by His Majesty to the office and has entered on the discharge of his duties, or until the Advocate-General has returned from his absence or deputation, as the case may be, or until the Governor-General in Council or the Local Government, as the case may be, cancels the acting appointment."

That is the first statutory recognition of an acting Advocate-General, and Mr. Coltman and Sir Chimanlal Setalvad point out that the Act provides that the person appointed acting Advocate General may exercise the powers of an Advocate-General, but does not provide that he is to enjoy all the rights and privileges of an Advocate-General.

The next Act, which it is necessary to look at and which to my mind is really conclusive of the whole question is the Indian Bar Councils Act. In the amending Act of 1927, s. 2, which amends s. 8 of the principal Act of 1926, there is contained in

sub s. (4) the following provisions:

"The respective rights of pre-audience of Advocates of the High Court shall be determined by seniority.

Provided that the Advocate-General shall have pre-audience over all other Advocates, and King's Counsel shall have pre-audience over all Advocates except the Advocate-General."

Now it seems to me that that is an inclusive and comprehensive provision: it settles the right of pre audience in all cases. It says that the respective rights of pre-audience of Advocates of the High Court shall be determined by seniority, and the only qualification upon that is in the case of the Advocate-General and King's Counsel. I asked Mr. Coltman whether, on his reading of the Act, which is, that "Advocate-General" in that proviso means the actual holder of the office and does not include an acting Advocate-General, he would concede that the acting Advocate-General was entitled to a right of pre audience in respect of Crown business, and he said that he did concede that right, though he maintained that the right was not enjoyed by virtue of the office, but by virtue of the principle that in the King's Court the King's business must come first. But it seems to me that on Mr. Coltman's reading of the Act that admission could not be maintained in law. The Act provides that the right of pre-audience of Advocates shall be determined by seniority, and it says nothing whatever about an Advocate conducting the King's business. The only qualification is in respect of the Advocate-General and King's Counsel. No doubt it may be said that, if that be the meaning of the Act, it interferes to some extent with the prerogative of the Crown, but under s. 84, sub-s. (*a*), Government of India Act of 1915, a law made by any authority in British India is not to be deemed invalid solely on account of the fact that it affects the prerogative of the Crown If the effect of the Act be, upon the construction given to it by Mr. Coltman, to take away from the acting Advocate-General all rights to pre audience, whether in respect of Crown business or any other business, that rather disposes one to think that Mr. Coltman's construction is wrong and that the expression "Advocate-General" in the proviso to s. 8 (4) indicates the person for the time being lawfully exercising the office of Advocate-General, and does not refer to the particular individual who has been appointed by Letters Patent. But in considering the construction of the Act one has of course to look at the whole Act and there are other provisions which throw some light on the meaning of the expression "Advocate-General." In the first place there is the definition in s. 2, sub s. (*b*) which says:

"'Advocate-General' includes, where there is no Advocate-General the Government Advocate, and where there is no Advocate-General or Government Advocate, such officer as the Local Government may declare to be the Advocate-General for the purposes of this Act."

We are not concerned in this Presidency with the "Government-Advocate," and the definition only applies where there is no Advocate-General and it does not have any effect where there is an Advocate-General but owing to absence somebody has been appointed to act for him. Mr. Coltman says that if the Legislature had intended the expression "Advocate-General" to include an acting Advocate-General, it would have used apt words to give effect to that intention, and he refers us to other Acts, particularly the Post Office Act and the Administrator-General's Act, in which that intention is given effect to. But the argument, I think, is a double edged weapon, because it may be said with force that the Legislature must have known at the time when it passed the Bar Councils Act, that there was power under the Government of India Act to appoint an acting Advocate-General, and if it had thought that there was any doubt about what the acting Advocate-General's rights were under the Act, it would have provided for the matter in the definition clause. The fact that it has not done so rather suggests that the Legislature thought that the expression "Advocate-General" as used throughout the Act would by itself include an acting Advocate-General.

Then there are two other provisions in the Act which must be looked at. The first is s. 4 which provides that every Bar Council shall consist of fifteen members of whom one shall be the Advocate-General, and then later on it provides that the Advocate-General of Bombay shall be Chairman *ex officio* of the Bar Councils constituted for the High Court at Bombay. If Mr. Coltman's reading of the Act be right, the effect would be that during any temporary absence of the Advocate-General, the Bar Council would be short of one member, and would not have its *ex officio* Chairman. Possibly that is what the legislature meant, but it would seem to me more in accordance with the probable intentions of the Legislature that the acting Advocate-General

should take the place on the Bar Council of the Advocate-General during his absence.

Then there is another material provision in s. 12 which is a section providing for bringing before the High Court cases relating to the exercise of the disciplinary jurisdiction of the Court over Advocates, and sub-s. (3) of that section provides that notice of the day fixed for hearing the case in question is to be given to the Advocate-General, and the Court is to provide the Advocate-General with an opportunity of being heard before orders are passed. No doubt, the acting Advocate-General would be the person entitled to be heard, because his right to be heard would be one of the powers of the Advocate General which the acting Advocate-General is entitled to exercise under s 114, Government of India Act But if the acting Advocate-General is the person entitled to be heard, obviously he must be the person to whom notice of the day of hearing is to be given, and a right to receive a notice is no more a "power" than is a right of pre-audience. It seems to me quite clear that in that section the expression "Advocate-General" must be used in the sense of the person entitled to exercise the office of the Advocate-General.

In my judgment, upon the true construction of the Act read as a whole, the expression "Advocate-General" is used as meaning the person for the time being legally entitled to exercise the powers of the Advocate General. If that is so, then he is given a right of pre audience in all cases under s. 2 of the Amending Act, and all the difficulties which were suggested in argument seem to me to vanish. It was suggested that the Advocate-General and the acting Advocate-General being necessarily two different persons, it might very well happen that they would be both in Bombay at the same time and that their rights might clash; for instance, the Advocate-General might be on deputation in Bombay, and an acting Advocate-General might be appointed in his place, but the Advocate-General might have time to attend a meeting of the Bar Council, or even to hold a brief in Court, and it was suggested that in that case he would be entitled to his rights as the actual Advocate-General, and the acting Advocate-General could not have competing rights. In my view of the Act, the rights would belong to the acting Advocate-General as the person for the time being lawfully exercising the powers of the office, and the Advocate-General, in the somewhat unlikely event which has been suggested of both he and the acting Advocate-General being in Bombay at the same time, would be temporarily deprived of his rights, because he would have been temporarily superseded in his office.

In my view, therefore the matter is now disposed of by the Bar Councils Act, and we must, in answer to the petition, declare that, notwithstanding the decision of 1865, by virtue of s. 114, Government of India Act 1915, and the Bar Councils Act 1926 and the amending Act 1927, the acting Advocate-General is entitled to a right of pre-audience over all other Advocates in respect of all business whether for the Crown or of a private nature. Declared accordingly. No order as to costs.

Rangnekar, J.—I agree, but as we are taking a view different from that taken by a Division Bench of this Court in 1865, I desire to state shortly my reasons.

The question which is now raised on the petition came up before Mr. M. R. Sausse, C J., and Westropp, J., in 1865 and was answered against the acting Advocate-General. The *ratio decidendi* of the judgment, as I understand it, was that the office of the acting Advocate-General did not appear to have had any strictly legal origin, and during the temporary absence of the Advocate General, the then subordinate Government nominated a substitute or a '*locum tenens*' to perform the duties attached to the office. In this way a usage—to use the words of the judgment—the offspring of necessity arose. Then came the Statute 21 and 22 Vic. c. 106 and by s. 30 of the Statute the appointment of the acting Advocate-General was legalized. The next step in the argument was that this section merely legalized the appointment and did nothing more, and, therefore, whatever the rights and privileges of the acting Advocate-General were, they remained in the same position after the Act as they were before it. It was admitted in that case by the petitioner that before the Act he had not claimed and was not given any right of pre-audience at the Bar, and, therefore, the learned Judges held that even after the Act he was not entitled to the right which he did not possess before it.

Since that decision we have now on the Statute Book two important Statutes, the one passed by Parliament, *viz.*, the Gov-

ernment of India Act, 1915, and secondly the Bar Councils Act of 1926, as amended by the amended Act of 1927, enacted by the Indian Legislature. The Government of India Act, 1915, was amended in 1916, and under the amended sub-s. (3), s 114, the office of the acting Advocate-General was for the first time created and recognized. It is clear therefore that the only ground of the judgment of the Division Bench in 1865 no longer survives.

The next question is what is the position of the acting Advocate-General. To determine this one must look at s. 114, Government of India Act, 1915, as amended by the Act of 1916, and at the Bar Councils Act 1926 as amended in 1927. Now under the amended s 114, Government of India Act, it is clear that the person appointed to act as Advocate-General has all the powers which thepermanent incumbent of that office has either under the Government of India Act, or under similar Statutes prior to it.

Whatever the position in England as to the rank, seniority and privileges of members of the Bar may be, it is clear from the Bar Councils Act that the question as to the appointment of Advocates, their rights and privileges, and their seniority are to be determined under the Indian Bar Councils Act and under that Act alone. In England the right of audience in Court is conferred by the Inns of Court and the right of pre audience or precedence is conferred by theCrown. But in this country after the passing of the Indian Bar Councils Act, these questions of audience as well as precedence have to be answered only in accordance with the provisions of the Bar Councils Act. It is not suggested and cannot be suggested that the Bar Councils Act is *ultra vires*, having regard to the provisions of s. 84, Government of India Act, 1915. Section 8, Bar Councils Act, lays down the manner in which Advocates are to be enrolled. This section was amended in 1927 and sub-s. 4, s. 8, now lays down the rules for determining the respective rights of precedence of the Advocates enrolled under the Act. Sub-s. (4) runs as follows:

"The respective right of pre-audience of Advocates of the High Court shall be determined by seniority:

Provided that the Advocate-General shall have pre-audience over all other Advocates. . ..."

The main argument, as I understand it, on behalf of the Bar Association and the Bombay Bar Council, is that the privilege which is granted to the Advocate-General under this section is a personal privilege and does not attach to the office. I am unable to find in the language used in sub-s. (4), s. 8, Bar Councils Act, and in s. 114, Government of India Act, that the rights and privileges of the Advocate-General are personal in the sense that they can be enjoyed by him independently of the office which he holds. As a matter of fact the Letters Patent of Sir Jamshedji Kanga have been produced before us. They show that his appointment was for five years in the first instance and was liable to be renewed. Supposing at the end of five years Sir Jamshedji Kanga is not re-appointed, what becomes of his so-called personal privilege? Does he continue to enjoy the privilege of pre-audience conferred upon him by the proviso to sub s. (4), s. 8, Bar Councils Act, even if he vacates the office which he is holding? A personal privilege, in my opinion, is a privilege which is capable of being enjoyed by the person on whom it is conferred, independently of any official position in connexion with which it was conferred, until recalled or revoked by appropriate proceedings. As an example of a personal privilege, I may refer to the practice of the Crown granting patents of precedence to members of the Bar in England. These patents expressly provided that the grantees should have a right of precedence after a particular Barrister named in the patents.

The next question is whether the person who is appointed to act in the temporary vacancy of the Advocate-General is entitled to the same privileges conferred by the Bar Councils Act on the permanent incumbent of that office. Now when a Statute confers a power or imposes a duty then, unless a contrary intention appears, the power may be exercised and duty performed from time to time as occasion arises, and when the power is so conferred or the duty imposed on the holder of the office as such, it may be exercised or performed by the holder for the time being. No authority is necessary for this proposition, but if one is needed, I may refer to s. 32 (1) of the English Interpretation Act (1889), 52 and 53 Vic. c. 63.

The Government of India Act 1915, as amended by the Act of 1916, is also to the same effect, and it is not disputed that the acting Advocate-General has in the past been exercising the powers and performing the duties attached the office of the Advocate-General. Now there are several Statutes which confer special powers on the Advocate-General, some of which are in the nature of rights or privileges. It

is not necessary to examine in detail these Statutes, but reference may be made to the Civil Procedure Code, the Criminal Procedure Code, and lastly, the Bar Councils Act. Taking the last Act, as is pointed out by my Lord the Chief Justice, it is difficult to see how the acting Advocate-General can perform or can exercise some of the duties and rights which are conferred upon him under the Bar Councils Act, or how the Act can be worked as to some of its provisions unless you read into the word "Advocate-General", wherever it occurs, the words "acting Advocate General" or "the person lawfully appointed to exercise the office of the Advocate-General during the temporary absence of the permanent incumbent". As a general rule, a word I think is to be construed throughout a Statute in the same sense. Therefore, if you read the words 'acting Advocate-General' into the words "Advocate-General", in say s. 4 or s. 12, Bar Councils Act, I am unable to see why it could not be read into the word "Advocate-General" in sub s (4), s. 8, Bar Councils Act.

A reasonable construction should, if possible, prevail and it must not be assumed that Legislature foresees every result which may accrue from the use of a particular word; and yet effect must be given to every part of the Statute even if the consequence be a hardship on some individuals. Where the meaning, the object and the spirit of a Statute are clear from the title, preamble or otherwise, it should not be reduced to a nullity by a literal following of the language or the words used, which may be due to a want of skill on the part of the draftsman, and in certain circumstances it is permissible to supply the omitted words or expressions. These rules of construction are well recognized. In my opinion judicial interpretation should be directed to avoiding consequences which are inconvenient and should be such as would in effect carry out the intention and spirit of the Act. As pointed out by the learned Chief Justice, to adopt the reading of sub-s. (4), s. 8, Bar Councils Act, insisted upon by Mr. Coltman, would be to reduce the Act to a nullity in some respects. Further, if the acting Advocate-General cannot claim precedence under the sub-section, it is difficult to see how, in view of the precise and definite rule laid down therein he can be allowed, as he always has been, precedence in respect of Crown business.

The next argument is that the expression "Advocate-General," as defined in s. 2, Bar Councils Act, does not include the acting Advocate-General. It is further contended that if the Legislature intended to place the acting Advocate-General in the same position as the permanent incumbent of the office of the Advocate-General, they would have said so in s. 2. Now s. 2 does not purport to define the expression "Advocate-General." It simply lays down that certain persons or officers are included in the expression "Advocate-General." This became necessary by reason of the well-known fact that in several provinces the principal law officers are described in different ways. It is only in the three major Presidencies that the principal law officer is called the "Advocate-General." In some provinces he is known as the "Government Advocate" and in others the "Government Pleader" and so on.

It is undoubtedly true that there are some Statutes in which a person who is appointed to act for a permanent incumbent of a particular office is specifically given the powers and the privileges attached to the office. But we have to take the Act as a whole and to construe it in the light and spirit of the Act. It is not permissible to attribute ignorance to the Legislature of the fact that the Advocate General may remain absent either on leave or deputation or a vacancy may arise by reason of the death or resignation, and that under the Government of India Act a person may be appointed to act in his place, and it seems to me that the very fact that the Legislature have not specifically referred to the acting Advocate-General in s. 2, Bar Councils Act, is an argument in favour of the construction we are placing on sub-s. (4), s. 8, Bar Councils Act.

Another contention is with regard to a possible conflict which may arise in the event of the permanent holder of the office and the acting Advocate General being present in the Court or in the Presidency at the same time. The answer to that however, is provided by the provisions of sub-s. (3), s 114, Government of India Act, 1915. It is clear from that sub section that the appointment of the acting Advocate-General lasts until the Advocate General, *i. e.*, the permanent incumbent of the office, has returned from his absence or deputation or until the acting appointment is cancelled. Therefore once a person is appointed to act in place of the permanent holder of the office of the Advocate-General, the office is legally full until the appointment is

terminated, and until then the duties of the office can only be discharged by the acting incumbent.

Reading the Bar Councils Act as a whole, I have come to the conclusion that it was the intention of the Legislature to include the acting Advocate General in the expression "Advocate-General" wherever it occurs, and I, therefore agree with the order proposed by my Lord the Chief Justice.

Barlee, J.—In view of what has been said by his Lordship the Chief Justice and my learned brother Rangnekar, I have very little to say. It is clear law that privileges once conferred can only be taken away by the clear words of a Statute or by necessary implication. There are no clear words here and we have to see whether there is any necessary implication in the Bar Councils Act that the term "Advocate-General" wherever used in that Act includes the term "Acting Advocate-General." I think that such an implication can be found. I refer only to s. 4 and s. 12 of the Act which have been referred to by my Lord the Chief Justice. These are important sections of the Act, s. 12 being amongst the most important since it occurs among the sections dealing with disciplinary action. Now s. 4, sub s. (1), says that every Bar Council shall consist of fifteen members of whom one shall be the Advocate General. If we turn to s. 114, Government of India Act, 1915, we find that this is incomplete as it stands because the acting Advocate-General has all the powers of an Advocate-General for the time being and has the power of voting at the Bar Council. In the case of a public officer I think that powers include rights, and therefore in my opinion the section rightly interpreted means the Advocate-General or the Acting Advocate-General. In s. 12 it is enacted that notice must be given to the "Advocate-General." For similar reasons I think this must mean the Advocate-General or the Acting Advocate-General. To hold otherwise, it seems to me, would mean that the Bar Councils Act by implication amends s. 114, Government of India Act and that s. 114 must run:

"the person so appointed may exercise the powers of an Advocate-General with the exception of those powers which are given under the Bar Councils Act."

This cannot be implied. So we must adopt the alternative and suppose that when the Legislature referred to the Advocate-General in these sections of the Bar Councils Act, it meant to include an Acting Advocate-General. It is a general rule that a word must be interpreted in the same sense in every part of an Act, and it follows that the term "Advocate-General" in s. 8 includes the term "Acting Advocate-General." I agree, therefore, with the order proposed by my Lord the Chief Justice.

R. L. *Order accordingly.*

PRIVY COUNCIL.

Appeal from the Patna High Court.

December 4, 1931.

VISCOUNT DUNEDIN, LORD BLANESBURGH, SIR JOHN WALLIS, SIR GEORGE LOWNDES, AND SIR DINSHAH MULLA.

Thakur BAGESHWARI CHARAN SINGH —APPELLANT

versus

Thakurain JAGARNATH KUARI AND ANOTHER—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (b)—'Declare,' meaning of—Document acknowledging a right—Registration, necessity of—Limitation Act (IX of 1908), s. 19, Arts. 142, 144—Discontinuance of possession—Possession not resumed—Article applicable.

The word 'declare' in s. 17, Registration Act, implies a declaration of will, not a mere statement of fact. A document which merely acknowledges as a fact that a right is vested in a particular person, does not require registration. *Sakha Ram Krishnaji* v. *Madan Krishnaji* (2), *Jiwan Ali Beg* v. *Basa Mal* (3), *Rungnayaki Ammal* v *Virupakshee Rao Naidu* (4), *Baldeo Singh* v. *Udal Singh* (5), *Ariff* v. *Dawood* (6) and *Subramonian* v. *Lutchman* (7), referred to. *Faki* v. *Khotu* (1), overruled. [p. 800, col. 2.]

In the case of an acknowledgment contained in a communication addressed to a third party registration is not practicable nor required. [p. 801, col. 1.]

A proprietor to whom the estate had been released and made over under the Chota Nagpur Encumbered Estates Act, made a gift of a portion of the estate to his wife in 1909 without the sanction of the Commissioner and delivered possession to her. In 1916 the wife filed a petition to the Commissioner referring to the gift and requesting that the Commissioner may be pleased to sanction the gift or order a fresh grant on the same terms to be executed. The donor died in 1924 and his grandson filed a suit for possession in 1924 against the widow and her transferees:

Held, (*i*) that the suit was governed by Art. 142 and not 144 of Sch. I, of the Limitation Act; [p. 799, col. 2.]

(*ii*) that the petition filed by the wife contained a clear acknowledgment of the title of her husband within the meaning of s. 19, Limitation Act; [p. 800, col. 1.]

(*iii*) that the petition did not declare any right in favour of the husband and was not compulsorily registrable under s. 17 (1), Registration Act. [p. 801, col. 1.]

Appeal from a decree of the High Court of Judicature at Patna, dated 4th January, 1929, affirming the decree of the Additional Subordinate Judge, Hazaribagh, dated the 26th April, 1926.

Messrs. *A. M. Dunne*, *K. C.* and *W. Wallach*, for the Appellant.

Messrs. *L. De Gruyther*, *K. C.* and *M. A. Jinnah*, for the Respondents.

Viscount Dunedin—This is an appeal from a decree of the High Court of Judicature at Patna, dated the 9th January 1929, which affirmed a decree of the Additional Subordinate Judge of Hazaribagh, dated the 26th April, 1926, dismissing the plaintiff-appellant's suit.

Thakur Jadu Charan Singh, the plaintiff's grand-father, was the owner of the impartible estate known as the Dhargulli Estate, in the District of Hazaribagh. He was heavily in debt, and by an order passed under s. 2, of the Chota Nagpur Encumbered Estates Act (VI of 1876) in 1894, the management of the whole of his estate was vested in a Manager appointed under that Act. The management of the estate continued under the Act until the 15th May, 1909, when the estate was released and made over to him according to the provisions of the Act.

Section 12-A, paras, 1, 2 and 3 of the Act provide:

"12-A—(1) When the possession and enjoyment of property is restored, under the circumstances mentioned in the first or the third clause of s. 12, to the person who was the holder of such property when the application under s. 2 was made, such person shall not be competent, without the previous sanction of Commissioner—

"(*a*) to alienate such property or any part thereof, in any way, or

"(*b*) to create any charge thereon extending beyond his life time.

"(2) If the Commissioner refuses to sanction any such alienation or charge, an appeal shall lie to the Board of Revenue, whose decision shall be final.

"(3) Every alienation and charge made or attempted in contravention of sub-s. (1) shall be void."

In 1909 Jadu Charan Singh, without having obtained any sanction from the Commissioner, executed a deed of gift of certain lands in favour of his second wife, who is now his widow and the respondent in this appeal. She entered into possession of these lands and was in possession up to 1920, when she transferred the lands to her son, also a respondent in this appeal. Jadu Charan Singh died on the 21st February 1924. His eldest son being dead, he was succeeded in the estate by his grandson, the plaintiff-appellant. The present suit was instituted by him on the 24th February 1925 and sought to recover the lands which had been transferred without sanction in 1909. The only effective defence was under the Limitation Act, and this defence was found to be good by the Subordinate Judge and by the Court of Appeal, and the suit was dismissed Both these courts held that it was a case of adverse possession and therefore fell within Art. 144 of the First Schedule of the Limitation Act of 1908. In their Lordships' view, inasmuch as it has been found as a fact that after the deed of 1909 the late Thakur discontinued his possession and never resumed it, it is rather a case which falls within s. 142. The result, however, is the same if the 12 years run from 1909. But the appellant pleads that the 12 years do not run from 1909, owing to the following facts. In March 1916, the Thakur filed a petition with the Commissioner in which he related the deed of gift to his wife, expressed a doubt as to whether the deed of gift was valid, and asked the Commissioner either to declare that the deed was valid or to give his sanction to the execution of a fresh deed of gift. At the same time the wife, present respondent, filed a petition in these terms—

"The humble petition of Thakurain Jagarnath Kuari, wife of Thakur Jado Charan Singh, proprietor of Gadi Dhurgulli, Parganna Rampore, District Hazaribagh. Most respectfully sheweth—

"That in view of the petition filed by Thakur Jado Charan Singh, your petitioners beg to file the original deed of gift and prays that your Honour may be pleased to sanction the same or order a fresh grant on the same terms to be executed."

This petition was signed by herself.

Section 19 of the Limitation Act is as follows:—

"19.—(1) Where before the expiration of the period prescribed for a suit or application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by same person through whom he derives title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

"*Explanation 1.*—For the purposes of this section an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right."

The appellant urges that this is an acknowledgment of liability in terms of the section and that therefore the period of limitation only began in 1916, and 12 years had not elapsed when the suit was raised in 1925. Both the Subordinate Judge and the Judges of the High Court disposed of this in a single sentence by simply saying they found no much acknowledgment. Their Lordships are unable to agree with this view. The petition produces the

deed of gift and asks that it may be sanctioned or that a fresh grant may be ordered. This is a clear acknowledgment that unless one of the two things is done, she has no title at all, or, in other words, that she recognizes that the title is in the Thakur, her husband, and not in herself.

The Subordinate Judge, however, raised another point. He says that the acknowledgment contained in the petition, not being registered, cannot be received in evidence, and he quotes in support of this the case of *Faki* v. *Khotu* (1). The section of the Registration Act on which the question depends is s. 17 (1), which is as follows :—

"The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

"(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property."

Now the case of *Faki* v. *Khotu* (1), undoubtedly goes the whole length that the respondents desire. It was a case where limitation was pleaded. The judgment on page 593, after reciting the document in question, goes on thus:

"The plaintiff wishes to use it (*i. e*, the document) as an admission or acknowledgment of his title to the lands, and as proof that, at the date of the document, the defendant's possession was not adverse to him. The document undoubtedly contains such an acknowledgment: and if it be genuine and relevant, a court, which had to determine the question of fact, would probably consider that acknowledgment sufficient proof that the defendant's possession was really the plaintiff's possion.....

"The Assistant Judge has held that the document is inadmissible in evidence, because it is not registered; and we are of opinion that this decision is right. The plaintiff wishes to use the document as an acknowledgment of a right, title and interest in immoveable property, which is admittedly of a higher value than one hundred rupees. If admitted it will 'operate to declare' such a right, title and interest and it thus appears to come within the terms of s. 17 of Act XX of 1866."

But the question remains whether that case was rightly decided Their Lordships are of opinion that it was not and that it was inconsistent with a long track of decisions which are incompatible with it. The first of these will be found in the case of *Sakha Ram Krishnaji* v. *Madan Krishnaji* (2). The question there was as to a document in the following words :—

"Our eldest brother M has built houses and is building new houses on property appertaining to his share..... To the same we three persons and our heirs and representatives have no interest of any kind whatever. If we or they should prefer any claim, then the same is to be null. This release paper we have duly passed in writing jointly and severally and in sound mind."

The document had not been registered, and it was objected that it could not be put in evidence in order to contradict a witness. Dealing with it West, J , said:

"Here.... the document is not itself one which declares a right in immoveable property, in the sense probably intended by s. 27. There 'declare' is placed along with 'create', 'assign', 'limit' or 'extinguish' a right, title or interest', and these words imply a definite change of legal relation to the property by an expression of will embodied in the document referred to. I think this is equally the case with the word 'declare.' It implies a declaration of will, not a mere statement of fact and thus a deed of partition, which causes a change of legal relation to the property divided amongst all the parties to it, is a declaration in the intended sense, but a letter containing an admission, direct or inferential, that a partition once took place, does not 'declare' a right within the meaning of the section."

Now it is quite clear in comparing these two cases that they took diametrically opposite views as to the proper meaning of the word "declare" in the s. 17 and it is upon that point that the whole question turns. Subsequent decisions have given full effect to the view of West J , in the *Krishnaji's case* (2)

In the case of *Jiwan Ali Beg* v. *Basamal* (3) the head note accurately sets forth one of the points in the case :—

"An instrument to come within s. 17 (*b*) of the Registration Act (III of 1877) must in itself purport or operate to create, declare, assign, limit or extinguish some right, title or interest of the value of Rs. 100 or upwards in immovable property."

Then in the case of *Kunganayaki Ammal* v. *Virupakshee Rao Naidu* (4), the learned Judge in the High Court expressly cites the words of West, J., in the *Krishnaji's case* (2), and in the case of *Baldeo Singh* v. *Udal Singh* (5), precisely the same thing is done

Their Lordships have no doubt that this track of decision is right. Though the word "declare" might be given a wider meaning, they are satisfied that the view originally taken by West, J. is right The distinction is between a mere recital of a fact and something which in itself creates a title. The distinction has been acted on in cases connected with mort-

(1) 4 B. 590.
(2) 5 B. 232.
(3) 9 A. 108.
(4) 72 Ind. Cas 456; 45 M. L. J. 100 at p. 102; 17 L. W. 588; 32 M. L. T. 312; A. I. R. 1923 Mad. 621.
(5) 58 Ind. Cas. 732; 43 A. 1; 2 U. P. L, R. (A.) 202; 18 A L. J. 877.

gages by deposit of documents of title. A comparison of the case of *Ariff* v. *Dawood* (6), with that of *Subramonian* v. *Lutchman* (7), will show that, according to this distinction, a document requires registration or not. In the present case the statement in the petition of the respondent did not create any right in the Thakur. It merely acknowledged as a fact that such right was his There was, therefore, no necessity for registration. It is not out of place to remark that this exactly fits in with explanation 1. If you take the case of an acknowledgment contained in a communication addressed to a third party registration is not practicable ; it is scarcely conceivable that it could be required.

Their Lordships will therefore humbly advise His Majesty to allow the appeal and to set aside the decrees of both the courts below with costs, and in lieu thereof that judgment ought to be entered for the appellant. The respondents will pay the costs of the appeal.

A. *Appeal allowed.*

Solicitors for the Appellant.—*Solicitor, India Office.*

Solicitors for the Respondent.—Messrs. *Watkins & Hunter.*

(6) 35 Ind. Cas. 30; 43 I. A. 127; 14 A. L. J. 741; (1916) 1 M. W. N. 460; 20 C. W. N. 1118; 20 M. L. T. 110; 18 Bom. L. R. 611; 31 M. L. J. 290; 24 C. L. J. 198; 2 L. W. 269; 9 Bur. L. T. 141; 43 C. 1085 (P. C.).

(7) 71 Ind. Cas. 650; 50 I. A. 77; A. I. R. 1923 P. C. 50; 44 M. L. J. 602; 32 M. L. T. 184; 25 Bom. L. R. 582; 1 R. 66; 2 Bur. L. J. 25; 38 C L. J. 41; 18 L. W. 446; (1923) M. W. N. 762; 28 C. W. N. 1; 50 C. 338 (P. C.)

BOMBAY HIGH COURT.

Second Civil Appeal No. 262 of 1928.

June 22, 1931.

BAKER AND NANAVATI, JJ.

SHANKAR YESU KARGUTKAR —APPELLANT

versus

H. H. KHEM SAWANT—RESPONDENT.

Landlord and tenant—Permanent tenancy—Execution of lease for fixed term after negotiation and intervention—Compromise of doubtful claim—Assertion of hostile title—Acquisition of permanent tenancy—Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*The question not before Court in previous suit—Effect on subsequent suit.*

A person in possession of land under a tenancy for a fixed term cannot by a mere assertion in a judicial proceeding during the period of tenancy and the lapse of twelve years without that assertion having been successfully challenged obtain a title as a permanent title. *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (11) and *Bhailal* v. *Kalansang* (12), followed. *Dhanna Mal* v. *Moti Sagar* (10), distinguished. [p.805, cols.1 & 2.]

The plaintiff landlord instituted a suit for the ejectment of his tenants on the expiration of the term of the lease i. e., 25 years after its execution in 1897. The lease was the result of negotiations for 8 years and intervention of political authorities. The lease provided for enhanced rent and restriction on cultivation of lands, planting of trees and erection of buildings. The tenants gave up any right to continue as tenants after the expiry of the lease. In the suit the tenants objected to their ejectment on the ground that they were permanent tenants in spite of the lease:

Held, that the defendants were not permanent tenants and the lease was binding on the parties and their family members as a compromise of a doubtful claim.

Raghunath v. *Lakshuman* (1), *Ram Ranchod* v. *Abdul Rahim* (2) and *Stapilton* v. *Stapilton* (5), distinguished. *Gangaji* v. *Sakharam* (3) and *Varajlal Shivlal* v. *Dalsukha Varajlal* (4), followed. [p. 803, cols. 1 & 2.]

Where the question in issue between the parties in the subsequent suit was not before the Court and was not decided in the previous suit between the parties, there is no bar of *res judicata* in the subsequent suit. *Narayan* v. *Political Agent, Sawantwadi* (6), *Bai Nathi* v. *Narshi Dullabh* (7), *Surrendra Nath* v. *Kamakhya Narain Singh* (8) and *Midnapur Zamindari Co.* v. *Naresh Narayan Roy* (9), distinguished. [p. 804, col. 2.]

Second Civil Appeal against the decision of the First Class Sub-Judge, Ratnagiri, in Appeals Nos. 180 and 191 of 1926.

Mr. *A. G Desai*, for the Appellant.

Messrs. *H. C. Coyajee* and *J. G. Rele*, for Respondent No. 1.

Baker, J —The plaintiff, the Sar Desai of Sawantwadi, sued thirty-three defendants for possession of the property in suit after removal of the buildings which defendants had built on the land, for arrears of rent, and for costs, alleging that the property which belongs to the Sawantwadi State was leased for twenty-five years, from 1st April 1897, to one Narayan Venku Kargutkar, who is the ancestor of the Hindu defendants, and one Farsoo Niklu, who is the ancestor of defendants Nos. 10 to 12. The other defendants held under these defendants. The defendants set up various pleas of permanent tenancy, limitation, and so forth, and claimed compensation. The first Court, the Subordinate Judge of Vengurla, awarded plaintiff possession as against defendants Nos. 1 to 17 and the heirs of defendant No. 18, but dismissed his suit as against the Christian defendants other than defendants Nos. 2 to 16, who were held to be ancient tenants of their portion liable to pay rent to the plaintiff according to the custom of the country under s 83, Bombay Land Revenue Code.

Two appeals were preferred against this decree, one by the Kargutkar defendants against them, and one by the plaintiff

against the dismissal of his suit as against the Christian defendants already referred to. Both these appeals were dismissed by the District Court of Ratnagiri. No second appeal has been made by the plaintiff as against the dismissal of his appeal, but defendant No. 17 and the heirs of defendant No. 18 have appealed to this Court.

We are not now concerned with the case of the Christian tenant, but only with the family of Kargutkar. The lease in question was passed by Narayan Venkaji Kargutkar. The genealogy will show that he had two brothers Yesu and Krishna. Yesu had two sons, Venkaji, defendant No. 16 and Shankar, defendant No. 17; and Krishna, who is defendant No. 18, had four sons. The present appellants are defendant No. 17 and the sons of defendant No. 18. Defendant No. 1 has not appealed.

The principal points which arise in this appeal are four: firstly, whether the lease of 1897 passed by Narayan has the effect of negativing any claim on his part to be a permanent tenant of the lands in suit; secondly, if so whether it is binding on his co-sharers and their descendants, *i. e.*, the present appellants; thirdly, whether the claim to be permanent tenants set up by the appellants is *res judicata*; and fourthly, whether the appellants are entitled to any compensation for the houses which they have built on the land. The findings of fact of the Courts below are: firstly, that Narayan and his brothers Yesu and Krishna were joint, and Narayan was the manager of the family. And it appears that the present appellants still live with defendant No. 1. Vithal who is the son of Narayan, who, as I have said, has not appealed. The lower Appellate Court held that both the Kargutkar defendants and the Christian defendants were permanent tenants under the presumption arising under s. 83, Bombay Land Revenue Code, the origin of their tenancy being lost in antiquity; but by reason of the lease Ex. 80 passed by Narayan and by Niklu who was the ancestor of defendants Nos. 10 to 12, the claim of these persons to be permanent tenants was extinguished. This did not apply to the other Christian defendants who were not bound by the acts of their ancestor and therefore their rights were unaffected by this lease; but as I have said, they are not parties to this appeal and we are not concerned with them. The lease which is dated 5th December 1897 but takes effect from 1st April 1897, was for twenty-five years, and therefore expired on 31st March 1922. That lease contains an admission that the executants *i. e.*, Narayan and Farsu, are annual tenants, and it also contains clauses by which they bind themselves to vacate the land at the expiry of the period of the lease.

It has been argued by the learned Counsel for the appellants that this is not inconsistent with permanent tenancy, and that the execution of this lease cannot operate to do away with the permanency of the tenancy which the executants had already acquired by reason of their long possession, and in support of that proposition he has relied mainly on two cases, one of which is a case between the same plaintiff and other defendants relating to land in the same place, *i. e.*, Vengurla, and that is the well-known case of *Raghunath* v. *Lakshuman* (1) and the other case on which he has relied is the case of 59 Ind. Cas. 278, *Ram Ranchod Abdul Rahim* (2). I do not think it is necessary to give the details of the *kabliuyat*, which is a long document, but it will be necessary to give the facts which led up to the execution of this *kabuliyat*. Now it appears that about the year 1889 there were disputes between the Savantwadi State and its tenants with regard to the amount of rent to be recovered from them, and in that year certain of the tenants including Narayan made an application to the Bombay Government dated 19th October 1888, saying that the assessment of the *thikans* occupied by them was Rs. 1,432 odd, but the Savantwadi State was demanding Rs 800 odd in addition, and asking Government to interfere and order the State to accept the assessment fixed by the Revenue Survey Settlement. In consequence of this petition certain steps were taken by the political authorities, and we find a letter from the Political Superintendent, Sawantwadi in October 1889 saying that the *Karbhari* of Savantwadi had offered to grant leases to the petitioners for thirty years from 1884-1885, the year of the Survey Settlement, on condition that an extra rent of Rs. 300 a year was paid and recommending that that settlement should be accepted as being equitable to both parties. And this was sanctioned by Government by a resolution of 13th December 1889. It appears, however, that this settlement was not at once brought into operation, and the subsequent events are narrated in the preamble of the *kabuliyat* which is Ex. 80 dated, as I have

(1) 2 Bom. L. R. 93.
(2) 59 Ind. Cas. 278.

already said, 5th December, 1897. The executants, *i. e*, Narayan and Farsu, say that in August 1889 they had appeared before the *karbhari* and expressed their willingness to pay the enhanced rent and to pass a *kabuliyat*.

And that is probably what led to the reference in the Political Agent's letter referred to above as to the offer made by the State authorities being equitable to both parties and acceptable to the tenants. It appears however that nothing was done up till 1897, and then there was a fresh interview between the tenants and the Political Superintendent, and the *kabuliyat* in question was passed. It will be seen, therefore, that the tenants took eight years to consider the matter, and that the intervention of the political authorities was twice necessitated, once in 1889, and once about 1897, and in the face of that I do not know how it can be argued with reference to other cases which are based on different facts that there was any question of the tenants being unaware of what the arrangement was into which they were entering. This *kabuliyat* is for 25 years. It imposes restrictions with regard to the cultivation of the *thikans*, the planting of trees and the erection of buildings, and at the end of the last paragraph of cl. 9 and cl. 14 the executing tenants expressly give up any right to have the land continued to them after the expiry of the period of the lease. In the face of this, even supposing that they were permanent tenants before, it can only be held that they gave up their permanent tenancy by arriving at a compromise with the State authorities. The learned Advocate for the appellants has relied on, as I have said two cases: one; in 59 Ind. Cas. 278 *Ram Ranchod* v. *Abdul Rahim* (2) and the other case arising between similar parties in *Raghunath* v. *Lakshuman* (1). In *Raghunath* v. *Lakshuman* (1) which was a test case brought by the Savantwadi State in which they failed, Sir Lawrence Jenkins, after referring to the various documents in the case came to the conclusion that in spite of the clause in one *kabuliyat* passed by one of the tenants agreeing to make over the land to the State at the expiry of the current year questions of this character cannot be determined by a clause such as the present but that the matter must be judged in the light of the actual facts, and referring to the case of *Gangaji* v. *Sakharam* (3), he held:—

"There the determining point was the fact that the tenants still continued to hold and that is what has happened here."

If the present case is judged in the light of the facts it will be seen that there was a dispute between the tenants and the landlord, *i. e.*, the State, that the State wanted to enhance the rent that the tenants then approached the Bombay Government as the paramount power, that the political authorities intervened, and by an arrangement between the parties it was settled that the lease should be given for 25 years at a slightly enhanced rent and that was accepted by the tenants, who undertook to give up the land at the end of that period. The case in *Ram Ranchod* v. *Abdul Rahim* (2) relied on by the learned Advocate for the appellants, is a case in which a tenant had been in possession of the land as far as memory went but in one year he executed a rent-note for one year but continued in possession as before paying throughout the same amount of rent, and it was held that this was not sufficient to rebut the presumption of the permanency of the tenancy which arose from its antiquity. Now it would be seen that in both these cases there was an admission of annual tenancy, but in spite of that the tenants continued in possession as before. In the present case there was no question of one rent note acknowledging an annual tenancy, but we have a lease entered into after protracted negotiation between the parties by which the tenants were confirmed in undisturbed possession of the land for a period of 25 years, and that being so, if the case is decided on the surrounding facts, in my opinion, the view of both the courts below that a compromise of this nature does away with the permanency of the defendants is correct. It has been argued by the learned Advocate for the appellants that the only dispute between the parties being as to the amount of rent it was not necessary to incorporate any provisions as to the duration of the tenancy in the rent-note. But I am unable to accept this position. When once there was a dispute between the parties when the question of a settlement arose other terms might be incorporated in the settlement.

It is to be observed that the date of this dispute was some years prior to the decision in *Raghunath* v. *Lakshuman* (1) and as has been pointed out by the learned Judge of the court below, nobody knew whether the State would be successful against the tenants or not in ejectment suits which as

(3) (1889) P. J. 156.

matter of fact were brought against a number of the tenants. The binding nature of a compromise such as this has been laid down in numerous cases. The learned Counsel for the respondent has referred to Story's Equity Jurisprudence Edn 3, para. 131, and to a case *Varajlal Shivlal* v. *Dalsukh Varajlal* (4), which says that defendants would be estopped from contesting it. It is not possible to say what the result of a suit by the State against the executants of this lease to eject them from the land or to recover enhanced rent would have been and taking the right of the State to be doubtful, the compromise between the parties will none the less be valid. The learned Counsel has further referred to the case of *Stapilton* v. *Stapilton* (5), laying down that the compromise of a doubtful right is a sufficient foundation of an agreement. This will also dispose of the question of whether the agreement entered into by Narayan will bind his brothers, *i. e.*, the fathers of the present appellants, defendants Nos. 17 and 18. The learned Judge of the court below has found that the compromise was for the benefit of the family because but for it the State would have tried to evict them from the land, and in view of the cases quoted which I have just referred, the compromise would be binding on the other members of the family. I will go so far as to say that it was for their benefit, inasmuch as the State, which at that time was demanding an enhanced rent, confirmed the tenants in their possession of the land for a further period of 25 years at a rate of rent which was not so much enhanced. The case of *Narayan* v. *Political Agent, Sawantwadi* (6) was not a case in which the compromise was of doubtful rights but one in which the person executing the *kabuliyat* had surrendered a permanent tenancy in exchange for a tenancy for a fixed term of 25 years. In that case, therefore, the permanent tenancy was held proved, whereas in 1889, or rather in 1897, the permanent tenancy of the present tenants was not proved, and it was not possible to say what the result of litigation would be. In these circumstances, I am of opinion that the compromise which was entered into between Narayan and the State (I omit the name of Niklu—he is not a party to the proceedings) was for the benefit of his co sharers, and in view of the cases quoted above, this compromise must be held binding.

The next point which has been raised by the learned Advocate for the appellants is that the question of the lease being binding on his clients is *res judicata* by reason of the judgment in Suit No. 207 of 1907 of the Vengurla Subordinate Judge's Court. That was a suit by the present plaintiff against Vithal Narayan, *i. e.*, present defendant No 1, Yesu the father of defendants Nos. 16 and 17, and defendant No. 18 Krishna, and two of the Christian defendants to recover rent under the *kabuliyat*. Defendants Nos. 2 and 3 in that suit representing defendants Nos. 16 to 18 in this suit pleaded that they were not liable to pay rent to the plaintiff, because they used to pay their share of rent to defendant No. 1's father who paid to plaintiff. Issues Nos. 2 and 3 in that case were: Is the *kabuliyat* not binding on defendants? Does it bind defendants Nos. 1, 2, 3? And the finding was that it is binding on defendants Nos. 1, 4 and 5. Hence it is contended that the court in that case decided that the *kabuliyat* was not binding on the ancestors of the present appellants and, therefore, it cannot be held to bind them. That case was a rent suit and, what was claimed was rent. No question of ejectment arose, and on reference to the reasons for the finding of the learned Subordinate Judge which are at page 32 of the record, what he says is as follows:—

"As plaintiff has based his suit on a written contract and as defendant No. 1 has undertaken to pay the balance of rent on the ground that all co-sharers used to pay the rent to his father and after him to defendant No. 1 and that as his father and himself used to pay the whole rent to plaintiff, I am constrained to hold that suit is not bad for want of parties and that defendants Nos. 2 and 3 are not personally liable."

This at the most amounts to a finding that defendants Nos, 2 and 3 who are the ancestors of the present appellants are not personally liable for the rent because they used to pay it to defendant No. 1 who paid it to the plaintiff. It is in no sense a finding that the *kabuliyat* in so far as it deals with the non-permanent nature of the tenancy is not binding on defendants Nos. 2 and 3 in that case. That point was not before the court and was not necessary for the determination of the suit. The learned Counsel for the respondent has referred to a number of cases on this point in which it was held that where a point was not necessary for the decision of the suit, a finding on that point would not be

(4) 12 B. H. C. R. 196.
(5) 1 W. & T. L. C., Edn. 8, 234.
(6) 7 Bom. L. R. 172.

res judicata. He has referred to the cases of *Bai Nathi* v. *Narshi Dullabh* (7), *Surrendra Nath* v. *Kamakhya Narain Singh* (8), *Midnapur Zamindari Co* v. *Naresh Narayan Roy* (9) and *Dhanna Mal* v. *Moti Sagar* (10). The present case, however, is somewhat different to the cases which have been quoted The question which is now at issue between the parties, *i. e*, the nature of the tenancy created under Ex. 80, the *kabuliyat* was not before the court at all, nor was it considered. The fact that defendants Nos 2 and 3, by reason of their paying the rent to defendant No 1, the eldest brother, who then paid it to plaintiff, were not liable to pay rent to the plaintiff directly has no bearing upon the question of the whether they are entitled to remain in possession of the land after the expiry of the period fixed by the lease. I agree,therefore, with the finding of the lower AppellateCourt that the suit is not barred by reason of *res judicata*.

Then it has been contended by the learned Advocate for the appellants that under the Statute of Limitations the present appellants have acquired a status of permanent tenants by reason of their assertion of an adverse title for a period of more then 12 years, and he has referred to the case of *Kamakhya Narayan Singh* v. *Ram Raksha Singh* (11), which is an entirely different case to the present, the facts being that after the expiry of the lease or the death of the lessee his heirs held over against the will of the landlord and without paying him any rent, and obviously has no application to the present case where the tenants were entitled under the lease Ex. 80 to hold the land for a period of 25 years which only expired in 1922, the present suit being brought in 1924. There is a case directly in point, *Bhailal* v. *Khalansang* (12), which refers to the Privy Council case in *Mohammad Mumtaz Ali Khan* v. *Mohan Singh* (13), where the Privy Council say that they are (p. 209 of 50 I. A.):

"unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of 6 or 13 years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands."

The assertion of the title of the appellants is presumably made in the suit of 1907 already referred to. The plaintiff was successful in obtaining a decree for rent against defendants Nos. 1, 4 and 5. The lease at that time had still 15 years to run, and the fact that the plaintiff did not think it necessary to bring a suit under s. 42, Specific Relief Act, in order to contest the statement that the defendants were permanent tenants would not, in virtue of the Privy Council decision just referred to, give rise to a starting point of limitation which would enable the defendants to count adverse possession from that date, and so perfect a title of permanent tenancy.

The sole remaining point is as to the right of the defendants to compensation for buildings on the land. The *kabuliyat* expressly provides that any buildings on the land erected after its date should be liable to removal without compensation. But it is contended that there are buildings on the land erected by them prior to the commencement of the *kabuliyat* in April, 1897,for which they are entitled to compensation, and in support of that proposition reliance is placed on the deposition of the plaintiffs' clerk as to the existence of buildings on the land prior to that date. That deposition, which is Ex. 149, was read. The witness says he was appointed as *karkun* by plaintiff there in the year 1912. Any bulidings standing on the land at the time when he was appointed cannot be said to be proved to have been erected before the year 1897. As a matter of fact there is no evidence as to when these buildings were erected or by whom they were erected or what the cost of erecting them was, and in this state of the evidence I am not prepared to hold on the evidence of a man whose acquaintance with the land began in 1912 that it is proved that the buildings on the land have stood there from ancient times and that any compensation should be awarded in respect of them.

The result is that the decree of the lower Appellate Court is confirmed, and the appeal dismissed with costs payable to respondent No. 1.

Nanavati, J.— I concur.

R. L. *Appeal dismissed.*

(7) 55 Ind. Cas. 322; 44 B. 321; 22 Bom. L. R. 64.

(8) 123 Ind. Cas 145; A. I. R. 1930 P. C. 45; 31 L. W. 352; 32 Bom. L. R. 515; Ind. Rul. (1930) P. C. 129; 51 C. L. J. 502; 59 M. L. J. 731. (P. C.).

(9) 64 Ind. Cas. 231; A. I. R. 1922 P. C. 241; 48 I. A. 49; 48 C. 460; 14 L. W. 265; 30 M. L. T. 279 (P. C.).

(10) 101 Ind. Cas. 355; A. I. R. 1927 P. C. 102; 54 I. A. 178; 8 Lah. 573; 52 M. L. J. 663; 29 Bom. L. R. 870; 31 C. W. N. 677; (1922) M. W. N. 481. (P. C.).

(11) 109 Ind. Cas. 633; A. I. R. 1928 P. C. 146; 55 I. A. 212; 7 Pat. 469; 48 C. L. J. 69; 9 P. L. T. 501; 32 C. W. N. 897; 28 L. W. 41; 30 Rom. L. R. 1361. (P C.).

(12) 107 Ind. Cas. 52; A. I. R. 1927 Bom. 661; 29 Bom. L. R. 1558; 52 B. 55.

(13) 74 Ind. Cas. 476; A. I. R. 1923 P. C. 118; 50 I. A. 202; 26 C. C. 231; 45 A. 419 21 A. L. J. 757; 45 M. L. J. 623; 9 O. & A. L. R. 901; 10 O. L. J. 383; 19 L. W. 283; 39 C. L. J. 295; 28 C. W. N. 840; 30 M. L. T. 321 (P. C.).

SIND JUDICIAL COMMISSIONER'S COURT.

Civil Suit No. 384 of 1930.

October 13, 1931.

ASTON, A. J. C.

ROCHANBAI UDHOMAL AND OTHERS—PLAINTIFFS

versus

MOTUMAL SHEWARAM AND OTHERS—DEFENDANTS.

Arbitration Act (IX of 1899), s. 14—Objection to award for want of valid reference—Objections disallowed—Fresh suit to set aside award, competency of.

A party in his objection to an award under s. 14, Arbitration Act can make an objection which challenges the factum of the reference so far as he is concerned and which goes to the root of the jurisdiction of the arbitration and it is within the jurisdiction of the court to hear this objection. *Pokar Das* v. *Forbes, Campbell & Co.Ltd.* (12), relied on. *Jai Narain Babu Lal* v. *Narain Das Jaini Mal* (7), *Sushil Chandra Das & Co.* v. *Sukhamal Bansidhar* (9) and *E. D. Sassoon* v. *Ramdutt Ramkishen* (11), referred to. *Matulal Dalmi* v. *Ramkishin Das Madan Gopal* (8), *Sodawaterwala* v. *Volkart Bros* (10), *Tayabally Abdul Hussain* v. *James Finlay & Co.* (14) and *Rugunathdas Ramsarup* v. *Suldyer Bruderar & Co.* (15), not followed. [p. 808, cols. 1 & 2.]

A suit is also competent, but if the party elects to file objections under s. 14 and his objections are heard and disallowed, it is not open to him to have the matter inquired into again in a separate suit. *Khimji* v. *Nathibai* (16), followed. [p. 808, col. 2.]

Mr. *Tahilram Maniram*, for the Plaintiffs.

Mr. *Kodumal Lakhraj*, for the Defendants.

Judgment.—This is a suit filed by the widow and minor sons of one Udhomal, a Hindu, for a declaration that a reference executed by the widow and her brothers in law Narumal and Sobhomal referring certain disputes which they had with one Motumal to arbitration and the award obtained thereon, were void, and for partition by metes and bounds of certain immoveable property and for separate possession of the plaintiffs' share of the same.

One Kundanmal died in 1926 leaving three sons: Udhomal, Narumal, and Sobhomal and certain immoveable property, *viz*:

(1) Plot Old S. No. 16 Survey sheet A-20, Naper Qr. Karachi, and (2) Plot Old S. No. 21 Survey sheet 21, Napier Qr. Karachi. At the time of his death he was carrying on utensil business in partnership with his three sons.

Udhomal died about 1928 leaving a widow Rochanbai, plaintiff No. 1 and five sons plaintiffs Nos. 2 to 6. Defendants Nos. 2 and 3 carried on the utensil business after his death.

On 16th August, 1927, and 21st September, 1928, Udhomal and defendants Nos. 2 and 3 executed mortgage-deed for Rs. 7,000 and Rs. 5,000 repayable in three years from the dates of the mortgage deeds.

Fresh business debts were incurred by defendants Nos. 2 and 3 after the death of Udhomal and an application was made by creditors to have defendants Nos. 2 and 3 adjudicated insolvent and the Official Assignee was appointed *interim* Receiver.

Thereafter an amicable settlement was arrived at. The plot bearing Old S. No. 21 was sold by defendant and the proceeds divided among the creditors. Plaintiff signed the conveyance deed; she also signed a reference to arbitration of the disputes relating to the mortgage dated 16th August, 1927, and 21st September, 1928, and the non-payment of a *hundi* executed by defendants Nos. 2 and 3 on behalf of defendant No. 1.

Plaintiff's case is that she signed the reference on her own behalf and on behalf of her children who were minors on the misrepresentation that it was necessary for her to sign it for the purpose of conveying the plot bearing Old S. No. 21 to the purchaser Motumal Tokandas.

The arbitrators held proceedings and passed an award dated 27th June, 1930, which they filed in court.

Plaintiff complains that the arbitrators held proceedings at which she was not represented and that no notice was served on her and she was never informed that proceedings were being held.

She further contends that since the moneys secured by the mortgages had not become payable and the interest had been regularly paid there was no dispute which she was competent to refer on behalf of the minors.

Plaintiff omitted to mention in the plaint that she filed objections to the award of the arbitrators, covering the same ground as her plaint and that the objections were considered and disallowed by my brother Rupchand A. J. C.

On plaintiff's behalf reliance is placed on *Dataram Munshi Lal* v. *Harjimal & Sons* (1) as establishing that objections to an award may fall either within or outside the purview of s. 14, Arbitration Act. When a court disallows objections falling within the purview of s. 14, althogh the doctrine of *res judicata* is not strictly applicable, the

(1) 121 Ind. Cas. 161; A. I. R. 1930 Sind 170; 24 S. L. R. 145; Ind. Rul. (1930) Sind 33.

principle of finality will apply to the decree. This principle, however, will not apply where a court assumes jurisdiction, and disallows objections falling outside the purview of s 14.

It is further contended, that the words "improperly procured", in s. 14 only apply to matters occurring between the reference and the award and that they have no application to anything which has occurred prior to the reference.

The Statute of William 3, cl. 15 (1698) enacted by s. 2 as follows :

"And be it further enacted by the authority aforesaid that any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect and accordingly be set aside by any Court of Law or equity so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage upon the last day of the next term after such arbitration or umpirage made and published to the parties; anything in this Act contained to the contrary notwithstanding".

In *Anderson* v. *Coxeter* (2), the court held that under the Statute above referred to nothing was a ground for impeaching the award but manifest corruption of the arbitrators.

Mr. Russell in his commentary on the Law of Arbitration and Award (10th Edition, page 193) observes that the term "undue means" signifies something different from corruption, as for instance the examination of witnesses in the absence of the parties, [*In re Plews and Middleton* (3) and *Harvey* v. *Shetton* (4),] or a refusal to allow the plaintiff a proper opportunity of discussing his case: *Spittingue* v. *Carpenter* (5). He adds that the restriction imposed by the language of the Act was subsequently much disregarded for the courts in England listened to applications to set aside awards under the Statute on other grounds than the two enumerated in the section : *Veale* v. *Warner* (6). What is more, the courts, in addition to the powers they exercised under Statute, exercise inherent powers of setting aside awards: see Russell Edition 10, page 194. Under the Arbitration Act, 1889, 52 and 53 Victo. 49 the inherent powers of the court were not referred to. The statutory powers of courts to set aside award were extended to cases where an arbitrator or umpire misconducted himself or an arbitration or award had been improperly procured ; see s. 11 (2). In s. 14, Arbitration Act IX of 1899, which is largely based on the English Act the grounds for setting aside an award are the same.

In *Jai Narain Babu Lal* v. *Narain Das Jaini Mal* (7) doubt was expressed by Sir Shadi Lal, C. J., whether a court, dealing with a private award, under the Arbitration Act, has jurisdiction to determine a dispute as to the factum or the validity of the contract containing the arbitration clause. He observed that there was a divergence of judicial opinion on the question : see pages 311 and 314* and Campbell, J., held that the question whether there was a contract and a valid contract was outside the scope of the arbitration.

Sir Shadi Lal referred *inter alia* to the case of *Matulal Dalmi* v. *Ramkishin Das Madan Gopal* (8) where it was held that when an award is challenged on the ground that there was no submission to arbitration by the parties the remedy lies in a regular suit and not in an application under s. 14, Arbitration Act. No reasons were given by the court for this decision. Walsh, J., in *Sushil Chandra Das & Co.* v. *Sukhamal Bansidhar* (9) observed that questions of fact and law upon which the jurisdiction of arbitrators depends are for the courts. It does not follow that an objection which goes to the root of the arbitrators' jurisdiction is not an objection which falls within the purview of s. 14. The court in deciding objections to an award, is not limited to the consideration of questions which are within the jurisdiction of the arbitrator. The arbitrator has no jurisdiction to try the question whether he was corrupt, whether he was guilty of misconduct. The court has jurisdiction to decide such questions as well as the question whether the arbitration was improperly procured. Its jurisdiction is not based upon the consent of the parties ; it is statutory and inherent.

Kincaid, J. C., in *Sodawaterwala* v. *Volkart Brothers* (10) drew attention to the harm which would be caused to business firms in this Province, if parties were enabled to render the provisions of the Arbitration Act nugatory, by simply alleging that they were misled, or browbeaten, or hypnotized when signing the contract of reference. If he meant by this that a

(2) (1720) 1 Stra. 301.
(3) (1845) 6 Q. B. 845.
(4) (1844) 7 Beav. 455; 13 L. J. Ch. 466.
(5) (1735) 3 P. Wms. 361.
(6) (1670) 1 Sand. 327.
(7) 69 Ind. Cas. 585; A. I. R. 1922 Lah. 369; 3 Lah. 296.
(8) 69 Ind. Cas. 568; 47 C. 806.
(9) 67 Ind. Cas. 487; A. I. R. 1922 All. 219; 44 A. 472; 20 A. L. J. 377; 4 U. P. L. R. (A.) 69.
(10) 82 Ind. Cas. 81; A. I. R. 1923 Sind 25.

*Page of 3 Lah.—[*Ed*].

party challenging the jurisdiction of an arbitrator, could not do so by means of a suit, his view was clearly erroneous, since it is in conflict with the decision of their Lordships of the Privy Council in *E. D. Sassoon* v. *Ramdutt Ramkishen* (11), but there appears to be no reason why a speedy remedy should not be available for a person, who complains that an arbitration was improperly procured, because there was no valid reference by reasons of fraud, misrepresentation or mistake if he wishes to avail himself of it. It does no violence to language to say that an arbitration procured in this manner has been improperly procured. No doubt the tenancy in England in ancient times was to construe the statutory powers of courts very strictly and to limit its jurisdiction to set aside awards under 9 William 3, C. 15 to cases of corruption. But the later tendency was for courts to intervene even in cases not provided for by the statute.

In *Pokar Das* v. *Forbes Campbell & Co. Ltd.* (12) it was held by Crouch, and Hayward, A. J. C, that when a party elects to proceed against individual members composing a firm any person alleged to be a member and denying his liability as such may, if he likes, appear before the arbitrators under protest and whether he has approved or not he may object to the award being filed against him on the ground that it had been improperly procured against him on the misrepresentation that he was a partner. In other words a party in his objections to the award under s. 14, Arbitration Act, can make an objection which challenges the factum of the reference so far as he is concerned and which goes to the root of the jurisdiction of the arbitration and it is within the jurisdiction of the court to hear this objection : see also *Isribai* v *Pevibai* (13).

Their Lordships of the Privy Council in *E.D. Sassoon* v. *Ramdutt Ramkishen* (11) held that a suit is competent when the validity of an alleged agreement to refer is challenged. They did not affirm that that was the only procedure available for a party.

If the party elects to file objections under s. 14, Arbitration Act, with regard to the *factum* or validity of the alleged reference. I am of opinion, for the reasons, I have mentioned, that the court has jurisdiction to hear the objection.

The plaintiffs filed objections to the award which covered all the facts on which they rely in the present suit. Raymond, J., in *Tayabally Abdul Hussain* v. *James Finlay & Co.* (14) held that a party dissatisfied with a private award could take such objections as the Arbitration Act allowed, and notwithstanding his having done so unsuccessfully, he could thereafter bring a suit to set aside the award on the ground of want of jurisdiction in the arbitrator. This decision was cited with approval in *Rugunathdas Ramsarup* v. *Suldyer Bruderar & Co*, (15) at page 47* If by this decision, Raymond A. J. C., meant that a party could under s 14, Arbitration Act, challenge the validity of the contract and the jurisdiction of arbitration and if unsuccessful, file a suit to set the award aside on the same grounds, with great respect I disagree with the decision.

I agree with the view of Rupchand, A. J. C., in *Khimji* v. *Nathibai* (16) where the principle of finality applies to the court's decree with reference to all matters coming within the purview of s. 14, Arbitration Act. A party no doubt has an alternative remedy when his complaint is that owing to the absence of a valid agreement of reference the arbitrator had no jurisdiction to make an award. A suit is competent to set aside the award. But if the party elects to file objections under s. 14 as the plaintiff did with regard to the award in dispute, and his objections are heard and disallowed, it is not open to him in my opinion to have the matter inquired into again in a separate suit.

With reference to issue No. 2, plaintiffs have in fact sued for consequential relief; they have prayed for partition by metes and bounds and for separate possession of property. The objection with regard to s. 42, Specific Relief Act, does not appear to me to be sustainable.

With regard to issue No. 3 under the Court Fees Act, Art. XVII (5), Sch. II, the court-fee in a suit to set aside an award was Rs. 10. This fee has now been raised to Rs. 15. For the reasons above set forth with regard to issue No. 1, I dismiss the suit. Defendant No. 1 to have costs.

A. *Suit dismissed.*

(11) 70 Ind. Cas. 777; A. I. R. 1922 P. C. 374; 49 I. A. 366; 50 C. 1; 37 C. L. J. 336; 44 M. L J. 758; 27 C. W. N. 660; [1923] M. W. N. 372; 18 L. W. 537 (P. C.).

(12) 19 Ind. Cas. 363; 6 S. L. R. 127.

(13) 121 Ind. Cas. 164; A. I. R. 1930 Sind 195; Ind. Rul. 1930) Sind 36.

(14) 80 Ind. Cas. 969; A. I. R. 1924 Sind 105; 17 S. L. R. 15.

(15) 92 Ind. Cas. 712; A. I. R. 1926 Lah. 125: 7 Lah. 42.

(16) 76 Ind. Cas. 953; A. I. R. 1925 Sind 42; 19 L. R. 360.

*Page of 7 Lah.—[*Ed.*]

ALLAHABAD HIGH COURT.

First Civil Appeal No. 63 of 1932.
January 4, 1931.
SULAIMAN AND YOUNG, JJ.
KRIPA RAM—DEFENDANT—APPLICANT—
versus
KUNWAR BAHADUR—PLAINTIFF—
OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Arts. 36, 48 and 49—Attachment of moveables—Removal by third person — Suit by attaching creditor — Limitation—Article applicable.

A suit by an attaching creditor against a third person who has removed and misappropriated the attached moveables in collusion with the debtor is governed not by Art. 48 or Art. 49 of the Limitation Act but by Art. 36. Articles 48 and 49 are intended to apply only to cases where the plaintiff had a right to possession of the moveable property concerned. *L. P. E. Pugh* v. *Ashutosh Sen* (1), referred to. [p. 809, col. 2.]

First Appeal from an order of the District Judge, Bareilly, dated the 19th January, 1931

Mr. *G. S. Pathak*, for the Appellant.

Mr. *P. M. L Verma*, for the Respondent.

Judgment—This is a defendant's appeal from an order of remand. The plaintiff alleged that he had brought a suit against Sewa Ram and got certain sugar and treacle belonging to his debtor attached before judgment. The present defendant, Kripa Ram, filed an objection to the attachment of the sugar and treacle claiming them as his own property; but his objection was dismissed in April, 1926, and the plaintiff's suit was decreed. Thereupon the present defendant filed another suit for a declaration of his title to the properties attached; but that suit failed. According to the plaintiff, the defendant obtained a stay order during the pendency of his declaratory suit, and in collusion with the custodian of the property, who had been appointed by the court, and the judgment-debtor, he dishonestly removed the sugar, sold the same and misappropriated the sale proceeds. This misappropriation was alleged to have taken place in May or June, 1926. The plaintiff filed a complaint in the Criminal Court on the 27th July, 1926, which, however, proved infructuous. He then filed his suit on the 29th July, 1929, the 27th and 28th July being holidays.

The claim was resisted on merits, as well as on the ground of limitation and absence of cause of action. The trial court, without going into the facts, dismissed the suit on the plea of limitation alone, holding that Art. 49 of the Limitation Act applied and the claim was more than three year after the misappropriation.

On appeal the lower Appellate Court has come to the conclusion that neither Art 48 nor 49, nor even Art. 36 of the Limitation Act applies, but that the residuary Art. 120 applies and the claim was within time. It has accordingly sent the case back to the trial court for decision on the remaining issues.

It is well settled that the residuary Art. 120 cannot be applied where there is any other special article applicable to the facts of the case. If, therefore, the suit falls under any of the other articles, this omnibus article would be inapplicable.

As observed by their Lordships of the Privy Council in the case of *L. P. E. Pugh* v. *Ashutosh Sen* (1), Arts. 48 and 49 are intended to apply to suits for recovery of specific moveable property or for compensation for the same. Article 48 is more special, whereas Art. 49 is more general. Article 48 is confined to cases where the moveable property has been lost or acquired by theft or dishonest misappropriation or conversion, and for compensation for wrongfully taking or detaining the same. Article 49 applies to other specific moveable properties or for compensation for wrongfully taking or injuring or wrongfully detaining the same. If we had to look to nothing but the first column in Art. 48, the present case, being one of dishonest misappropriation or conversion, might be thought to fall under it. But in the last column it provides that time begins to run from the date when the person having the right to the possession of the property first learns in whose possession it is. The article is accordingly intended to apply to cases where the plaintiff having the right to the possession of the property learns of the acquisition by theft or dishonest misappropriation or conversion. In the present case the plaintiff was a mere attaching creditor and had no right to the possession of the property itself. His only remedy was to put it up for sale after the decree had been obtained and realise his decretal amount, although he might himself have purchased the property in lieu of it It, therefore, seems to us that Art. 48 cannot apply to the facts of the present case. Article 49 is a more general article and applies to other cases of specific moveable property being wrong-

(1) 114 Ind. Cas 604; (1929) A. L. J. 170; A. I. R. 1929 P. C. 69; 33 C. W. N. 323; 29 L. W. 449; 10 P. L. T. 155; 6 O. W. N. 151; 49 C. L. J. 415; 31 Bom. L. R. 702; 8 Pat. 516; 56 M. L. J. 517 (P. C.).

fully taken, injured or detained. The difference between Arts. 48 and 49 is that while the former refers to cases where the property has been lost, acquired by theft or dishonest misappropriation or conversion, the latter applies to other cases of wrongfully taking, injuring or detaining moveable property. No clear authority directly in point either way has been brought to our notice. But we think that having regard to its language Art. 49 also is intended to apply to cases where the plaintiff had a right to possession of the moveable property which was wrongfully taken from him, injured or wrongfully detained. The plaintiff's remedy is to sue for the recovery of the specific moveable property or in the alternative for its compensation for wrongfully taking, injuring or wrongfully detaining. In such a case the period begins to run from the time when the property was wrongfully taken, injured or the defendants' possession became unlawful. In the present case, the plaintiff was a mere attaching creditor. He had no right to possession of the goods. His right was confined to get the goods sold through the court and realise his decretal money out of the sale proceeds. His attachment took precedence over any private transfer made by the judgment-debtor pending the same. But this right did not entitle the plaintiff to take possession of the goods direct. Article 49 accordingly is not applicable.

Article 36 is a more general article. It is applicable to suits for compensation for any malfeasance, misfeasance, or non feasance independent of contract It refers to action which may be on account of the commission of some act which is in itself unlawful, or being the improper performance of some lawful act, or the omission of some act which a person by law is bound to do. It is a general article for suits for compensation for all acts and omissions amounting to torts which are not provided for elsewhere. It, therefore, follows that as neither Art. 48 nor Art. 49 applies, Art. 36 must apply. Accordingly, the residuary Art. 120 cannot apply. But Art. 36 gives only two years' time to the plaintiff. The suit was brought more than three years after the day when the property was wrongfully taken. The claim is obviously barred by time.

Even if we assume in favour of the plaintiff that owing to a fraudulent act of the defendant he was prevented from knowing the fact of the misappropriation of the goods, and, therefore, the knowledge of his right to sue for compensation was withheld from him by the defendant, and that he can get the benefit of the provision of s 18 of the Limitation Act, the claim is hopelessly beyond time. He admitted that he came to know of the misappropriation on the 27th of July, 1926, and the period of years would begin to run from that day. The suit was filed on the 29th of July, 1929, and was therefore beyond time.

We are accordingly of opinion that the plaintiff's claim would fail on the ground of limitation. We allow the appeal and setting aside the order of the court below restore the decree of the first court dismissing the suit, with costs in all courts.

A. *Appeal allowed.*

OUDH CHIEF COURT.

Criminal Appeal No. 459 of 1930.
November 24, 1930.
POLLAN, J.
SHIAM SUNDAR—APPELLANT
versus
EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 222 (2)—Criminal misappropriation—Proof of specific sums misappropriated, whether necessary—Nature of proof required for conviction—Scope of the section.

In a charge for criminal misappropriation it is not necessary for the prosecution to prove that the accused spent the items in any particular manner The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts. *King-Emperor* v. *Kadir Bakhsh* (1), followed [p. 811, cols. 1 & 2.]

Under s. 222, cl. 2, Criminal Procedure Code, persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated any specific sum. *K. K. Mukerjee* v. *Emperor* (6), *Samiruddin Sarkar* v. *Narain Chandra Ghose* (7) and *Emperor* v. *Bhatkhande* (8), relied on. *Buddhu* v. *Babu Lal* (2), *Queen-Empress* v. *Kellie* (3), *Thomas* v. *Emperor* (4) and *Emperor* v. *Mohan Singh* (5), referred to. [p. 812, col. 1.]

Criminal Appeal against an order of the Additional Session Judge, Unao, dated the 17th of October, 1930.

Mr *J. M. Basu*, for the Appellant.

The Assistant Government Advocate (Mr. *Ali Muhammad*), for the Crown

Judgment—The appellant Shiam Sundar was the *Munim* of Lala Dwarka Nath, *Taluqdar* of Maurawan. He has been convicted on three counts of offences under s. 408 of the Indian Penal Code and he has been sentenced to five years' rigorous

imprisonment on each charge, the sentences to run concurrently. The learned Sessions Judge has written a long and elaborate judgment in which he has given in full all the accounts which were kept by this man for the period of one year during which the offences are said to have been committed. There are three charges; two of specific acts of embezzlement and one of a general defalcation evidenced by the deficiency in his balance at the end of the year. This last charge is supported by the evidence of the account books kept by the accused himself and he has been unable to show either that he has entered the accounts correctly or that he has handed over to his master the court balance. On the contrary in many cases the *kachchi rokar* showed different totals from the *pakki rokar*. At times where his balance showed a deficit he has entered fictitious items as deposits made by himself in order to square the totals, and when he was finally called upon to pay in the balance in hand he only paid in a sum of Rs. 335 odd, whereas his accounts showed, according to the learned Sessions Judge, that he should have had in hand at that time over Rs. 1,771. I may remark that the Judge has cut down this sum. According to the evidence it was considerably more. In appeal the learned Counsel for the accused has attacked the conviction on the two specific items on the ground that there is no definite proof that the accused took this money. It is true that there is no proof as to how he dealt with the money but it is proved without doubt that he received both these items, one of Rs. 15 6 11 on the 26th of September, 1928, and the other of Rs. 175 on the 12th of June, 1929, from *Ziladars* of his master, that he gave receipts for them and that he himself signed *arz irsals* which showed that these items had been paid in. Yet there is no mention of either item in the accounts and he never handed in these sums to his master or complainsed that he had given receipts without receiving the money. It is consequently too late for him to make that defence now and I hold that it is proved that he received both these items, that he did not pay them to his master, that he did not enter them into his accounts and I must infer from that that he misappropriated both these items to his own use Generally speaking, it is impossible for the prosecution to follow the money in the hands of an accused person and prove that he spent a certain specific item in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts. See *King Emperor* v. *Kadir Bakhsh* (1).

The learned Counsel for the appellant has challenged the conviction on the third charge on the ground that a conviction on a general deficiency is not in accordance with s. 222 of the Code of Criminal Procedure. Before the passing of the present Act a Bench of the Allahabad High Court ruled in the case of *Buddhu* v. *Babu Lal* (2), made the following observations:—

"Where an agent or servant has received over a period of time several sums on behalf of his employer, and has, during the same time, expended moneys on behalf of or made payments to his employer, but still a deficiency was left, for which the agent or servant would or could not account, it might be impossible to fix him with the embezzlement of any particular item received by him, although, taking the items proved on both sides of the account and his course of conduct, it might be obvious that he had embezzled a large sum of money, namely, the difference between the amounts received and those expended and accounted for."

Their Lordships then said that the question of liability in such a case had been decided by Mr. Justice Aikman in *Queen-Empress* v *Kellie* (3) and they agreed with that decision and, therefore, held that a servant charged with an offence of this nature could be legally convicted. I have been asked to consider that the law as laid down by the learned Judges of the Allahabad High Court is not good law in view of the provisions of s 222 of the present Code of Criminal Procedure of the year 1898. The second clause of that section runs as follows:—

"When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed."

Commenting on this section as far back as the year 1901 a Bench of the Madras High Court in the case of *Thomas* v. *Emperor* (4), observed that they were unable to accept the argument addressed to them that s. 222 was only intended to apply to cases where there is a general deficiency of account, and this ruling has led to many rulings by other High Courts to the effect that a number of specific charges may be included in one charge framed in accordance with the provisions of this section. There is, as far as I know only one ruling of any High Court which takes the point of view that a

(1) 8 Ind. Cas. 687; 8 A. L. J. 88; 33 A. 249; 11 Cr. L. J. 693.
(2) 18 A. 116; A. W. N. (1896) 11.
(3) 17 A. 153; A. W. N. (1895) 37.
(4) 29 M. 558.

conviction on a general deficiency of accounts is improper. This is to be found in the case of *Emperor* v. *Mohan Singh* (5). But I observe that in that case the learned Judge only expressed a grave doubt as to whether the form of the charge in which it was sent to the Sessions Judge was one which the Judge ought to have entertained and he gave his own opinion that s. 222 was meant for a case where a man is charged with embezzling the gross sum by which he appears to have meant the total of items embezzled as distinct from the difference between the sums actually received and the sums actually credited. It is probable that the learned Judge accepted the view of law taken in England by certain authorities that at a trial for embezzlement it is not sufficient to prove a general deficiency in account. But in England there is a conflict of authority on this question, and in India the courts have to construe not the English Law but the Indian Codes. A Bench of the Calcutta High Court in the case of *K. K Mukerji* v. *King-Emperor* (6) considered the object of the amendment made in the Code of Criminal Procedure by the introduction of sub s (2) of s. 222. The learned Judges pointed out that it was not to amend the Penal Code but merely to get rid of a technical difficulty in framing the charge. As the law then stood it was difficult to convict, where there was a running account and the prosecution was unable to put their hand on specific items out of which the particular sum was embezzled. There is, therefore, no question that the learned Judges were of opinion that s. 222, cl. (2) was primarily enacted so that persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated this or that specific sum. In an earlier case in *Samiruddin Sarkar* v. *Narain Chandra Ghose* (7), the same High Court held that a man who had realized by 23 rent receipts a sum of Rs. 103 and misappropriated out of this the sum of Rs. 67 could be properly convicted on a charge framed in accordance with s 222. And the Bombay High Court in *Emperor* v. *Bhatkhande* (8) has taken the same view as the Calcutta High Court and distinguished the Allahabad ruling to which I have referred—*Emperor* v. *Mohan Singh* (5).

In the present case the accused is shown to have kept false accounts. These accounts were checked by one Deokinandan and the learned Sessions Judge has considered this man to be an expert and has accepted for the most part his evidence. The accused, who is himself a *munim* and should at least understand his own accounts, has made no serious attempt to explain what he has done with the money which he is shown to have received and which he entered wrongly in his accounts. He made an elaborate written statement and when he was examined in court his usual reply to any question was that it was contained in his written statement even when it is not. For the rest he contended himself with making foolish allegations as to his master. It is certainly difficult to say with certainty the amount which he embezzled but the learned Counsel has been unable to show any item on which the learned Sessions Judge can be held to have gone wrong. He finds that the total deficiency apart from the two specific items was Rs. 1,771-7-1 and this sum was embezzled in the course of a single year. In my opinion the conviction was proper in law and in accordance with the evidence. As to the sentence I do not consider that it is excessive and I accordingly dismiss this appeal and uphold the conviction and sentence on all counts. The accused must surrender to his bail.

A. *Appeal dismissed.*

(5) 59 Ind. Cas. 372; 42 A. 522; 18 A. L J. 633; 2 U. P. L. R. (A) 360; 22 Cr. L. J. 84.

(6) 85 Ind. Cas. 372; 29 C. W. N. 54; 40 C. L. J. 555; A. I. R. 1925 Cal. 260; 26 Cr. L. J. 532.

(7) 31 C. 928.

(8) 113 Ind. Cas. 612; 53 B. 119; 30 Bom. L. R. 1530; A. I. R. 1928 Bom. 557; 30 Cr. L. J. 185.

ALLAHABAD HIGH COURT.

Civil Revision No. 397 of 1930.

January 6, 1932.

PULLAN AND NIAMAT ULLAH, JJ.

NASARULLAH—APPLICANT

versus

S. WAJID ALI AND ANOTHER—OPPOSITE PARTIES.

Mussalman Wakf Act (XLII of 1923), ss. 3, 5, 10—Failure to submit statement of accounts—Conviction—Denial of wakf—*Effect of—Jurisdiction of District Judge to impose penalty.*

Mussalman Wakf Act of 1923 is applicable to all instruments other than those to which the Musalman Wakf Validating Act of 1913 applies. [p. 814, col. 1.]

Under the Act of 1923 all that is needed to bring home the offence under s. 10 read with s. 3 is to establish by evidence that the offender is a *mutawalli* in respect of property which is *wakf* within the meaning of Act XLII of 1923, though the *mutawalli* is bound to file a statement only if he has already furnished particulars under s. 3. If the *mutawali*

has complied with the provisions of s. 3 no question as to whether he denies the *wakf* or admits it can arise because by his conduct in furnishing particulars of the *wakf* property he may be deemed to have admitted the *wakf* and he can be convicted for failure to file statement under s. 5 of the Mussalman Wakf Validating Act of 1923. [p. 814, cols. 1 & 2.]

The District Judge is the proper authority to impose the penalty provided for by s. 10. It is not necessary to proceed against the *mutawalli* in a regular Criminal Court. [p. 815, col. 1 & 2.]

Civil Revision against an order of the District Judge, Moradabad, dated the 26th August, 1930.

Mr. *A. M. Khawaja*, for the Applicant.

Mr. *A. Aziz*, for the Opposite Parties.

Pullan, J.—This is an application in revision of an order of the District Judge of Moradabad imposing a fine of Rs. 50 upon the applicant, Nasrullah, under s. 10 of the Musalman Waqf Validating Act (XLII of 1923). The proceedings are the direct outcome of former proceedings which have been the subject of a reported ruling of this court *Nasrullah Khan* v. *Wajid Ali* (1). My brother Niamatullah was a member of the Bench which decided that case. There the question was whether under s. 5 of Act XLII of 1923 the District Judge could, on the intervention of other persons, call upon a "*mutawalli*" to furnish accounts of a '*wakf*' and the view taken by the Bench was that the Act does not authorize the District Judge to pass an order that the '*mutawalli*' should file a statement of account, as contemplated by s. 5, and that the only procedure provided was to punish him under s. 10 of the same Act for not doing so. Accordingly, the same persons approached the District Judge and requested him to take action under s. 10. The Judge felt that he had to decide the question which was left undecided by this court, namely, whether the *wakf* was a *wakf* covered by Act XLII of 1923, before passing an order of fine. In my opinion, he was bound to decide this question. His jurisdiction depended on the fact that the *wakf* was one under Act XLII of 1923, and until he decided that question, he could impose no fine under the Act. Nasrullah is a person who, in compliance with s. 3 of the Act, made a statement as to the property of the *wakf* and by so doing was held in the judgment of this court to which I have already referred, to have fulfilled the requirements of s. 3 of the Act. I am of opinion that he brought himself under the other provisions of the Act also and established his own liability to furnish accounts and made himself open to punishment for not doing so. It is true that from time to time Nasrullah has denied that the property which he manages was a *wakf* within the meaning of the Act, but I cannot consider that this denial is of any value in view of his own action in complying with the requirements of the Act in the first instance. Moreover, once the learned District Judge went into the facts of the case as in my opinion, he was entitled to do he found that in the year 1842 the Commissioner passed an order showing the nature of this *wakf*, and it is clear from that order that this was a *wakf* such as is contemplated by Act XLII of 1923 and is not one of those *wakfs* which are excluded from the Act by s. 2 (*e*). Thus, in my opinion, the District Judge was in a position to deal with Nasrullah under the Act if he found that Nasrullah had not complied with the provisions of the Act in the matter of filing accounts. In such cases the District Judge appears to act *suo motu*; but in actual practice he can never take action, unless somebody calls his attention to the fact that a *mutawalli* has failed to perform his duties. The part played by the opposite party in this case is merely the part of calling to the notice on the District Judge an impropriety of which he is able to take cognizance. The Judge has imposed a fine of Rs. 50. His jurisdiction is not impeached in the grounds for revision, and although the wording of s. 10 is far from clear, I am of opinion that the District Judge is, under that section, the only person who can take proceedings and who can, therefore, impose the fine. The fine does not appear to be excessive, and I do not consider that this court has any cause to interfere with the decision. I would, therefore, dismiss this application, but I do not consider this is a case in which costs should be allowed.

Niamatullah, J.—The applicant has been held guilty of what should be considered to be an offence under s. 10 of Act XLII of 1923, and sentenced to a fine of Rs. 50. Two main questions arise in revision: first, whether the applicant incurred the penalty provided for by s. 10 of the aforesaid Act, and secondly, whether the District Judge who convicted and fined him had jurisdiction to do so.

As regards the 1st question, s. 10 makes an omission to do what is required of a *mutawalli* by s. 3 or s. 5 of the Act to

(1) 118 Ind. Cas. 717; 52 A. 167; Ind. Rul. (1929) All. 925; A. I. R. 1930 All. 81; (1930) A. L. J. 233.

be punishable. As both these sections make use of the words *mutawalli* and *wakf*, we must consider, at the threshold of the case, whether the applicant is a *mutawalli* and the property in question in the present case is '*wakf*.' '*Wakf*' has been so defined in Act XLII of 1923, Section 2 (*e*), as to include all endowments other than those to which the Musalman Wakf Validiting Act (VI of 1913) applies. In other words, all *wakfs* other than '*wakfsalal aulad*' are within the purview of Act XLII of 1923. The property in dispute in this case has been in possession of the applicant and his predecessors for a considerable length of time, and its character is clearly determined by an order of the Commissioner passed in 1843 The learned District Judge has referred to the terms of that order which satisfied him that the property in question was '*wakf*' for the support and upkeep of a mosque and incidental purposes, including the maintenance of a '*muazzin*' who is to be selected from among the descendants of the original *mutawalli* the applicant's ancestor. Nothing has been said on behalf of the applicant which can induce me to differ from the view taken by the learned District Judge as regards the character of the property in possession of the applicant I am, therefore, in entire agreement with my learned colleague that the property in question is *wakf* and not dedicated for the personal benefit of the descendants or family of the *wakif*. The applicant himself professed to act as *mutawalli*, and thereby admitted his position as such, in furnishing particulars of the property in his possession, as required by s. 3 of Act XLII of 1923 It follows from what has been said already that the property in question is '*wakf*' within the meaning of that Act and the applicant is the *mutawalli* thereof.

It is necessary to refer to two sections of Act XLII of 1923 before examining the terms of s. 10. Section 3 requires every *mutawalli* to furnish particulars of the '*wakf*' property in his possession Section 5 requires him, if he has furnished particulars under s. 3, to file a statement of account within three months after the 31st day of March following the passing of Act XLII, of 1923 and thereafter within 3 months after the 31st March of each year. Section 10 makes failure to furnish particulars as required by s. 3 or to file statements of accounts as required by s. 5 punishable with fine, which may extend to Rs. 500. It has been argued before us that Act XL I of 1923 is applicable only to cases in which a '*mutawalli*' accepts his position as such and furnishes particulars required by s. 3 This contention is correct so far as the '*mutawalli's*' omission to file a statement of accounts under s. 5 is concerned, because he has to file such statement only if he has already furnished particulars under s. 3. It is, however, incorrect to say that a person is not liable to be punished under s. 10 at all, unless he admits certain property in his possession to be '*wakf*' and himself to be the '*mutawalli*' thereof. Section 10 makes omission to furnish particulars as required by s. 3 also punishable. All that is needed to bring home an offence under s. 10 read with s. 3 to a defaulting' *mutawalli*' is to establish by evidence that he is a '*mutawalli*' in respect of property which is '*wakf*' within the meaning of Act XLII of 1923. Whether the character of the property as '*wakf*' and his own position as '*mutawalli*' are admitted or are established by evidence, if denied, s. 10 is equally applicable' if a '*mutawalli*' has failed to comply with s. 3. If a '*mutawalli*' has complied with the provisions of s. 3, no question as to whether he denies the '*wakf*' or admits it can arise, because by his conduct in furnishing particulars of the '*wakf*' property he must be deemed to have admitted the '*wakf*' and his own position as '*mutawalli*'.

The applicant in this case furnished particulars of the property in question under s 3. He cannot, therefore, be convicted of an offence under s 10 read with s. 3. Nor has the learned District Judge convicted him of such offence. But, having furnished particulars required by s. 3, he was also under an obligation to file a statement of account in terms of s. 5. He omitted to do so. Section 10 makes such omission to be as much punishable as the non compliance with the provisions of s. 3, the penalty in either case being the same. In these circumstances, I do not think there is anything wanting in the case before us to complete an offence under s 10 of Act XLII of 1923, and so far as the applicant's liability to pay the penalty provided for by s. 10 is concerned, there can be no doubt.

The next question, which is not free from difficulty, relates to the court empowered to enforce the penal provision contained in s. 10 I was a member of the Bench which decided *Nasarullah Khan* v *Wajid Ali* (1) which is, in fact, an earlier stage of the case before us. The only question which called for decision in that case was whether

s. 5 of Act XLII of 1923, apart from laying an obligation on a '*mutawalli*' to furnish a statement of account, also contemplated regular proceedings being taken before the District Judge for the determination of the question whether a certain property is '*wakf*' or whether a certain person is a '*mutawalli*' in respect thereof. It was held that s. 5 did not empower the District Judge to decide these questions in a proceeding taken by interested parties under s. 5. The court went on to observe that the determination of such questions may be necessary if the '*mutawalli*' is prosecuted for an offence under s. 10, and the alleged '*mutawalli*' denies facts which establish his offence and which have to be enquired into. As regards the forum, it was assumed rather than decided that the District Judge can enforce the penal provision contained in s. 10 Any remark, therefore, as to whether the District Judge could impose the fine provided for by s. 10 is in the nature of an *obiter dictum*. The question has directly arisen in the present case and must be decided, though, I may note, that it was not argued before us that any court, other than that of the District Judge, could impose a fine under s. 10. The applicant's contention was that no court had jurisdiction to do so in the circumstances of the case. We cannot, however, refuse to take notice of the narrower question, namely, whether the District Judge as such can take cognizance of a case under s 10. On the one hand, it can be reasonably contended that s. 10 contains merely a penal provision which declares a certain omission to be an offence punishable with fine, that the manner in which and the court by which the penalty is to be enforced are outside the purview of Act XLII of 1923, and that the '*mutawalli*' should be punished by a regular Criminal Court in accordance with the provisions of the Criminal Procedure Code. There are many enactments, besides the Indian Penal Code, which declare certain acts and omissions to be offences, though the trial for those offences is regulated not by those Acts but by the general Criminal Law. On the other hand, the whole scheme of Act XLII of 1923 suggests that the District Judge is the proper authority to impose the penalty provided for by s. 10 in respect of certain duties enjoined by that Act. Section 11 requires the Local Government to make rules "to carry into effect the purposes of this Act". This seems to include rules prescribing the forum and the procedure for enforcement of the penalty laid down in s. 10. No rules have, however, been framed by the Local Government in this behalf. In this state of things, I am inclined to the view, though not without hesitation, that the District Judge is the proper authority to enforce the provision contained in s. 10 of Act XLII of 1923. For these reasons, I concur with my learned brother in dismissing this revision.

By the Court.—We dismiss this application. The parties shall bear their own costs.

A. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

First Civil Appeal No 68 of 1928.
November 21, 1930.
WILD, J. C. AND RUCHAND, A. J. C.
HEERJI JIVRAJ—APPELLANT
versus
FIRM OF VALABRAM MULJI—
RESPONDENTS

Provincial Insolvency Act (V of 1920), ss. 44 (2), 79—Adjudication of firm—Discharge of partners—Subsequent arrest of partner for private debts, legality of—Adjudication, effect of—Failure of court to frame rules—Procedure.

It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings, and a partner whose property has vested in the Official Receiver for the benefit of his creditors should not be allowed to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed in an application directed against him but against a firm in which he was a partner or because, for the sake of convenience the court passed an order against the firm and did not pass a specific order against each individual partner in such firm. *Sadler* v. *Whiteman* (1) and *In re The Firm of Hiralal Shivnarain* (2), referred to. [p. 816, col 2.]

The failure of the Court to frame rules as required by s. 79, Provincial Insolvency Act, cannot override the provision of the law which exempts an insolvent from liability for his debts prior to the date of his insolvency on his obtaining a discharge. In the absence of such rules the provisions of the Civil Procedure Code apply to insolvency proceedings in view of s. 5 of the Provincial Insolvency Act. [*ibid*]

First Appeal against an order of the Additional Judicial Commissioner, Sind.

Mr. *L. P. Ferro*, for the Appellant.

Mr. *Kimatrai Bhojraj*, for the Respondents.

Judgment—This appeal arises out of execution proceedings. The appellant Heerji Jivraj worked at one time as a partner in the firm of Rawji Hirji. That firm was adjudicated insolvent in Insolvency No. 3 of 1921. On 2nd June, 1925, the learned Judicial Commissioner

Mr. Kennedy passed an order of discharge which read as follows:—

"I discharge the firm of Rawji Hirji (Rawji Jethabhai and Hirji Jivraj, insolvents."

The firm of Jivraj Lakhamsi had obtained a decree in Suit No. 19 of 1915 against the firm of "Hirji Jivraj said to consist of more than one partner and carrying on business in Karachi by their Managing partner Hirji Jivraj." It appears that this firm did not prove their claim against Hirji Jivraj in the Insolvency proceedings. But by an award made between the firm of Jivraj Lakhamsi and Messrs. Valabhram Mulji a charge was created in favour of the latter on the decretal amount due to the firm of Jivraj Lakhamsi in the suit of 1915 from the firm of Hirji Jivraj On the strength of that award Messrs. Valabhram Mulji applied for execution of the decree in favour of Jivraj Lakhamsi against Hirji Jivraj by arrest of Hirji Jivraj. He objected to his arrest on two grounds: First that the award creating a mortgage in favour of Messrs. Valabhram Mulji did not amount to an assignment of the decree so as to enable them to apply for execution of the decree and secondly that as he was a discharged insolvent he could not be arrested in respect of a debt due by him prior to his insolvency. The learned Additional Judicial Commissioner disallowed both these objections and ordered a warrant of arrest to issue. It is against that decision that the appellant has come to us in appeal.

In dealing with the 2nd objection the learned Additional Judicial Commissioner has said:—

"It is further contended that the judgment-debtor has filed his insolvency application and has been discharged. The firm of Rowji Hirji in which the judgment-debtor was a partner was declared insolvent and later the partners were discharged. The judgment-debtor firm in the present proceedings is however a different firm; the debts of the present firm would not have been proveable in the insolvency proceedings of the other firm in which the judgment-debtor was a partner."

With all respect, we are afraid, we cannot accept this view to be correct.

A partnership has in law no corporate personal existence distinct from that of its individual partners; and the firm name is a mere expression, not a legal entity, per Farwell L. J. in *Sadler* v. *Whiteman* (1). An order passed in the insolvency proceedings against a firm is an order passed against each individual partner in that firm, *In re The firm of Hiralal Shivnarain* (2). When an order of adjudication is passed either under the Provincial or the Presidency Towns Insolvency Act against a firm, not only does the property of the firm vest in the Official Receiver or Assignee, as the case may be, but also the property of each individual partner vests in him. Both these Acts provide for the procedure which the Official Receiver or Assignee, as the case may be, is required to follow for dealing with such property. He is required to apply the partnership property in discharge of the partnership debts and likewise to apply the private property of each individual partner in discharge of his private debts in the first instance, and it is only when there is a surplus of either kind of property that he has power to apply it in payments of the other debts. It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings, and it would be unfair to an insolvent whose property has vested in the Official Receiver for the benefit of his creditors to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed in an application directed against him but against a firm in which he was a partner or because for the sake of convenience the court passed an order against the firm and did not pass a specific order against each individual partner in such firm.

Mr. Kimatrai has argued that in 1921 when an order of adjudication was passed against the firm of Rawji Hirji this court had not framed rules as required by s. 79 of the Provincial Insolvency Act, that in the absence of those rules the private creditors of each individual partner in an insolvent firm were not served with notices of insolvency and that there was no procedure under which such creditors could prove their claims. But the obvious answer to that argument is that the failure of the court to frame rules cannot override the provision of the law which exempts an insolvent from liability of his debts prior to the date of his insolvency on his obtaining a discharge. In the absence of such rules the provisions of the Civil Procedure Code apply to insolvency proceedings in view of s. 5 of the Act.

For these reasons we think that the appellant was exempt from arrest in execution of this decree.

Under the circumstances it is not necessary for us to go into the other question, namely whether the respondent is an assignee of the decree or not.

(1) (1910) 1 K. B. 868, at p. 889.

(2) 97 Ind. Cas. 446; 21 S. L. R. 280; A. I. R. 1927 Sind 18.

We, accordingly, allow this appeal but make no order as to costs.

A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Civil Revision No. 566 of 1930.
January 12, 1932.
PULLAN AND NIAMAT ULLAH, JJ.
KR. BHAGWANT SINGH—APPLICANT
versus
BHAO SINGH AND ANOTHER—
OPPOSITE PARTIES.

Allahabad High Court General Rules, Chap. I, r. 1—Costs—Pleader's-fees—Fees not actually paid—Mere execution of promissory note—Fees, whether taxable—Decree—Amendment—Duty of Court.

Rule 1 of Chap. I of the General Rules of the Allahabad High Court relating to Pleader's fees contemplates the actual payment and not a mere promise to pay even though such promise is evidenced by a promissory note, bond or other instrument, and, therefore, if payment of fees is not actually made to the Pleader it could not be taxed as part of the costs incurred by the party who is alleged to have made payment. The legal aspect of the matter is not altered by the fact that the Judge had permitted payment by means of a promissory note. [p. 818, cols. 1 & 2.]

The duty of preparing the decree in accordance with the judgment primarily rests with the court and not with the interested party. [p. 818, col. 2; p.819, col. 1.]

When the judgment awards costs to a party it implies the costs deemed to be such according to the rules. [*ibid.*]

Civil Revision against a decision of the District Judge, Budaun, dated the 5th November, 1930.

Mr. *A. Sanyal*, for the Applicant.

Mr. *P. M. L. Verma*, for the Opposite Parties.

Judgment.—This is an application for revision directed against an order passed by the learned District Judge of Budaun in proceedings taken by the present applicant for amendment of a decree passed by him, which decree was subsequently appealed from and affirmed by this court.

The applicant was the plaintiff in the suit originally instituted in the court of the Subordinate Judge of Budaun. It was decreed *ex parte*. An application for an order to set aside the *ex parte* decree was dismissed by that court; but on appeal to this court it was successful. The suit was however, remanded not to the court of the Subordinate Judge, but to that of the District Judge for trial on the merits. It was eventually dismissed by the District Judge with costs. Included in the memo. of costs appended to the decree prepared by the District Judge were two sums taxed as costs properly incurred by the plaintiff: one was a sum of Rs. 735, paid to Babu Sheo Narain Jafa, senior Vakil, and the other a sum of Rs. 299 paid to Babu Prem Mohan Lal, junior Vakil. It is conceded that these sums were not paid to the aforesaid Vakils in cash and that a promissory note was executed by *Musammat* Pania, wife and *'mukhtar i am'* of one of the defendants, in favour of both the Vakils. The certificates filed by the Vakils themselves showed that cash had not been paid, but that a promissory note had been executed in their favour in lieu of the unpaid part of their fees.

The defendants, on whose behalf the above named Vakils appeared, were in Jail at the time the certificates were filed. The lower Court has mentioned in its judgment that the promissory note was executed with the permission of the then District Judge. The learned Counsel for the applicant has controverted this fact and drawn our attention to an application, dated 8th March, 1927, presented by B. Sheo Narain Jafa, in which he represented to the District Judge that his clients were in Jail, that those who looked after the case on their behalf had paid only Rs. 140 in respect of the fees due to the Vakils who acted for them and that, if payment was not made, they would not file certificates and the defendants would, on the one hand, not be entitled to have the legal practitioners' fees taxed, and would, on the other hand, be liable to pay on a suit being brought by the legal practitioners for recovery of their fees. Babu Sheo Narain Jafa requested the District Judge by this application to send for the defendants, who, as already stated, were in Jail, so that they might execute promissory notes in favour of the Vakils, who would, in that case, file certificates and the fees thus paid would be taxed as costs recoverable from the opposite party. The only order which the learned District Judge noted on this application was "permitted." Reading this order in the context in which it occurs, we think that what the learned District Judge meant was that the defendants be allowed to come to the court to settle matters with their Vakils. We are not aware whether this was done; but it is certain that no promissory note was executed by the defendants themselves and it was *Musammat* Pania who did so. A promissory note was filed with the certificates in which the Vakils acknowledged receipt of a certain amount as fees by obtaining execution of

the promissory note. The promissory note bears an order of the District Judge that the same be retained with the record. In these circumstances, it is not correct to say that the promissory note executed in favour of the two Vakils, which constituted the payment referred to in their certificates was executed with the permission of the District Judge, though he was aware of the circumstances and the manner in which payment had been made; but even assuming that the District Judge expressly permitted this mode of payment, the legal aspect of the matter is not different. Rule 1, Chap. XXI, of the General Rules applicable to the Subordinate Courts distinctly provides that "in drawing up a decree or order no fee to any legal practitioner not appearing for the Crown or Government or the Court of Wards as a party shall be allowed on taxation between party and party or shall be included in any decree or order.....unless the *munsarim* or, on application to the Judge, the Judge is satisfied that the fees was paid to such legal practitioner at or before the hearing of the suit. . . . and unless at or before such time there shall have been delivered to the *munsarim* a certificate signed by the legal practitioner certifying the amount of the fee or fees *actually paid to him* for his own actual use and benefit by or on behalf of his client." There can be no doubt that the rule quoted above contemplates actual payment, and not a mere promise to pay, even though such promise is evidenced by a promissory note, bond or any other instrument. The learned District Judge was apparently under the impression that there is no law which made payment to a legal practitioner in the manner adopted in this case as no payment for the purposes of taxation of costs. The rule already referred to by us has the force of law, and is clearly against the view accepted by the learned Judge.

We think that Babu Sheo Narain Jafa did not correctly represent matters to the learned District Judge in stating that, if payments were made to the legal practitioners by promissory notes being executed in their favour, the same would be taxed as costs in the suit. Either he did not acquaint himself with the rules on the subject, or knew the rule quoted above and yet assured the District Judge that such costs could be taxed. In either case, his action was unjustified. He was apparently anxious to secure the payment of fees to himself and his junior colleague by promissory notes being executed in their favour. The District Judge was not opposed to that mode of payment, as he had been given to understand that payments made in that manner would be taxed as costs incurred in the suit. Be that as it may, we entertain no doubt that the payment of fees to legal practitioner must be made in the manner laid down by r. 1, Chap. XXI, already referred to, and that, if payment is not actually made but is only promised, it cannot be taxed as part of the costs incurred by the party alleged to have made the payment. This being so, the sums of Rs 735, taxed as fee paid to Babu Sheo Narain Jafa and Rs. 299 taxed as fee paid to Babu Prem Mohan Lal, should not have been taxed.

The learned Advocate for the opposite party has contended that the lower Court had no jurisdiction to order an amendment of its own decree, which became merged in the decree of this court passed on appeal and that, therefore, the application for amendment of decree was incompetent. According to his contention, the application for amendment of decree must be made to the Court of Appeal, that is, to the High Court in this case. It is not necessary for us to decide the legal question involved in this contention, because assuming the application for amendment of the decree should have been made to this court in the first instance, we can treat and are inclined to treat the application for revision as such application and dispose of the matter on the merits to prevent multiplicity of proceedings. We have already expressed our opinion on the merits, and whether we entertain the application as one for revision or as an original application made to this court, our view is the same. There is no doubt that the District Judge who took a contrary view acted in contravention of r. 1, Chap. XXI and to that extent he exercised his jurisdiction illegally. If, therefore, we entertain the application as revision, the ground for interference under s. 115, Civil Procedure Code clearly exists.

The learned Counsel for the opposite party also contended that the applicant was guilty of laches and his belated application for amendment of decree should not have been entertained by the District Judge and should not be entertained by this court. We do not think there is any force in this argument. It is the duty of a court to prepare its decree in accordance with its judgment, and if there is any

variance between the two it must correct the decree so as to make it in confirmity with the judgment. The duty primarily rests with the court, and not with any interested party, to apply to that court for amendment of the decree. When a judgment awards costs to a party, it implies costs deemed to be such according to rules. If a decree includes costs not legally taxable, it cannot be said to be in accordance with the judgment. Moreover, there are no facts on which the plea of laches or undue delay can be founded.

In view of the circumstances already stated, we allow this application inpart and direct that the decree of the court of the District Judge, Budaun, in suit No. 70 of 1925, be so amended as to exclude the sums of Rs. 735 and Rs. 299, shown as fees paid to the defendants' Pleaders, namely, Babu Sheo Narain Jafa and Babu Prem Mohan Lal, from the memorandum of costs incurred by the defendants.

Another prayer, which the applicant made to this court in revision, and to the learned District Judge in the first instance, was that a sum of Rs. 450, paid to the legal practitioners in miscellaneous proceedings taken for an order to set aside the *ex parte* decree, should not be taxed in its entirety Rs. 225 was paid to the legal practitioners of each of two sets of defendants, whose defence proceeded on a common ground. The decree prepared by the trial court allows the entire sum of Rs. 450 as part of the costs incurred by the defendants against whom the plaintiff-applicant's suit was dismissed. There is no mistake in the decree in this respect. The suit was dismissed with costs, which means costs incurred by all the defendants against whom the plaintiff's suit was dismissed. We are satisfied that the order passed by the learned District Judge in this connection is not open to challenge. The application is dismissed in that respect.

In the circumstances of this case, parties shall bear their own costs of the proceedings taken before this court and those in the court of the District Judge by an application for amendment.

A. *Application dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

Civil Suit No. 331 of 1929.

January 8, 1931.

MILNS, A. J. C.

Musammat ZENAB BAI—PLAINTIFF

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANTS.

Income Tax Act (XI of 922), ss. 48, 67—Assessment of firm—Refusal of refund by income-tax authorities—Suit in Civil Court—Maintainability—Death of partner before assessment—Claim for refund by legatee, competency of.

A suit for refund of income-tax refused by the income-tax authorities is not barred by s 67, Income-Tax Act, which refers only to assessment. [p. 820, col. 1]

The estate of a dead person is not liable to be assessed to income-tax and s 48 (2) of the Act cannot apply to a person who died before the assessment on his own income was made *Mitchell* v. *McNeil & Co.* (1), relied on [p. 820, col. 2]

Where a partner of a firm died in 1926 having bequeathed his share of the profits to his widow and the widow and the partners applied under s 48, Income Tax Act, for a refund of tax assessed for the year 1927-1928:

Held, that as the deceased partner or his estate was at no time entitled to a refund inasmuch as he was not a person who paid the assessment on the firm nor liable to pay that assessment or any part of it, and as he could not himself be an assessee for the year 1927-1928, his legatee could not claim as heir to or constructive owner of any refund. [*ibid.*]

Mr *Kimatrai Bhojraj*, for the Plaintiff

Mr. *C. M. Lobo*, Government Pleader, for the Defendants.

Judgment.—This is a suit by the plaintiff for recovery of a refund of income-tax paid, which refund has been refused by the Income tax authorities.

The facts are as follows:— There was a firm of Messrs. Kadirbhoy Karimji doing business as timber merchants at Karachi; in December, 1926, the senior partner of the firm, Kadirbhoy, died, and the partnership was dissolved. The firm was assessed for their own financial year from October to October; thus for the income-tax year April 1927-1928, the firm's accounting period was October, 1925, to October, 1926. Kadirbhoy bequeathed to his widow, the plaintiff, his share of the profits of the business. The firm was treated as a registered firm and the firm's profits were taxed for the income-tax year 1927-1928 at the maximum rate of 18 pies. The partners under s. 48 of the Act applied for a refund of the tax, the rate at which their individual incomes were liable being less than the maximum rate. Plaintiff also applied as a partner for a refund for the tax payable on the profits which she received under her deceased husband's will. This

application was refused on the ground that she was not a partner in the firm and was not entitled to a refund under s. 48 of the Act.

Two issues have been tried as preliminary issues. The first is, (Issue No. 7 of the issues framed).

"Is the suit as framed competent?"

And the second is, (2nd part of issue No. 3 of issues framed).

"Has the plaintiff any claim to refund?"

On the first of these issues, I hold in the affirmative and on the second, in the negative.

On the first preliminary issue, the defendants rely on s. 67 of the Income-Tax Act which bars any suit to modify or set aside any assessment made under the Act. Defendant contends that the Act is complete in itself, that the Act gives all the necessary remedies and s. 67 bars access to the Civil Courts.

Plaintiff, on the other hand, contends that ss. 30, 32 and 33 are limited in their scope; they apply to appeals against assessments made; they do not apply to the grant of refunds or to refusals to grant refunds. There is no provision made in the Act for appeals against a refusal to give a refund under s. 48 and the suit does not raise any question of assessment so as to be barred by s. 67.

The Government Pleader on behalf of the defendant replies that under rr. 36 and 37 the procedure in the case of refunds is practically the same as the procedure for assessment, and the question of refund and assessment is dealt with in one proceeding and under one form, and that assessment is determined after deciding whether a refund is or is not due.

I cannot hold, however, that because the procedure for grant of refund is ordinarily made part of the assessment procedure, that, therefore, it becomes a question of assessment. The provisions for assessment and the provisions for granting refund are in the Act entirely separate. A person who is not an assessee may be entitled to a refund. Section 67 refers to assessment. There does not appear to be any provision for appeal against an order refusing a refund. I hold that s. 67 which refers only to assessment does not bar the suit.

The second preliminary issue is whether plaintiff is legally entitled to any refund: Under s 3 the profits of a firm are liable to income-tax. Under s. 26 as it stood in March, 1928, the assessment was to be made on the firm as constituted at the time the assessment was made; the assessees were the members of the firm as constituted at the time the assessment was made. Thus plaintiff's husband was not liable for the assessment or any part of it payable by the firm for the year 1927-1928, the assessment having been made in March, 1928, and plaintiff's husband having died in December, 1926.

Further, the estate of a dead person cannot be assessed to income-tax, *Mitchell* v. *McNeil & Co.* (1). The Income-tax authorities were not represented in that case, but the Government Pleader has accepted the proposition laid down therein. Section 48 (2) applies in the case of a member of a firm when the rate of income-tax applicable to his private income is less than the rate at which his firm is assessed. It applies then to an assessee of the year for which the assessment is made or a person who would have been an assessee if his own income apart from that of the firm reached the minimum; that is, it cannot apply to a person who died before the assessment on his own income is made. There was no rate of income-tax applicable to plaintiff's husband for the year 1927-28 as he or his estate was not liable to income-tax for that year.

Plaintiff's husband or his estate was at no time entitled to a refund (*a*) because he was not a person who paid the assessment on the firm for 1927-1928 nor was he liable to pay that assessment or any part of it (*b*) as he could not himself have been an assessee in the assessment year 1927-28. Plaintiff then cannot claim as heir to, or constructive owner of, any refund.

The only provision of law which plaintiff has put forward is s 48 of the Income Tax Act, and it is clear that plaintiff was not a partner in the firm so as to be entitled to the benefit of the provisions of that section. She was merely entitled under the will of her deceased husband to certain profits which had accrued to the deceased.

Mr. Kimatrai has argued that there has been a change in the constitution of the firm, and that defendant has detained one-seventh of the refund due to the firm which belonged to the deceased partner and the plaintiff is entitled to that refund. There is, however, no question of detention of part of the refund, the refund is payable to each individual partner if his total income is assessable at a rate less than the maximum.

(1) 103 Ind. Cas. 120; 31 C. W. N. 630; A .I. R. 1927 Cal. 518.

There is no question of a lump refund to be divided amongst the partners.

Plaintiff's suit is, therefore, dismissed with costs.

A. *Suit dismissed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1151 of 1929
December 21, 1931.
BENNET, J.
MOHAMMAD ABDUL JAMIL
PLAINTIFF—APPELLANT
versus
Hafiz MANZOOR AHMAD AND OTHERS
DEFENDANTS—RESPONDENTS

Easements Act (V of 1882), ss. 60-B, 64—Building of wall—Failure to protest—Implied license—Erection of work of permanent character—Power to revoke—Right to injunction.

Where the defendant to whom a wall belonged knew that the plaintiff, an adjacent house owner, was constructing a wall above the defendant's wall and did not make any protest until it was built :

Held, that there was an implied grant of license by the defendant to the plaintiff that could not be revoked as the plaintiff had executed a work of a permanent character and incurred expenses in the execution and the defendant was not entitled to demolish the wall.

Section 64 of the Easements Act does not apply to case where the work is of a permanent character.

Second Appeal from a decision of the Second Subordinate Judge, Saharanpur, dated the 31st May, 1929.

Mr. *Akhtar Husain Khan*, for the Appellant.

Mr. *M. A. Aziz*, for the Respondents.

Judgment.—This is a second appeal by the plaintiff against a decree of the lower Appellate Court which reduced the damages of the court of first instance from Rs. 50 to Rs. 25 for demolition of a wall, and which refused the remedy of injunction to the plaintiff. The defendants have filed a cross-objection claiming that on the findings of the lower Appellate Court the plaintiff is not entitled to any damages. The findings of the lower Appellate Court were that "the wall which was in dispute was the wall of the upper story of the house. The wall of the lower story on which the upper wall rested belongs admittedly to the defendants. The upper wall however appears to have been made by the plaintiff. Having regard however to the fact that the defendants must have had knowledge of the construction of the wall and to the absence of any protest on their part it may, I think, be inferred that the wall was built either with the implied consent or without any protest on the part of the defendants. Learned Counsel for the plaintiff contended that this would amount to an implied grant of licence by conduct of the grantor within the meaning of s. 54 of the Easements Act. Learned Counsel for defendants said that he could produce rulings to the contrary, but he could not find any such rulings. I consider that on the finding of the lower Appellate Court there was an implied grant of licence by the defendants to the plaintiff to construct the wall of this upper story on the wall of the lower story which belonged to the defendants. The two houses are side by side and the lower wall is apparently between the two houses separating them.

The next point is contained in the judgment of the lower Appellate Court which is as follows:

"The wall at best had been erected with the leave and the premission of the defendants. It is not shown that the licence cannot be revoked by the defendants".

Now under s. 60 (*b*) of the Easements Act a licence may be revoked unless the licensee acting upon the licence has executed a work of a permanent character and incurred expenses in the execution. The lower Appellate Court has found

"The only loss that has been suffered by the plaintiff is the loss of construction of the wall. I am of opinion that a sum of Rs. 25 would be adequate as damages in this case".

This is a finding, therefore, that the plaintiff has incurred Rs. 25 in expense for the execution of this work. Learned Counsel argued that it was not proved to be a work of a permanent character. In the plaint it was alleged that the plaintiff had erected this wall and that the defendant had pulled it down. Those facts were admitted in the written statement and it was not alleged in the written statement that the wall was of a temporary and not of a permanent character. I consider *prima facie* that a wall which costs Rs. 25 to construct would be a wall of a permanent character and the finding of the lower Appellate Court appears to me to indicate that the wall was of a permanent character. Learned Counsel for respondent-defendants was given an opportunity to refer to the evidence of their witnesses on the record and he stated that he could not find any evidence that the wall was of a temporary character. Under these circumstances I consider that the finding of the lower Appellate Court is that the wall was of a permanent character and that expense had been incurred in its execution. Therefore under s. 60 (*b*) the defendants cannot revoke their licence.

Some further argument was made by learned Counsel, after the arguments were closed, with reference to s 64 of the Easements Act and learned Counsel contended that under that section there should be no injunction issued to the plaintiff and that he would only be entitled to the Rs. 25 compensation granted by the lower Appellate Court. I do not think that that section applies to the present case, which is a case where the licence cannot be revoked because a work of a permanent character has been made, and where s. 60 (*b*) applies. I consider that s. 64 applies to a case where there is not a work of a permanent character and that in the present case s. 64 does not apply.

For these reasons I dismiss the cross-objection with costs and I allow the appeal with costs as the appellant succeeds in the major portion of his claim, that is that he should get an injunction. I restore the decree of the court of first instance with this difference that the appellant, although he will have an injunction, will only have Rs. 25 damages instead of Rs. 50 decreed by the court of first instance. The appellant will also receive his costs in the lower Appellate Court. In this court costs will embrace costs on the higher scale.

Permission to file a Letters Patent Appeal is granted.

A. *Appeal allowed.*

MADRAS HIGH COURT.

FULL BENCH.

Original Side Appeal No. 37 of 1931.

December 4, 1931.

BEASLEY, C. J., RAMESAM AND CORNISH, JJ.

FATMA BI—APPELLANT

versus

NAGOORKHAN AND ANOTHER—RESPONDENTS.

Limitation Act (IX of 1908), s. 4—Presidency Towns Insolvency Act (III of 1909), s. 46 (3)—Limitation expiring on holiday—Adjudication of debtor on re-opening day—Whether debt provable without filing suit.

Where the period of limitation for a suit to recover a debt expires on a holiday and the judgment-debtor is adjudicated an insolvent on the next re-opening day, the debt can be proved in the insolvency. It is not necessary for the creditor to file a suit on the re-opening day for keeping the debt alive. *In re General Rolling Stock Co.* (1) and *Ex parte, Lancaster Banking Corporation, In re Westby* (2), relied on. [p.823, col. 2.]

Appeal from a judgment of Mr. Justice Waller, dated the 28th January 1931, and passed in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 73 of 1931, in Petition No. 441 of 1928, *In the matter of* A. S. D. Batcha Sahib, an insolvent.

Mr. *A. Ramachandra Aiyar*, for the Appellant.

Mr. *K. Krishnaswami Aiyangar*, for the Respondent.

Beasley, C. J.—This is an appeal from a judgment of Waller, J., sitting in insolvency. The Official Assignee allowed the claim of the appellant here which was in respect of a debt alleged to be due to her on a promissory note by the insolvent. A creditor preferred an appeal from the order of the Official Assignee to Waller, J., and he allowed the appeal.

The facts can be briefly stated. The insolvent owed the appellant money on a promissory note. The last payment was a payment of interest on the 20th of October, 1925. No further payment was made by the insolvent and the debt would have become and did become barred by limitation on the 20th October, 1928. Up to that time the appellant had taken no steps to enforce her claim against the insolvent on the promissory note. The 20th of October, which was a Saturday, was a public holiday and the High Court was closed. The next day, the 21st, was a Sunday and the court was closed that day also. On the 22nd October the appellant could have filed a suit against the insolvent upon the promissory note and enforced her claim because by reason of the provisions of s. 4 of the Limitation Act, the insolvent could not successfully set up as bar to the suit the Limitation Act. Section 4 of the Limitation Act is as follows:—

"Where the period of limitation prescribed for any suit, appeal or application expires on a day when the court is closed, the suit, appeal or application may be instituted, preferred or made on the day that the court re-opens."

However, on the morning of the 22nd October, 1928, the insolvent was adjudicated an insolvent and it is admitted that no steps were taken thereafter with regard to this claim by the appellant until she preferred her claim in the insolvency. Waller, J., held that, as the claim on the promissory note was barred on the 20th October and as the appellant had not filed a suit on the 22nd October, the first available day after that, her claim was one which could not be proved in the insolvency and accordingly allowed the appeal.

What we have got to consider here is,

what effect an adjudication in insolvency has upon s. 4 of the Limitation Act. It is argued by the respondent here that it has no effect at all and that the appellant's claim was barred by limitation on October 20th and she did not avail herself of the time given her for enforcing her claim against the insolvent on October 22nd. On behalf of the appellant it is argued that when the adjudication took place on the 22nd October, no further steps could reasonably be taken by the appellant and that her claim was one to be dealt with in the insolvency. What has got to be considered is the meaning of s. 46 (3) of the Presidency Towns Insolvency Act. That states that all debts to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable in insolvency. It is argued on behalf of the appellant that on the 22nd October this was a debt to which the debtor was subject and that being so, it was provable in insolvency. It seems to me that at any rate throughout the 22nd October this was a debt to which the debtor was subject and the question as to whether or not it was provable cannot depend upon the action taken thereafter by the creditor. It is argued by the respondent that it was a conditional debt only, conditional on the appellant filing a suit against the debtor. In my view, on that date the appellant had an enforceable claim against the debtor and the debtor had a debt which could be enforced against him. We have now got to consider whether it was necessary, the adjudication having supervened, for the creditor to file a suit. After the adjudication of a debtor all his property by reason of s. 17 of the Presidency Towns Insolvency Act vests in the Official Assignee and no one can bring any suit to enforce any right against the property without the leave of the court It is argued here that, notwithstanding this vesting of the insolvent's property in the Official Assignee, the appellant should have come to court on the 22nd October after the adjudication of the insolvent and applied for leave to file a suit. That would have meant, of course, that he would have had to pay court-fee on his plaint and that if, on an examination of his claim, it appeared to the Official Assignee that the claim was a good one, the filing of the suit would have been entirely unnecessary and would have cast upon the estate of the insolvent the burden of paying the costs of that plaint. A position somewhat similar, though the facts were slightly different arose in *In re General Rolling Stock Co.* (1). In that case, which was a company winding-up case, it is true that it appears that the debt was not barred at the time of the making of the winding-up order but became time-barred during the pendency of the liquidation. It was held there that the creditor had a good claim. On page 649* James, L J. says.

"After a winding-up order has been made, no action is to be brought by a creditor except by the special leave of the Court."

Here, after an adjudication no suit can be filed by a creditor against a debtor without the leave of the court. Then he proceeds:

"And it cannot have been the intention of the Legislature that special leave to bring an action should be given merely in order to get rid of the Statute of Limitations."

Here the obvious effect of filing a suit on the 22nd October would have been to deprive the debtor of his plea that the suit was barred by limitation. That seems to me to be the same thing as filing a suit for the purpose of getting rid of the Limitation Act; nor does it seem to me to make any difference at all that in that case there was at the time of the winding-up order a debt which was not barred by limitation. Here was an enforceable debt; before it could be enforced the adjudication happened and it seems to me to be quite an unreasonable thing to force a creditor under such circumstances to apply for the leave of the court to file a suit. Supposing the court refused leave, then, although the Limitation Act gave the creditor the right to file a suit and enforce his claim on that day, that right would be taken away by the action of the court. Another case to which reference can usefully be made is *Ex parte Lancaster Banking Corporation, In re Westby* (2). There Bacon, C. J., says:

"When a bankruptcy ensues, there is an end to the operation of that Statute with reference to debtor and creditor. The debtor's rights are established and the creditor's rights are established in the bankruptcy and the Statute of Limitations has no application at all to such a case, or to the principles by which it is governed."

It is perfectly clear that but for the intervention of the insolvency here, if the creditor did not file the suit on October 22nd she could not enforce her claim. What I have said here must not be taken as meaning that s. 4 of the Limitation Act extends the period of limitation. It does not; it merely gives an extended time to a creditor in which to enforce his claim under certain circumstances. For these reasons,

(2) (1872) 7 Ch. App. 646; 41 L. J. Ch. 732; 27 L. T. 88; 20 W. R. 762.

(2) (1879) 10 Ch. D. 776.

*Page of (1872) 7 Ch. App.—[*Ed.*]

the appeal must be allowed with costs (throughout) on the O. S. scale.

Ramesam, J.—I agree.

Cornish, J—I agree.

N K./A. *Appeal allowed*

ALLAHABAD HIGH COURT.

Letters Patent Appeal No. 14 of 1931.

January 29, 1932.

SIR GRIMWOOD MEARS, C. J., AND SEN, J.

BALBHADDAR UPADHYA—DEFENDANT —APPELLANT

versus

SHEO MANGAL AND OTHERS—PLAINTIFFS —RESPONDENTS.

Mortgage—Merger—Intention to keep alive—Express undertaking by purchaser to discharge subsequent mortgage, effect of.

Where a transferee of immoveable property, having a prior lien upon the property, purchases the property with a distinct stipulation with his vendor to discharge with the purchase-money left in deposit with him his own lien and that of another mortgagee of date subsequent to his own and the transferee satisfies his own encumbrance but fails to discharge the other incumbrance he cannot be allowed in equity to use his paid up mortgage or charge as a shield against the latter. *Muhammad Sadiq* v. *Ghaus Mohammad* (1) and *Makhan Lal* v. *Nathi* (2), followed.

Letters Patent Appeal against a judgment of Justice Sir Dalal, dated the 1st December, 1930, in Second Appeal No. 691 of 1929.

Mr *U. S. Bajpai*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

Judgment.—This is a defendants' appeal and arises out of a suit for sale on a mortgage dated the 1st of June, 1916. Lachhmi Narayan and others were possessed of 2 *bighas* 13 *biswas* of fixed rate holding in *Mouza* Sipahi. On the 27th of May, 1912, they made a usufructuary mortgage of this property in favour of Balbhaddar. On the 1st of June, 1916, they made a simple mortgage of the said property in favour of Murlidhar, father of the plaintiffs for Rs. 400. On the 30th of August, 1921, they executed another simple mortgage of the same property in favour of Balbhaddar's grandson in consideration of Rs. 1,425. It has been found as a fact by the court below and the finding is not challenged in appeal that the real mortgagee under this document was Balbhaddar himself. The details of the mortgage consideration were as follows:—Rs. 499 were left with the mortgagee for payment to himself on account of his prior mortgage dated the 27th of May, 1912, and a sum of Rs. 799 was left with him for payment to Murlidhar on account of the mortgage bond now in suit. On the 31st of August, 1921, the mortgagors executed another simple mortgage in favour of Balbhaddar of the fixed rate holding and also a house.

The suit was resisted by Balbhaddar on the ground that he was entitled to hold as a shield against the plaintiff his prior mortgage, dated the 27th of May, 1912. This plea was replied by the court of first instance and the defendant-appellant has lost in all courts.

Under the contract, dated the 30th of August, 1921, Balbhaddar had undertaken not only to pay up his own mortgage dated the 27th of May, 1912, but also to pay up the mortgage bond in favour of the plaintiff, dated the 1st of June, 1916. He never paid this mortgage. Having regard to the nature and character of the transaction as embodied in the document, dated the 30th of August, 1921, it is patently clear that it could never have been in the contemplation of Balbhaddar that he should use his mortgage bond, dated the 27th of May, 1912, as a shield as against the plaintiff because the parties had agreed that both the mortgages of 1912 and 1916 should be completely wiped off. Whether a mortgage paid off is kept alive or extinguished depends upon the intention of the parties and ordinarily such an intention is to be presumed where it would be for the preservation or protection of one's contract against a third party. This is the settled law and is founded upon considerations of justice, equity and good conscience. But this rule is not to be extended to the case of a transferee, who has flagrantly failed to carry out his obligation in full under his contract with his transferor. Where a transferee of immoveable property, having a prior lien upon the property, purchases the property with a distinct stipulation with his vendor to discharge with the purchase money left in deposit with him his own lien and that of another mortgagee (of a date subsequent to his own) and the transferee satisfies his own incumbrance but fails to discharge the other incumbrance, he cannot be allowed in equity to use his paid up mortgage or charge as a shield against the latter [*Muhammad Sadiq* v. *Ghaus Muhammad* (1), *Makhan Lal* v. *Nathi* (2)] We are of opinion that the view taken by the learned Single Judge of this court is perfectly correct. We accordingly dismiss this appeal with costs.

A *Appeal dismissed.*

(1) 7 Ind. Cas. 200; 33 A. 101; 7 A. L. J. 914.

(2) 74 Ind. Cas. 640; 21 A. L. J. 382; A. I. R. 1923 All 509.

RANGOON HIGH COURT.

First Civil Appeal No. 78 of 1931.
July 21, 1931.
PAGE C. J. AND SEN, J.
J. G. ROBINSON—APPELLANT
versus
THE CENTRAL BANK OF INDIA, LTD.—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 131—Negligence of collecting Bank, test of.

Whether or not a collecting Bank is guilty of negligence under s. 131, Negotiable Instruments Act, is a question the determination of which depends upon the particular circumstances of each case. The test of negligence is whether the transaction of paying in any given cheque is so out of the ordinary course that it ought to arouse doubts in the Bankers' mind and cause them to make enquiry. [p. 826, col. 1]

First Appeal from a judgment of this Court on the Original Side in Civil Regular No. 346 of 1930

Mr. *Leach*, for the Appellant.

Mr. *F. Jeejeebhoy*, for the Respondent.

Page, C. J.—This is a suit brought by the drawer of a crossed cheque against the respondent Bank to recover damages for conversion or, in the alternative, for the value of the cheque as money had and received by the respondent Bank to the plaintiff's use. The material section of the Negotiable Instruments Act (XXVI of 1881), is s. 131, which runs as follows:

"A Banker who has in good faith and without negligence received payment for a customer of a cheque crossed generally or specially to himself shall not, in case the title to the cheque proves defective, incur any liability to the true owner of the cheque by reason only of having received such payment."

Now, it is not contended on behalf of the appellant that in connection with the receipt of this cheque by the respondent Bank the Bank was not acting *bona fide*. The allegation of the appellant is that in receiving payment of this cheque and crediting the proceeds to the account of a customer the respondent Bank was guilty of negligence. It is common ground that the customer to whose account the proceeds were credited had no title to the cheque, and that, as the cheque was not delivered to the Corporation, the plaintiff at all material times was the true owner of the cheque within s. 131. In these circumstances the plaintiff alleged that the respondent Bank were guilty of conversion, or, in the alternative, that the plaintiff was entitled to recover the proceeds of the cheque as money had and received to his use.

It appears that on the 12th October the cheque in question was drawn on Dawsons Bank, Limited, Rangoon, in favour of the Corporation of Rangoon or order for Rs. 2,361-12-0. It was drawn on behalf of the plaintiff J. G. Robinson by his attorney R. S. Dantra, and it is common ground that Mr. Dantra had authority to draw this cheque as the attorney and agent of the plaintiff. The cheque was drawn in favour of the Corporation of Rangoon in payment of Municipal taxes due from the plaintiff to the Corporation. Now, Mr Dantra had in his employment a clerk, Manilal Shivchand Shah, who was known to Mr. Dantra, and to those who worked with and under him, as M. S. Shah. It so happened that Mr. Dantra at the time when this cheque was drawn was also the agent of Dawsons Bank, and there can be little doubt that Manilal Shivchand Shah had become acquainted, at any rate to some extent, with the nature of the business carried on by Bankers. Mr. Dantra having drawn this cheque on behalf of the plaintiff in favour of the Corporation, handed the cheque to Shah with a direction that Shah should deliver it to the Corporation. Shah failed to do so, and nothing more is known about the history of this cheque until the 5th of December, 1929, when Shah, having forged what purported to be an endorsement on the cheque on behalf of the Corporation, proceeded to the respondent Bank, and tendered this cheque over the counter to one of the clerks of the Bank for collection. At the same time Manilal Shivchand instructed the Bank to credit the proceeds of the cheque to a savings Bank account which he had opened with the respondent Bank on the 8th of October, 1929, in favour of an infant girl, Savitabai, of whom he asserted that he was the guardian. The clerk to whom the cheque was tendered accepted the cheque; endorsed it with a rubber stamp to this effect "Payee's endorsement guaranteed. For the Central Bank of India, Ltd., Agent," and took the cheque to one Tracy, who was the assistant accountant of the respondent Bank, and at that time was acting as the chief accountant. What Tracy did after he had received the cheque may be stated in his own words:

"I received Ex. 'A' (*i. e.*, the cheque in suit from Maung Nyun Pe (the clerk to whom the cheque had been tendered by Shah), with several other cheques. I remember receiving this cheque Ex. A, and I noticed that it was to order and was a crossed cheque payable to the Corporation of Rangoon. I also noticed that it purported to be endorsed by the Chief Superintendent of the Corporation of Rangoon. I did not know that there was such an official as the Chief Superintendent of the Cor-

poration of Rangoon. I knew that Manilal Shivchand was not a person whose endorsement I could guarantee. That was why I did not sign the guarantee-stamp. I knew that there was a Savings Bank account which Manilal Shivchand had opened in the name of his infant daughter. I had no time to enquire why Manilal Shivchand was paying into this Savings Bank account a crossed cheque drawn in favour of the Corporation of Rangoon.

"*Q* : The reason that you did not enquire why this crossed cheque drawn in favour of the Corporation was being paid into the Savings Bank account of this infant was that you had no time?

"*A* : I knew that the cheque had been drawn by Mr. R. S. Dantra. who was the agent of Dawsons Bank and I thought that he would be in the best position to know whether the cheque was properly endorsed. I knew his signature very well. Those are the reasons why I did not enquire. I did not communicate with Mr. Dantra when the cheque had been presented to me for signature. I passed them on to the casheir for collection, I do not know who was the cashier of Drawsons Bank at that time. The money was collected by my Bank from Dawsons Bank and credited to the Savings Bank account."

The cheque, without the guarantee of the payee's endorsement having been signed on behalf of the respondent Bank, was returned to Dawsons Bank, and cleared the same day through Lloyd's Bank, and the proceeds of the cheque were immediately credited to the Savings Bank account of the infant of whom Manilal Shivchand had stated that he was the guardian. On the 9th December, when this cheque for Rs. 2,361-12 0 was credited to the Savings Bank account of Savitabai, that account stood in credit to an amount of Rs. 5. On the 10th December Manilal Shivchand drew out of the Savings Bank account Rs. 2,360 leaving a balance of Rs. 6-12-0. This account was not further operated upon. In January, 1930, Manilal Shivchand Shah absconded, and when the Corporation served upon the plaintiff a further demand for payment of the taxes the fraud was discovered.

The question that falls to be determined is whether in those circumstances the respondent Bank in receiving payment of this cheque, and crediting the proceeds to the Savings Bank account of the infant Savitabai, was guilty of negligence.

Now, what is the duty of a collecting Bank having regard to the terms of s. 131 of the Negotiable Instruments Act (XXVI of 1881). In *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Limited* (1), Lord Dunedin, delivering the judgment of the Privy Council, observed :

"In the case of *Commissioners of State Savings Bank* v. *Permewan, Wright & Co.* (2), in the High Court of Australia, Isaacs, J., says: 'Apart from the well-established rule that whether or not the evidence establishes that a person acts without negligence is a question of fact, the legal principles found in *Morison* v. *London County and Westminster Bank* (3) and relevant to the present case are(*i*) that the question should in strictness be determined separately with regard to each cheque; (*ii*) that the test of negligence is whether the transaction of paying in any given cheque was so out of the ordinary course that it ought to have aroused [doubts in the Banker's mind, and caused them to make inquiry,' If there be inserted after the words 'given cheque' the words 'coupled with the circumstances antecedent and present,' their Lordships think this is an accurate statement of the law."

Applying the law thus laid down to the facts of the present case the question is whether in the circumstances disclosed in the evidence the respondent Bank was guilty of negligence in receiving payment of the cheque in suit.

On behalf of the respondent Bank it is contended that however suspicious might be the circumstances in connection with the presentation of a crossed cheque for collection, the collecting Bank is under no obligation to make any enquiry for the purpose of ascertaining whether the cheque is a genuine cheque, or whether the endorsements upon the cheque are genuine or forged endorsements. It is urged that the sole obligation of a collecting Bank, if it suspects, or is put on enquiry as to, the genuineness of a crossed cheque or the endorsement thereon is to refrain from signing the guarantee of the collecting Bank that the endorsements are genuine, and that if it forwards the cheque to the paying Bank in that condition it is absolved from further responsibility in the matter. It is contended that in such circumstances, according to the usage of Bankers obtaining in Rangoon, the paying Bank must elect to pay or not to pay the cheque on its own responsibility and if it pays the cheque the collecting Bank is at liberty, however extravagant the endorsements on the cheque might be, to credit the proceeds to the account of the customer who had tendered it for collection. In the first place I am not satisfied that any such usage has been proved in the present case. Whether the usage exists or not is a question of fact, and the usage upon which the respondent Bank relies is that in the case of every crossed cheque the collecting Bank signs a form guaranteeing the genuineness of the endorsement on the cheque. The only

(1) (1920) A. C 683 at p, 688; 89 L. J: P. C. 181; 123 L. T. 34; 36 T. L. R, 305.

(2) 19 C. L. R. 457 at p. 478.

(3) (1914) 3 K. B. 356; 83 L. J. K. B. 1202; 111 L. T. 114; 19 Com. Cas. 273; 58 S. J. 453; 30 T. L. R. 461.

evidence in support of such an usage is to be found in the testimony of Mr. Thakur, the agent of the respondent Bank. In corroboration of the usage as stated by Mr. Thakur reliance was placed on the evidence of Mr. Wing, the accountant of Dawsons Bank. The evidence of Mr. Wing, however, is not to the same effect. He stated that "*If there is any irregularity in the cheque* it is usual for the collecting Bank to guarantee the endorsements. If there is no such guarantee it is the usual practice to return the cheque unpaid. If there is no such guarantee the paying Bank pays the amount of the cheque on its own responsibility." I am not satisfied upon the evidence adduced in the present case that an usage in the form stated by Mr. Thakur has been proved, but in my opinion, assuming that an usage of this nature obtains amongst Bankers in Rangoon, whatever rights or obligations may arise thereunder as between the collecting and the paying Bank, conformity to such an usage would not *ipso facto*, as held by the learned trial Judge, absolve the collecting Bank from all further responsibility in connection with the receipt of a crossed cheque. In every case the test to be applied in order to ascertain whether the collecting Bank was guilty of negligence within s. 131 of the Negotiable Instruments Act is that laid down by Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Limited* (1).

Now, did the collecting Bank in the present case, having regard to the facts disclosed in the evidence, take such reasonable care in connection with the payment of this cheque as a member of the mercantile community conversant with banking business would be expected to take? What information had the respondent Bank in its possession when Manilal Shivchand tendered this cheque for collection? Manilal Shivchand was known to the accountant Tracy whose duty it was to exercise reasonable care in this matter on behalf of the respondent Bank. Tracy knew that Manilal Shivchand was merely a clerk, and in his evidence Tracy admitted that Manilal Shivchand was not a person upon whose statement the Bank would guarantee the endorsement on a cheque. The respondent Bank knew that this crossed cheque had been drawn in favour of a public body, the Corporation of Rangoon, for Rs. 2,361-12-0. It knew that the cheque was being tendered for collection by Manilal Shivchand, a man for no substance. It knew that the cheque was presented for collection with instructions that the proceeds should be credited to the Savings Bank account of an infant, of whom Manilal Shivchand claimed to be the guardian. And the Bank also knew that the cheque was endorsed with a rubber stamp "Chief Superintendent, Corporation of Rangoon," and an illegible scribble purporting to be the name of that official written in ink under the rubber stamp. I should have expected that a gentleman entrusted with the duties of the Chief Accountant of the respondent Bank would have been acquainted with the names and designation of the senior officials of the Corporation As a matter of fact, there is no such official as the Chief Superintendent of the Corporation of Rangoon. But for the purpose of this case I will assume that the Chief Accountant of the respondent Bank was not to be deemed to have notice that there is not such an official as the Chief Superintendent of the Corporation of Rangoon. Tracy in his evidence stated that he did not know whether there was such an official or not, and there is no reason why his statement should not be believed. At any rate, the endorsement of the cheque would not have enlightened him, because what purported to be the signature of that official was a mere scribble that was wholly illegible.

In my opinion, however, the most casual perusal of the cheque ought to have aroused suspicion, and put the Bank on enquiry as to the genuineness of this endorsement, for it was a crossed cheque drawn in favour of a public body for Rs. 2,361-12-0, and tendered by a mere clerk for collection and payment into a small Savings Bank account opened by the clerk in favour of an infant of whom he was the guardian. In *Commissioners af Taxation* v. *English, Scottish and Australian Bank, Limited* (1) where the question was whether the Bank was negligent in crediting a customer's account with the proceeds of a stolen bearer cheque drawn in payment of taxes, Lord Dunedin observed:

"If the cheque had been in a different form things might well have been otherwise. Their Lordships cannot help remarking that to a certain extent the appellants have themselves to think for what has happened, owing to the terms of their instructions. If they had insisted that in the case of payments made at the office, as they did not insist in the case of drafts sent by post, the cheques should be made payable to the Commissioners of Taxation, then there would have been something on the face of the cheque to arouse inquiry. The fact that the cheque was to bearer distinguishes this case from *Commissioners of State Savings Bank* v. *Permewan, Wright & Co.* (2)

In that case, in the case of thirty-six cheques, the cheques were drawn in favour of the Commissioners, or had such markings on them as showed as they were drawn for the purpose of paying duties. This was held, their Lordships think rightly, to be a circumstance which ought to have put the Bank on inquiry when such cheques were presented by a private individual."

Again, in *Ross* v. *London County Westminster and Parr's Bank, Limited* (4), Bailhache, J., stated that

"the question is whether the employees of a Bank authorised to receive its customers' cheques, to whom a private customer presents for collection a crossed cheque payable to and endorsed by a public official, ought, before treating the customer as the person entitled to the cheque and receiving payment of it for him, to make inquiry as to the customer's title to the cheque, and in the event of their failing to do so are guilty of negligence.....It is, therefore, necessary to consider whether a Bank cashier of ordinary intelligence and care on having these cheques presented to him by a private customer of the Bank would be informed by the terms of the cheques themselves that it was open to doubt whether the customer had a good title to them. Each of the cheques in question was drawn payable to—"The Officer in charge, Estates Office, Canadian Overseas Military Forces," and was endorsed by that officer under the same description Each cheque bore upon its face the fact that it was payable to the officer of a public department and not to a private person, and the endorsemont on each cheque showed that it was being negotiated by that officer. It is not in accordance with the ordinary course of business that a cheque so drawn and endorsed should be used for the purpose of paying the debt of a private individual. It was highly improbable that the officer-in-charge of the Estates Office would hand to de Volpi cheques in this form with the intention that the latter should pay them into his private account. It, therefore, seems to me that when de Volpi presented these cheques with a view to having them credited to his private account a cashier of ordinary intelligence and experience should have been put on inquiry whether or not the credit ought to be made. I have come to the conclusion that the employees of the defendants in treating de Volpi as the person entitled to the cheques and in receiving or assisting in receiving payment of the cheques for him without making any inquiry whether he was entitled to the cheques, failed to execrise due care and were guilty of negligence, and, therefore, that the defendants are not within the protection of s. 82."

In that case the Statute that was applicable was s. 82 of the English Bills of Exchange Act, 1882, which is to the same effect as s. 131 of the Indian Negotiable Instruments Act. I respectfully agree with the observations of Bailhache, J., in *Ross's case*,(4) confirmed as they were by the Court of Appeal in *A. L. Underwood, Limited* v. *Bank of Liverpool and Martins* (5) and applying the test laid down by Lord Dunedin in *Commissioners of Taxation* v. *English, Scottish and Australian Bank, Limited* (7), I am clearly of opinion that the respondent Bank on receiving the cheque in suit tendered for collection by Manilal Shivchand in order that the proceeds should be credited to Savitabai's account was under an obligation to make enquiry as to whether the customer was entitled to receive the proceeds of this cheque, having regard to the form of the cheque and its endorsement, and the circumstances in which it was tendered for collection. But the case does not rest there, because at the time when it was tendered for collection there was also a further endorsement on this cheque "Pay signature guarantee for Savitabai Manilal Shivchand." Now, although these words do not make sense if strictly read, it may be taken, I think, that Manilal Shivchand endorsed the cheque in this way because he thought it well to volunteer his personal guarantee of the genuineness of the endorsement which purported to be that of the Chief Superintendent of the Corporation of Rangoon. Why should Manilal Shivchand have volunteered to give such a guarantee unless he was afraid that the respondent Bank, acting with such prudence as a Banker is bound to exercise in the course of his business, would suspect the genuineness of what purported to be the endorsement of the Corporation of Rangoon? Tracy observing this endorsement by Manilal Shivchand on the back of the cheque, at once decided that he could not act upon such an endorsement, or place any reliance on a guarantee by such a person as Manilal Shivchand. In those circumstances, in my opinion the respondent Bank was bound to satisfy itself that Savitabai was entitled to receive payment of this cheque before it credited the proceeds to the Savings Bank account that had been opened in her name.

Now, with all this information in its possession creating suspicion as to the genuineness of this endorsement, were any enquiries instituted by Tracy or any one else on behalf of the respondent Bank to ascertain whether the endorsement was genuine or a forgery, or whether Savitabai was entitled to receive payment of the cheque? None whatever. Why not Because the respondent Bank, forsooth contended that it was absolved from all responsibility in connection with the collection of this cheque after having sent the cheque to Dawsons Bank without a guarantee by the Bank that the endorsement was genuine. Such a contention in my opinion, is wholly misconceived

(4) (1919) 1 K. B. 678 at pp. 685, 686; 88 L. J. K. B. 927; 120 L. T. 636; 635 J. 411; 35 T. L. R. 315.
(5) (1924) 1 K. B. 776 at p. 793.

and unsustainable. Why was it that this cheque was paid? I am satisfied and hold that it was paid because of the negligent conduct of the respondent Bank. The simplest inquiry would have disclosed that the endorsement on this cheque, purporting to be that of the Corporation, was a forgery. If the respondent Bank had sent the cheque to the officers of the Corporation of Rangoon for perusal and information as to whether the endorsement purporting to be that of the Chief Superintendent of the Corporation of Rangoon was genuine or not, they would have received an answer back in less than ten minutes. The answer would have been that the endorsement was a forgery, and the reasonable suspicion as to its genuineness that the respondent Bank had entertained would have been justified. Or, again, if the respondent Bank had informed Dawsons Bank of the facts in its possession in connection with the receipt of this cheque, and the circumstances in which it had been tendered for collection by Manilal Shivchand, no one can doubt that Dawsons Bank would not have paid the cheque. Mr. Tracy in his evidence stated that he made no enquiries because he had "no time", and it was urged by the learned Advocate on behalf of the respondent Bank that business could not be carried on if Banks were bound to investigate the right of their customers to receive the proceeds of all cheques that were tendered for collection. No doubt that is so, and I do not suggest that Banks are under any such obligation, but the answer to the respondent's contention is that

"if Banks for fear of offending their customers will not make inquiries into unusual circumstances, they must take with the benefit of not annoying their customer the risk of liability because they do not inquire;"

per Scrutton, L J., in *A. L. Underwood, Limited* v. *Bank of Liverpool and Martins* (5). Now, this case turns solely upon an issue of fact, and no question of law is involved, for whether or not a collecting Bank is guilty of negligence within s. 131 of the Negotiable Instruments Act must depend upon the particular cirumstances obtaining in each case. In the present case, with all due respect to the learned trial Judge, I have no doubt that the respondent Bank was guilty of negligence in receiving payment of this cheque for Savitabai, and that the plaintiff is entitled to a decree. The result is that the appeal is allowed, the decree of the trial court set aside, and a decree passed in favour of the plaintiff for the sum claimed, and interest thereon at 6 per cent. from the date of judgment, and costs in both courts. The learned Advocate on behalf of the appellant is entitled to special costs as awarded to the learned Advocate for the respondent Bank in the trial Court.

Sen, J.—I agree.

R. L. *Appeal allowed.*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 1520 of 1929.

January 18, 1932.

PULLAN AND NIAMAT ULLAH, JJ.

ZIA UDDIN AHMAD KHAN AND ANOTHER—DEFENDANTS—APPELLANT

versus

AKBAR ALI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 62, 116—Suit to enforce covenant for indemnity in mortgage-deed—Article applicable—Cause of action—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Application for personal decree—Sale, whether condition precedent.

Where a mortgage-deed contained a provision that if in consequence of a dispute raised by a third person any loss is occasioned to the mortgagee the person and other property of the executant will be liable to make good the loss, and a third person having obtained a declaratory decree that the property could not be sold in execution of the decree obtained upon the mortgage, the mortgagee instituted a suit for breach of the covenant of indemnity contained in the mortgage :

Held, that the suit was not governed by Art. 62 but by Art. 116 of the Limitation Act and the cause of action arose when it was declared that the plaintiff was not entitled to have the house sold in execution of his decree. [p 830, col. 2.]

The fact that a consent decree had been passed on a mortgage-deed cannot have the effect of making a covenant for indemnity contained in the deed inoperative. [p. 831, col. 1.]

Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgage property, O. XXXIV, r. 6, Civil Procedure Code, can have no application. [p. 831, col. 2.]

Second Appeal from a decision of the District Judge, Agra, dated the 30th April, 1929.

Mr. *A. M. Khawaja*, for the Appellants.

Mr. *A. Dharam Das*, for the Respondents.

Judgment.—This is an appeal by the defendants and arises out of a suit brought by the plaintiff respondent for recovery of Rs 3,580 10 as compensation for breach of a covenant contained in a mortgage-deed executed by the defendant-appellants in his favour. Both the courts have decreed the suit. The facts are that the defendants executed, on the 15th March, 1923, a deed of simple mortgage for Rs. 1,600 in favour of the plaintiff, hypothecating a house situate in Firozabad, District Agra. The plaintiff

brought Suit No. 10 of 1925 in the court of the Subordinate Judge, Agra, for recovery of principal and interest due under the aforesaid deed by sale of the mortgaged-property. A decree for sale under O. XXXIV, r. 4, Civil Procedure Code, was passed in favour of the plaintiff, Ismail Khan, the first cousin of the defendants, objected, in execution proceedings, to the house being sold on the allegation that it belonged to him and not to the mortgagors, the defendants. His objection was disallowed, and thereupon he instituted a regular suit for the declaration of his right to the house in question, which was dismissed by the 1st court but decreed, by the court of the District Judge on appeal, on the 15th February, 1928. It was declared that the house in question could not be sold in execution of the decree obtained by the plaintiff on foot of his mortgage-deed. Consequently the decree became infructuous A suit for a simple money decree was barred on that date.

The suit, which has given rise to this appeal, was instituted on the 10th July, 1928, for damages for breach of a covenant contained in the mortgage-deed, which runs thus:—

"If, in consequence of any act done by me, the executant, or my heirs or in consequence of a dispute raised by a third person, any loss is occasioned to the mortgagee as regards the sum due under the deed, the person and the other property of the executant shall be made liable to make good the loss and costs etc".

The cause of action for the relief claimed by the plaintiff is said to have accrued to him on the 15th February, 1928, when the house mortgaged by the defendant appellants under the deed, dated 15th March, 1923, was declared to be the property of Ismail Khan and not liable to be sold in execution of the decree in favour of the plaintiff.

The main contention put forward in appeal is that the plaintiff's claim, which is in substance a claim to the original debt with interest, is barred by limitation. It is argued that, in so far as the plaintiff is claiming to recover money advanced to the defendants, Art. 62 of the Indian limitation Act is applicable and that the period of limitation began to run from the date of the deed. That article provides for suits "for money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use". We are clearly of opinion that that article has no application to the suit as framed by the plaintiff-respondent. It is not one for recovery of any money advanced by the plaintiff to the defendant for the use of the former, but seeks to enforce a covenant which is in the nature of indemnity. The learned Counsel for the defendant-appellants referred to a large number of rulings in which Art. 62 was applied to cases in which the plaintiff sought to recover the consideration paid by him under a mortgage or a lease, which failed. In none of those cases did the plaintiff seek to enforce a specific covenant of indemnity contained in the deed in determining the particular article of the Limitation Act applicable to a case much depends on the nature of the plaintiff's claim. If the plaintiff is entitled so to frame his suit as to make a certain article giving a favourable period of limitation applicable, it is not a valid objection to say that he could have framed it otherwise so as to make a less favourable article applicable. We should, therefore, find an appropriate article applicable to a suit for compensation for breach of a covenent of indemnity. In *Collector of Mirzapur* v. *Dawan Singh* (1), Art. 116 has been applied and, in our opinion, correctly. It provides for suits "for compensation for the breach of a contract in writing registered". The only question is as to when the period of six years, provided for by it, begins to run. It was contended that as the mortgaged-property did not belong to the mortgagor, a breach of the covenant occurred on the date of the mortgage. We do not think this argument can hold good in the circumstances of the case before us. The covenant already quoted entitles the plaintiff to sue for compensation on loss being occasioned to him in consequence of a dispute raised by a third-party. The plaintiff's right to recover damages, therefore, accrued when loss was occasioned to him in consequence of a dispute raised by Ismail Khan for the first time in execution proceedings taken in 1926, that is, within three years before the present suit was instutited. The loss was occasioned to the plaintiff when it was declared in the suit brought by Ismail Khan that the plaintiff-respondent was not entitled to have the house sold in execution of his own decree. This was on the 15th February, 1928, well within 3 years. It was on this date that the plaintiff was deprived of his security and of the right to have the mortgaged house sold in execution of his decree for sale. In these circumstances, we hold that the plaintiff's suit, which is governed by Art. 116 of the

(1) 30 A. 400; A. W. N. (1908) 160; 5 A. L. J 486.

Limitation Act, is within limitation, whether it is reckoned from the date of Ismail Khan's objection or the date of the decree nullifying the decree in favour of the plaintiff.

The lower Appellate Court has applied Art. 97 of the Limitation Act, holding that the consideration paid by the plaintiff-respondent under the mortgage-deed executed by the defendant-appellants in his favour failed on a decree being passed in favour of Ismail Khan. The learned Counsel for the appellants made reference to a number of cases bearing on Art. 97; but it is not necessary for us to consider the applicability of Art. 97 or of the cases relied on by him in the view of the case we have taken.

It was also argued by the learned Counsel for the appellants that the decree obtained by the plaintiff-respondent for sale of the house mortgaged to him was based on a compromise and that the mortgage-deed having thus become merged in the compromise and the decree based thereon, no covenant contained in the mortgage deed can be enforced. We are satisfied that this contention is not well founded. It may be correct to say that the mortgage-debt became converted into a judgment debt; but this cannot have the effect of making all collateral covenants contained in the mortgage deed inoperative. The compromise related to the controversy in the suit, namely, the amount to which the plaintiff-respondent was entitled and his right to obtain satisfaction of such amount by sale of the mortgaged-property. It did not relate to any other matter, nor did the decree passed on the basis of such compromise. There was no question as regards the plaintiff's right to recover compensation for loss occasioned to him in consequence of a dispute raised by a third person. For these reasons, we hold that the covenant now sued on was unaffected by the compromise and the decree passed in pursuance thereof.

It was further contended that the only remedy which the plaintiff respondent had was to obtain a decree over, under O. XXXIV, r. 6, Civil Procedure Code. We do not think that the plaintiff could obtain a simple money decree under that rule before the sale of the mortgaged-property and the sale proceedings proving insufficient to satisfy the mortgage money. Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgaged-property at the date of the mortgage, O. XXXIV, r. 6, can have no application.

The appeal fails on all the grounds urged on behalf of the appellants. It is accordingly dismissed with costs, including Counsel's fees in this court on the higher scale.

A. *Appeal dismissed.*

RANGOON HIGH COURT.

First Civil Appeal No. 69 of 1931.

July 13, 1931.

PAGE, C. J. AND SEN, J.

SHADEO—APPELLANT

versus

MAHRAJI AND ANOTHER—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 25—Suit for custody of ward—Maintainability—Act, whether exhaustive.

Though the Guardians and Wards Act does not purport to be exhaustive of all questions that arise with respect to the custody of a minor yet in cases to which s 25 applies it is incumbent upon the guardian to proceed by way of application under the Guardians and Wards Act, and not by a regular suit. *Sham Lal* v. *Bindo* (2), *Besant* v. *Narayaniah* (3), *Utma Kuar* v. *Bhagwanta Kuar* (4), *Arunachellam Pillay* v. *Iyama* (5) and *Sathi* v. *Ramandi Pandaram* (6), followed. *Ma Shwe Ge* v. *Maung Shwe Pan* (1), *Sharifa* v. *Munekhan* (7), *Achratlal Jekisandas* v. *Chimanlal Parbhudas* (8), and *Mathuraban* v. *D. Tewary* (9), distinguished. [p. 832, col. 1.]

First Appeal from the judgment of this Court on the Original Side in Civil Regular No. 605 of 1930.

Mr. *Rauf*, for the Appellant.

Miss *Dantra*, for the Respondent.

Page, C. J.—This is a suit by a Hindu husband for an order that his minor wife should be restored to his custody as her guardian. The judgment of the lower Court and of this Court proceeds upon the footing (*i*) that the suit was brought by the plaintiff as the guardian of his wife and not otherwise; and (*ii*) that the plaintiff claimed that the custody of his wife should be restored to him as she had been removed from his custody by her parents. That this is the plaintiff's cause of action is clear from para. 3 of the plaint, and para. 7 of the written statement.

The learned trial Judge held (*i*) that the plaintiff was a major at the time when he filed his suit; and (*ii*) that, having regard to the provisions of the Guardians and Wards Act (VIII of 1890), the remedy of the plaintiff lay in an application under s. 25 of the Guardians and Wards Act, and not

by filing a regular suit. The suit was dismissed.

At the hearing of the appeal it was urged by the learned Advocate for the appellant that, although the appellant was entitled to apply that the custody of his wife should be restored to him under the Guardians and Wards Act, he had an alternative right to file a regular suit in that behalf.

Now, it is common ground that before the passing of the Guardians and Wards Act the plaintiff would have been entitled to file a regular suit for the restoration of the custody of his minor wife, and it is urged on behalf of the appellant that the right which he possessed before the passing of the Act was not taken away by express terms or necessary implication by the Guardians and Wards Act. The Guardians and Wards Act does not purport to be exhaustive of all questions that arise with respect to the custody of a minor, but, in my opinion, in cases to which s. 25 applies it is incumbent upon the guardian to proceed by way of application under the Guardians and Wards Act, and not by a regular suit. The case is concluded, in my opinion, against the appellant both on principle and by authority. As was pointed out in *Ma Shwe Ge* v. *Maung Shwe Pan* (1), and *Sham Lal* v. *Bindo* (2) to hold that there were concurrent or alternative remedies open to a guardian who sought the restoration of the custody of a minor would lead to great inconvenience, for it might be that there would be subsisting at the same time an order made in a suit by one person claiming to be the guardian of a minor for restoration of the minor to his custody, and also an order made on an application under the Guardians and Wards Act by another person claiming to be the guardian of the minor for an order that the custody of the minor should be restored to him. In my opinion the object of the Legislature in enacting s. 25 of the Guardians and Wards Act was that in cases to which that section applied the guardian should be bound to seek redress as provided in the Act, and not otherwise. I am of opinion that the case is also concluded against the appellant by authority. In *Besant* v. *Narayaniah* (3) Lord Parker, in delivering the judgment of the Privy Council, laid down that

"the District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890."

That was a case in which a natural guardian sought to recover the custody of his minor sons. Prior to *Besant's case* (3) the same view had been expressed by the Allahabad High Court in *Sham Lal* v. *Bindo* (2) and in *Utma Kuar* v. *Bhagwanta Kuar* (4); and after the decision of the Privy Council in *Besant* v *Narayaniah* (3), the Chief Court of Lower Burma in *Arunachellam Pillay* v. *Iyama* (5) held that the effect of the ruling of the Privy Council in that case was that proceedings by a guardian for restoration of the custody of a minor must be taken under the Guardians and Wards Act, and not by way of a separate suit. In *Sathi* v. *Ramandi Pandaram* (6) Wallis, C. J., when considering the effect of *Besant* v *Narayaniah* (3) observed that :

"The question for decision was whether a civil suit not under the Guardians and Wards Act, would lie in the Civil Court. The Privy Council held that it would not, and assigned as the sole but sufficient reason for so holding the fact that the District Court had no jurisdiction in the case except under the Guardians and Wards Act. This I feel bound to construe as a ruling that the jurisdiction conferred by the Guardians and Wards Act was exclusive, and that the right of proceeding independently by civil suit no longer existed."

On the other hand the learned Advocate on behalf of the appellant referred to *Shrifa* v. *Munekhan* (7) in which case the Bombay High Court held that the remedy by way of a regular suit in a proceeding in which an application might have been made under the Guardians and Wards Act, was not ousted by that Act ; but Jenkins, C. J., in the course of his judgment, observed that in so holding the Bombay Court was concluded by an earlier decision of that Court, and his Lordship added :

"It appears to me under the circumstances profitless to enter on any discussion of the question; for even if we disagreed with that decision we could only refer the matter to a Full Bench. When, however, the Legislature comes to amend Act VIII of 1890 (which I trust may be at no distant date), it will, I think, be worthy of consideration whether the procedure under the Act should not be explicitly substituted for an ordinary suit, and the position of a father at the same time made clear."

(1) 2 L. B. R. 140.

(2) I, L. R. 26 A. 594; 1 A. L. J. 266; A. W, N. (1904) 135.

(3) 24 Ind Cas. 290; 38 M. 807; 27 M. L. J. 30; 18 C W. N. 1089; 1 L. W. 520; (1914) M. W. N. 585; 16 M L. T. 165; 20 C. L. J. 253; 16 Bom. L. R. 625; 12 A. L. J. 1155; 41 I. A. 314 (P. C.)

(4) 29 Ind. Cas. 416; 37 A. 515; 13 A. L. J. 742.

(5) 29 Ind. Cas. 768; 8 B. L. T. 128; 8 L, B. R. 211.

(6) 53 Ind. Cas. 399; 42 M. 647 at p 652; 9 L. W. 600; 37 M. L. J. 93; 26 M. L. T. 61; (1919) M. W. N. 487 (F. B.)

(7) 25 B. 574.

Jenkins, C. J., therefore, did not purport to express any opinion of his own as to whether, if the matter were open, he would have decided the question one way or the other. Reference was also made to *Ma Shwe Ge* v. *Maung Shwe Pan* (1) in which a Full Bench of the Chief Court came to the conclusion that in the circumstances of that case inasmuch as "the person who claims to be the natural guardian has never had the custody of the minor," it could not be held that a regular suit was barred In *Achratlal Jekisandas* v. *Chimanlal Parbhudas* (8) the Bombay High Court was "not prepared to hold that the dictum of the Privy Council in *Annie Besant* v. *Narayaniah* (3) to the effect that a suit *inter partes* is not the proper proceeding was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa* v. *Munekhan* (7), and Scott, C. J., added that "s. 25 cannot apply to this case for the ward has never left or been removed from the custody of his guardian " In *Mathuraban* v. *D. Tewary* (9) Robinson, J. dissented from *Arunachellam Pillai* v. *Iyama* (5) and followed *Ma Shwe Ge* v. *Maung Shwe Pan* (4) but in *Mathuraban* v. *D. Tewary* (9) as in *Ma Shwe Ge* v. *Maung Shwe Pan* (1) s. 25 had no application, for the plaintiff had never had the custody of the minor. For these reasons, in my opinion, the law as laid down by the Full Bench of the Madras High Court in *Sathi* v. *Ramandi Pandaram* (6) was correct, and this appeal must be dismissed with costs.

Sen, J.—I agree.

A. *Appeal dismissed.*

(8) 37 Ind. Cas. 215; 40 B. 609; 18 Bom. L. R. 582.

(9) 44 Ind. 753; 10 B. L. T, 186.

ALLAHABAD HIGH COURT.

Second Civil Appeal Case No. 1268 of 1929.

January 18, 1932.

PULLAN AND NIAMAT ULLAH, JJ.

M. AMIR HASAN KHAN—DEFENDANT—APPELLANT

versus

H. MOHAMMAD NAZIR HASAN AND ANOTHER—PLAINTIFF AND—DEFENDANT—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 130, 135, 136—Muhammadan Law—Dower—Assignment of right of dower to legal practitioner—Validity—Right to dower, whether actionable claim—Actionable claim, meaning of.

A widow's right under the Muhammadan Law to recover her unpaid dower is an actionable claim as defined in s. 2 of the Transfer of Property Act and an assignment of such right to a legal practitioner is void under s. 136 of the said Act. Such a transfer cannot be treated as the transfer of the widow's right to possession inasmuch as the widow cannot transfer her right to possession alone without validly transferring her right to receive the dower debt. [p. 835, col. 2]

[The nature of a widow's right to dower under the Muhammadan Law discussed.]

Under the Transfer of Property Act as amended in 1900 a debt which otherwise amounts to an actionable claim does not cease to be such merely because the cause of action in respect thereof has not arisen, or the time for its payment has not arrived. *Shib Lal* v. *Azmatullah* (1), *Aruna Chelliam Chetti* v. *Subramaniam Chetti* (2), and *Ali Bakhsh* v. *Allahdad Khan* (3), referred to. [p. 835, col. 1.]

Second Appeal from the decision of the District Judge, Cawnpore, dated the 12th July, 1929.

Messrs *P. L. Banerji* and *M. A. Aziz* for the Appellant.

Mr. *Zamir-ul-Haq*, for the Respondent.

Judgment.—This second appeal has arisen out of a suit brought by the plaintiff respondent for recovery of possession of a six anna share in village Bahrampur, District Fatehpur. The Subordinate Judge in whose Court the suit had been instituted, dismissed it but on appeal by the plaintiff it was decreed by the District Judge.

Village Bahrampur above mentioned belonged to Saghir Hasan, husband of Kulsum Bibi, defendant No. 2, and Munshi Amir Hasan Khan, a Vakil practising in Fatehaur, in equal shares. The two do not appear to belong to the same family, and the fact that they were co sharers may be due to circumstances which are not material for the purposes of this case. Saghir Hasan died in or about 1920, leaving his brother Nazir Hasan, plaintiff-respondent and *Musammat* Kulsum Bibi, defendant No. 2 as his heirs, the latter being entitled to one-fourth of Saghir Hasan's property, and the former to the remaining three-fourths. The widow, however, entered into possession of the entire 8 anna share belonging to her husband, and obtained mutation of names, as owner to the extent of 2 annas (one-fourth), and in lieu of dower to the extent of 6 annas (three-fourths). The plaintiff contested her claim in the proceedings for mutation, but was unsuccessful. He acquiesced in the order of the revenue court upholding the widow's right to remain in possession of the plaintiff's share till her dower debt was paid, she executed on the 22nd September 1925, a deed of sale in favour of defendant No. 1 the validity of which is in question in the present case.

The deed recites that a large sum of money was due to the executant, *Musammat* Kulsum Bibi, in respect of her unpaid dower debt, (the exact amount of which is not specified) and that she was in possession of 6 annas share in lieu thereof The deed purports to convey the entire 8 anna share to the vendee in consideration of Rs. 3,875, part of which was left with the vendee. The deed also purports to assign to the vendee the vendor's right to recover her dower debt and the right to remain in possession of 6 anna share until it is paid. Defendant No. 1 obtained possession of the entire 8 anna sold by the defendant No. 2.

The present suit was instituted on the 18th May 1927 for recovery of possession of 6 anna share belonging to the plaintiff but previously held by the widow (defendant No. 2) in lieu of dower. The validity of the sale-deed so far as it relates to 6 anna share belonging to the plaintiff is impugned on the ground that defendant No. 2 had no right to transfer her dower debt and her right to possession of 6 anna share to defendant No. 1. According to the plaintiff the dower of defendant No. 2 stipulated at the time of her marriage with Saghir Hasan was no more than Rs. 1,700. It was pleaded by defendant No. 1 in defence that the dower of defendant No 2 agreed to by her husband was Rs. 50,000, and that she was entitled to possession of her husband's share till the aforesaid amount was paid, which right she validly transferred to defendant No. 1.

The trial Court held that the dower of defendant No. 2 stipulated at her marriage with Saghir Hasan, was Rs 50,000 and that she having transferred her right to receive dower as well as her right to retain possession of her husband's share in village Bahrampur in lieu of dower, the defendant No. 1 was entitled to remain in possession, the dower debt not having been paid by the plaintiff.

The learned District Judge took a contrary view in a well reasoned judgment holding that the widow's claim to dower is an actionable claim, as defined in the Transfer of Property Act, and that the defendant No. 1 being a legal practitioner was debarred from taking a transfer of such claim. Accordingly defendant No. 1 did not acquire the right to recover the dower debt and could not, for that reason, acquire an indefeasible right of possession of six anna share which was previously in the hands of the widow subject to the lien for her unpaid dower debt. As regards the amount of dower, the learned Judge held that the burden of proving the exact amount stipulated at the time of marriage lay on the widow, who failed to establish that it was Rs. 50,000. He laid stress on the recital in the sale-deed which did not specify the amount of dower but mentioned it generally as a large amount. Apparently the learned Judge was of opinion that the sum of Rs. 50,000 alleged in the written statement was the result of an after-thought.

It was contended before us by the learned Advocate for the defendant-appellant that the widow's right to recover her unpaid dower is not an actionable claim, as defined in the Transfer of Property Act. Reference was made to *Shib Lal* v. *Azmatullah* (1) and *Aruna Chellam Chetti* v. *Subramaniam Chetti* (2). In the first of these cases, which was decided by a Full Bench of this court in 1896, it was held 'that the term "actionable claim" as used in s. 130 of Act IV of 1882, means a claim in respect of which a cause of action has already matured and which, subject to procedure, may be enforced by suit'. The debt in question in that case was due under a simple mortgage payable after a specified date. It was held that a mortgage debt, before it became payable, was not an actionable claim. The second case follows the first. In view of subsequent legislation, which materially altered the definition of "actionable claim" both the above cases have become obsolete in relation to transactions entered into after 1900, when the Transfer of Property Act was amended. An actionable claim is now defined to mean,

"a claim to any debt, other than a debt secured by mortgage of immoveable property . . . . . which the civil courts recognize as affording grounds for relief, whether such debt . . . . be existent, accruing, conditional or contingent."

In the Act as it stood before the amendment, s 130 defined "actionable claim" as "a claim which the civil court recognises as affording grounds for relief . . . . . whether a suit for its enforcement is or is not actually pending or likely to become necessary". A comparison of the two definitions makes it clear to us that there was room for argument before the amendment that a debt in respect of which no cause of action had arisen and which was not payable at the date of assignment did not amount to an actionable claim. The amended definition has excluded secured debts from the category of actionable claims

(1) 18 A. 265; A. W. N. (1896) 80.
(2) 30 M. 235; 17 M. L. J. 87.

on the one hand and included certain debts though they are 'accruing, conditional or contingent.' It is no longer possible to contend that a debt, which otherwise amounts to an actionable claim, is not such only because a cause of action in respect thereof has not arisen or the time for its payment has not arrived. Section 135 as it stood before the amendment and which was in question in *Shib Lal* v *Azmatullah* (1), was repealed. It is not necessary to pursue this aspect of the case further, as we are satisfied that a claim to unpaid dower debt is an actionable claim as now defined in s. 2 of the Transfer of Property Act. This being so, and the defendant No. 1 being a legal practitioner, s. 136, Transfer of Property Act, is undoubtedly applicable. It forbids a legal practitioner among others to buy any actionable claim. The prohibition being absolute, any transfer in defiance of s. 136 is calculated to defeat its provisions and as such is void.

It was contended by the learned Advocate for the appellant that the transaction evidenced by the deed dated 22nd September, 1925 should not be viewed as (1) an assignment of dower debt by *Musammat* Kulsum Bibi and (2) a transfer of her right to possession, taking the two separately, and that it amounted only to a transfer of the widow's right to possession in lieu of dower. The argument was that the claim to dower debt became merged in the widow's right to retain possession and had no separate existence as an assignable right. It was emphasised that the widow could not institute a suit for recovery of her dower and that her only remedy in respect of it was to remain in possession till she was paid off. We are unable to accede to this argument. A widow in possession of her husband's property, if she obtained it peacefully and without force or fraud, is entitled to retain it till her dower is paid. No exception can be taken to this statement of the law on the authorities of this court. It implies the existence of the dower debt and the liability of the heirs to pay it before they can take possession of their shares. There is nothing to prevent a widow from instituting a suit for her dower for the purpose of obtaining a simple money decree against all the assets of her husband, including the property in her possession, at least by surrendering possession of such property in her hands. We refrain from deciding that she must in all cases surrender possession as a condition precedent to her obtaining a decree against the assets of her husband but we entertain no doubt that she can sue for her dower, if she is so advised and obtain a decree against the assets of her husband, subject to her claim being unaffected by the law of limitation. The right of a Muhammadan widow, who has entered into possession of her husband's property peacefully and without force or fraud in lieu of her dower debt has been held by this court to be heritable so as to entitle her heirs to remain in possession until the debt is satisfied. See *Ali Bakhsh* v. *Allahdad Khan* (3). The possession of heirs who inherited not only her right to receive the dower but also her right to remain in possession is thus not open to question. It was also laid down in that case that a widow could transfer her right to possession, if she also assigned her right to receive the unpaid dower. One of the learned Judges observed that he knew of "no valid reason in law why she should not be entitled to transfer her debt together with her right to continue in possession". The heirs of the widow had, in that case, transferred part of their right to receive the dower and to possession of her husband's property to strangers, who were jointly in possession with them and were defendants in the suit brought by the heirs of the husband for possession. We are bound to follow the cases of this court, even if we thought differently, but as already stated we take exactly the same view. If the right to receive dower and the right to remain in possession of certain property in lieu of such dower are vested in the same person, he cannot be ousted by the heirs of the husband. If however the widow transfers her right to possession or the property itself, without transferring her right to receive dower the transferee cannot defend his right to possession as against the heirs *qua* the latter's share. The ownership being vested in the heir of the husband, the only person who can stand between him and what belongs to him is the person who is entitled to the dower and to possession of the property in lieu thereof. In the present case the defendant No. 1 who has not in law acquired the widow's right to receive dower, is not entitled to retain possession, which the widow could not transfer without validly transferring her right to receive the dower debt.

The result is that this appeal fails, and is dismissed with costs, including Counsel's fees in this court on the higher scale.

(3) 6 Ind. Cas. 376; 32 A. 551; 7 A. L. J 567.

A. *Appeal dismissed.*

RANGOON HIGH COURT.

Criminal Revision No 247-B of 1931.

July 28, 1931.

BAGULEY, J.

EMPEROR—PETITIONER

versus

EBRAHIM AND OTHERS—RESPONDENTS.

Penal Code (Act XLV of 1860), s. 34—Joint assault—Inference of common intention—Criminal Procedure Code (Act V of 1898), s. 439—Alteration of conviction—Conviction for minor offence—Power to alter for major offence.

Where several men assault another at one and the same time, each of them seeing that the others are assaulting also, the assault may be regarded as a common one though the impulse to assault may have arisen independently. [p. 836, col. 2.]

When the accused are charged under s. 325, Penal Code, but are convicted under a minor section, namely, s. 323 of the same Code, the Magistrate must be held to have acquitted them of the charge under s. 325 and the High Court in revision cannot alter the conviction into one under s. 325. *Kishan Singh* v. *Emperor* (1), followed. [p. 837, col. 1.]

Mr. *B. C. Guha*, for the Crown.

Mr. *M. I. Khan*, for the Respondent.

Judgment.—The five respondents were sent up for trial under s. 325, Indian Penal Code, charges were framed against them under the same section, but the Magistrate who tried the case found them guilty under s. 323, Indian Penal Code, only and all of them paid fines, Rs. 30 each. The sentences were not appealable and no application in revision is filed by the respondent. The complainant however filed an application for revision before the District Magistrate and he has forwarded it to this Court to direct that the convictions under s 323 should be altered into those under s. 325 read with s 30 Indian Penal Code and that the fines may be refunded to the respondents, and in lieu thereof the respondents may be each sentenced to undergo 25 lashes. Before this Court the respondents have urged that the convictions should not be sustained.

The incident which gave rise to the proceedings was an assault upon one Lekraj. This man was undoubtedly very seriously assaulted in a street of Rangoon, and taken to the hospital with nine wounds. A bone in the right hand was broken, the right fabula was broken and he had four contused or lacerated wounds on the head, but fortunately his skull remained intact. He was seriously injured and received grievous hurt.

That the assault must have happened before a large number of witnesses there can be no doubt, but as happens so often only a few have come forward to give evidence for the prosecution. Four of them are Hindusthani Hindus like the victim of the assault but one of them Maung Hla Pe a Burman Buddhist appears to be quite impartial and he only identified Ebrahim of the five men who have been convicted as being among those who took part in this assault. The Magistrate for some reason says that he can be easily bought over but there is nothing on the face of this evidence which justifies this decision. A careful consideration of the evidence of the remaining prosecution witnesses however seems to me to justify the convictions of the accused.

The evidence given by the witnesses is to a certain extent confused, but in my opinion where a sudden affray takes place in which a large number of people are concerned, passers by do not begin to see what is happening before their brains are really attuned to observing and recording their impressions. By the time the affray is half way over they are really observing and noticing for the first time particular facts, if a man is slow in mind as at least one of these witnesses clearly was, his brain would hardly awaken to the fact that something really worthy of note is happening which should be observed carefully. I see no reason to hold that the learned Magistrate has come to a wrong conclusion in holding that the five respondents did take part in the assault on Lekraj. I do however, consider that he was wrong in convicting them only under s. 323, Indian Penal Code. He s ys that the assault was a sudden one and not a planned one, and that, therefore, the accused cannot be said to have assaulted Lekraj in furtherance of a common intention. This seems to suggest that each of the five accused acting entirely independently was moved to strike Lekraj and all happened to choose the same moment to commit their assault. The impulse to assault may have arisen independently, but when five men assault at one and the same time, each of them seeing that the other four are assaulting also, the assault in my opinion may be regarded as a common one. Their common intention was to hurt the victim of the assault In this particular case any person who struck blows hard enough to cause the wounds on the head or to break the bones must, I think, be regarded as having the common intention to cause grievous hurt.

The order which the District Magistrate suggests the Court to pass is un-

fortunately illegal. The accused having been charged under s. 325 and convicted under a minor section, namely, s. 323, the Magistrate must be held to have acquitted them of the charge under s. 325, Indian Penal Code and this Court in revision cannot alter the conviction into one under s. 225 in consequence of the ruling in *Kishan Singh* v. *Emperor* (1). This being the case, the convictions must remain under s. 323 and this is not one of the conviction sections which in Burma can be punished with whipping The result is unfortunate, as I consider that the punishment suggested by the learned District Magistrate would be eminently suitable. The assault however was a cowardly and a serious one and ruffianism of this kind must be put down. I therefore confirm the convictions but direct that each of the respondents do undergo three months' rigorous imprisonment, in addition to the fines which they have already paid.

A. *Sentence enhanced.*

(1) 111 Ind. Cas 332; A. I. R. 1928 P. C. 254; 29 Cr. L. J. 828; 50 A. 722; 5 O. W. N. 911; 28 L. W. 396 (1928) M. W. N. 749; 29 P. L. R. 575; 33 C. W. N. 1; 98 C. L. J. 397; 30 Bom. L. R. 1572; 55 M. L. J. 786; 26 A. L. J. 1099 (P. C).

ALLAHABAD HIGH COURT.

Stamp Reference in First Civil Appeal No. 2 of 1932.

February 13, 1932.

KING, J.

MAJOR A. U. JOHN AND OTHERS—APPELLANTS

versus

Rai Bahadur Seth SURAJ BHAN AND OTHERS—RESPONDENTS.

Court Fees Act (VII of 1870), Art 17, (iii), Sch. I, Art. 1—Declaration as to priority—Appeal for cancelling declaration—Court-fee payable.

Where a suit for recovery of a certain sum of money from a company and debenture-holders of that company and for a declaration that the amount is recoverable in priority to the debentures was decreed and the debenture holders appealed to modify the decision of the Trial Court by refusing the declaration as to priority:

Held, that Art. 17 (*iii*) of the Court Fees Act did not apply and the court-fee as payable *ad valorem* under Sch. I, Art. 1 of the Court Fees Act on the decretal amount or on the value of their debentures whichever was less. [p. 838, col. 1.]

[Case-law discussed.]

Mr. *Ram Nama Prasad*, for the Appellants.

Judgment.—This is a reference under s. 5 of the Court Fees Act, 1870.

The suit was for recovery of Rs. 37,246 from the Agra United Mills Ltd., and from certain debenture-holders of that company, and for a declaration that the amount is recoverable in priority over the debentures in favour of defendants Nos 2 to 7.

The debenture holders have appealed to the High Court to modify the decision of the trial Court by refusing the declaration that the plaintiff's claim has priority over the debentures. The appeal is valued at Rs. 37,246 and a court-fee of Rs. 10 only has been paid. The question is, what is the proper court-fee payable on the memorandum of appeal.

The Stamp Reporter contends that an *ad valorem* fee on Rs. 37,246 amounting to Rs. 1,055 is payable. The appellants' learned Advocate contends that the appeal challenges nothing more than the declaratory portion of the trial Court's decree and the court-fee is governed by Art. 17 (*iii*) of the 2nd Schedule.

In my opinion, Art. 17 (*iii*) has no application to the facts of this case. That provision applies to a memorandum of appeal *in a suit* "to obtain a declaratory decree where no consequential relief is prayed." The present suit was of a very different nature. It was primarily a suit for money It is true that a declaration was also prayed for, as a further relief, but the suit was obviously not for a mere declaration without consequential relief, so Art. 17 (*iii*) cannot apply. Moreover, the relief claimed in this appeal is not a mere declaration but a modification of the trial Court's decree, which is a substantial relief.

The appellants rely upon *Chunia* v. *Ram Dial* (1), *Moti Singh* v. *Kaunsilla* (2), *Bagala Sundari Debi* v. *Prosanna Nath Mukherjee* (3) and *Shrimant Sagajirao* v. *Smith* (4), but they are quite beside the point. They refer to the court-fee payable on the plaint in a suit which is held to be for a declaration pure and simple *Nekho Tewari* v. *Kishun Prasad Pandey* (5) is also cited. The suit was for a declaration and for consequential relief in the form of a temporary injunction pending the disposal of the suit. A decree was granted for the declaration only. The court-fee on the defendants' appeal against this declaratory decree was held to be governed by Art. 17 Sch. II as the temporary injunction was granted

(1) 1 A. 360; 1 Ind. Jur. (N. S.) 851.
(2) 16 A. 308; A. W. N. (1894) 109.
(3) 35 Ind. Cas. 797; 21 C. W. N. 375.
(4) 20 B. 736.
(5) 80 Ind. Cas. 563; 3 Pat. 640; 6 P. L. T. 62; 2 P. L. R. 193 Civ.

at an early stage of the suit and thereafter the suit was reduced into a mere suit for a declaration and it was tried as such. This ruling therefore, is also clearly distinguishable upon the facts.

As Art 17 (*iii*) does not apply and there is no suggestion that the memorandum of appeal is otherwise specially provided for, I think it follows that the court-fee is payable *ad valorem* under Sch. I, Art. 1 upon the amount or value of the subject matter in dispute in the appeal. The appellants seek to establish the priority of their debentures. In other words, they seek to exonerate the property which is security for their debentures (to the extent of the value of their debentures) from liability to satisfy the decretal debt. I think the court-fee is payable *ad valorem* on the decretal debt, or on the value of their debentures, whichever is less.

This conclusion is supported by a decision of this court in *Moti Begam* v. *Har Prasad* (6). That was a suit for sale upon a mortgage and one of the defendants Moti Begam, claimed priority for a mortgage executed in her favour to secure her dower debt. The court held that the plaintiff's mortgage was prior in date. *Musammat* Moti Begam appealed for a declaration that she had a prior charge for the amount of her dower debt and that the property could only be sold subject to her prior charge. The facts are, therefore, similar to those of the present case. The Taxing Judge repelled the contention that the court-fee was payable as in a suit for a mere declaration, and held that it was payable on the amount of the prior charge.

I am also supported by the following decisions of other High Courts. *Venkappa* v. *Narasimha* (7), *Kesavarapu Ramakrishna Reddi* v *Kotta Kota Reddi* (8) *Jugal Pershad Singh* v. *Parbhu Narain Jha* (9) and *Premsukh Das* v. *Shah Gopi Saran* (10).

The Madras Full Bench decision lays down that where the appellant in an appeal against a mortgage-decree does not dispute the amount decreed but disputes the liability of certain properties for the decretal amount, then the court fee is payable on the value of the properties, or on the decretal amount, whichever is less. The other rulings are consistent with this view and I think the same principles are applicable to the present case.

I, therefore, hold that the court-fee is payable *ad valorem* on the decretal amount or on the value of the debentures, whichever is less.

A.

(6) 47 Ind. Cas .311; 16 A. L. J. 81.
(7) 10 M. 187.
(8) 30 M. 96; 1 M. L, T. 311; 16 M. L. J. 458 (F. B.).
(9) 8 Ind. Cas. 1145; 37 C. 914.
(10) 51 Ind. Cas. 786; 4 P. L. J. 323.

OUDH CHIEF COURT.

Civil Miscellaneous Application No. 663 of 1931.
Second Civil Appeal No. 396 of 1931.
February 15, 1932.

BISHESHWAR NATH, J.

Sh. MOHAMMAD RAZA—PLAINTIFF—APPELLANT

versus

Shrimati GANGA DEVI AND OTHERS—DEFENDANTS—RESPONDENTS

Limitation Act (IX of 1908), s. 5—Limitation for filing appeal—Allegation as to misreading of letter of Counsel's clerk—Non-production of letter—Delay, whether can be excused.

Where the period of limitation for filing an appeal expired on the 9th December 1931, but the appeal was filed on the 19th December 1931, and s. 5 of the Limitation Act was called in aid on the ground that the appellant had made a mistake in reading the date in the letter sent to him by his Counsel's clerk and the letter itself was not produced:

Held, that under the circumstances of the case the appellant had not made out sufficient cause for the delay in filing the appeal.

Mr. *H. Husein*, for the Appellant.

Mr. *A. C. Mukerji*, for Respondent No. 1.

Judgment—This is an application under s. 5 of the Limitation Act. The limitation for the appeal expired on the 9th December 1931, but the appeal was filed in the office on the 19th December and presented in Court for admission on the 21st December. It is said that the appellant's agent had entrusted the papers to a Counsel in Lucknow for an appeal being filed, that the Counsel's clerk wrote to the appellant informing him that the limitation for filing the appeal was to expire on the 9th December 1931, but the appellant made a mistake in reading the date given in the letter. He read it as "19th December 1931" and therefore, the appellant's general agent came to Lucknow on the 19th December with necessary expenses for the filing of the appeal. The contentions in the application are supported by an affidavit of an agent of the appellant. I am not satisfied that the appellant has made out sufficient cause for the delay in filing the

appeal. When his agent came to Lucknow and entrusted the papers to a Counsel here he must have found out the last date for the filing of the appeal. It is difficult to believe that he did not, and waited for the Counsel's clerk to inform him of the date later on. The letter alleged to have been sent by the Counsel's clerk has not been produced. The learned Counsel who appears in support of the application on being questioned by me about it says that the letter was not sent by post. Under the circumstances I am unable to believe the story told by the appellant, and must hold that he has failed to make out a sufficient cause for the delay in filing the appeal. The application is therefore dismissed with costs.

The appeal also stands dismissed as time-barred.

A. *Appeal dismissed.*

ALLAHABAD HIGH COURT

Civil Revision No. 45 of 1931
December 7, 1931.
SIR GRIMWOOD MEARS, C. J. AND SEN, J.
KALLU MAL—APPLICANT
versus
Ch. BIKRAMAJIT SINGH—
OPPOSITE PARTY

Provincial Small Cause Courts Act (IX of 1887), s. 17—Application to set aside ex parte *decree—Amount to be deposited—'Amount due under the decree', meaning of.*

The words "the amount due under the decree" in s. 17, Provincial Small Cause Courts Act, mean the amount due under the decree at the date it was given and not the amount due under the decree at the date when the application for restoration was presented. *Bisesar Ram Dassi Ram* v. *Har Kishan Pahlad Rai* (1), followed.

Civil Revision against an order of the Small Cause Court Judge Cawnpore, dated 20th December, 1930.

Mr. *S. N. Seth*, for the Applicant.

Mr. *R. C. Ghatak*, for the Opposite Party.

Judgment.—On the 20th January 1930, an *ex parte* decree was passed in favour of Kallu Mal by a Court of Small Causes for a sum of Rs. 792-2-3 together with interest at the rate of 6 per cent. per annum. The decree also allowed Rs. 108 8-0 as costs to the plaintiff. On the 4th of November, 1930, the defendant applied to set aside the *ex-parte* decree under s 17 of the Provincial Small Cause Courts Act. His application was accompanied by a deposit and the deposit amounted to a sum of Rs. 934-2-3. The court below considered that the conditions of s. 17 of the Provincial Small Cause Courts Act were fulfilled and it accordingly set aside the *ex parte* decree. It has been contended that the amount deposited in the Court of Small Causes fell short by a small amount and the court had therefore no jurisdiction to set aside the *ex parte* decree. Our attention has been drawn to a ruling of this court in *Bisesar Ram Dassi Ram* v. *Har Kishan Pahlad Rai* (1) in which it has been held by a learned Judge of this court that on a construction of s. 17 of the Provincial Small Cause Courts Act, 1887, the words "the amount due under the decree" mean "the amount due under the decree at the date it was given" and not "the amount due under the decree at the date when the application for restoration was presented." This ruling is of the year 1925 There is no published decision that we know of in which a contrary view has been taken. The ruling in question therefore was an authority for the defendant in depositing in court the amount which was equivalent to the amount which *ex facie* was due on the decree on the date when the decree was passed. The Small Cause Court Judge in entertaining the application under s. 17 of the Provincial Small Cause Courts Act was bound by this ruling. Even assuming that the case referred to above may at some time require consideration we are of opinion that this is a case in which the revisional jurisdiction of this court should not be exercised in favour of the plaintiff under s. 25 of the Act because we think that substantial justice has been done We accordingly dismiss this application with costs.

A. *Application dismissed.*

(1) 87 Ind. Cas. 370; 47 A. 623; 23 A. L. J. 296; L. R. 6 A. 345 Civ; A. I. R. 1925 All. 412.

OUDH CHIEF COURT.

Criminal Reference No. 59 of 1931.
December 22, 1931.
RAZA, J.
SOHAN LAL—ACCUSED—APPLICANT
versus
DISTRICT BOARD LUCKNOW—
COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 139 A—Proceedings for removal of public nuisance—Question of title involved—Reliable evidence adduced—Duty to stay proceedings.

Where in a proceeding for removal of a dwelling house from the land in dispute, it appeared that a question of title was involved and there was reliable

evidence to support the title of the person against whom the proceedings were instituted

Held, that the proceedings should be stayed under s. 139-A, Criminal Procedure Code, until the matter of the existence of the right in question was decided by a competent Civil Court.

Reference made by the Sessions Judge, Lucknow.

Mr. *D. P. Khare*, for the Accused

Dr. *J. N. Misra* for District Board, Lucknow.

Judgment—This is a reference under s. 438 of the Code of Criminal Procedure.

The dispute in this case relates to certain plots of land measuring 254 sq. ft. at mile No. 13 furlong 7, Lucknow Sultanpur Road. Mr. Sharafat Ullah, First Class Magistrate of Lucknow, directed Sohan Lal, on the complaint of the District Board, Lucknow, to remove a dwelling house from the land in dispute, within a month Sohan Lal filed an application in revision against the order of the Magistrate in the Court of the Sessions Judge of Lucknow. The learned Judge made this reference to this Court for proper orders. He was of opinion that the learned Magistrate should not have disposed of the case himself in face of the fact that the question of title was involved, as there was 'reliable evidence' in support of Sohan Lal's title, and that the learned Magistrate should have directed the District Board to get their rights established in a competent civil court.

I have read the detailed and careful order of the learned Sessions Judge. I have also heard the learned Counsel on both sides. In my opinion the learned Judge was perfectly right in making this reference to this court. I agree with the learned Judge that the trying Magistrate should not have disposed of the case himself in face of the fact that the question of title was involved and there appeared to be 'reliable evidence' in support of Sohan Lal's title within the meaning of s. 139-A (2) of the Code of Criminal Procedure. The reasons which the learned Judge has given in the referring order appear to me to be irrefutable. The learned Magistrate should have stayed the proceedings until the matter of the existence of the right in question was decided by a competent Civil Court. I set aside the order of the learned Magistrate and direct him to proceed according to law. The proceedings should be stayed until the matter of the existence of the right in question has been decided by a competent civil court.

A. *Reference accepted*

ALLAHABAD HIGH COURT.

Second Civil Appeal No. 984 of 1929.

January 21, 1932.

PULLAN AND NIAMAT ULLAH, JJ.

Musammat FATIMA BEGAM AND OTHERS—DEFENDANTS—APPELLANTS

versus

BANSIDHAR PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 91 (f)—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1—Attaching creditor—Right to redeem—Sale under attachment, whether extinguishes such right.

Where property subject to a mortgage is attached by one who holds a simple money-decree against the mortgagor and the property is sold in pursuance of this decree during the pendency of a suit by the mortgagee to enforce the mortgage to which the attaching decree-holder is not made a party, the purchaser under the mortgage-decree is not entitled to recover possession from the purchaser under the simple money-decree unconditionally but only subject to the latter's right to redeem the mortgage.

The attaching creditor's right to redeem is not extinguished when a sale in pursuance of the attachment takes place. *Subramanian Chettiar* v. *Sinnammal* (1), *Veyindramuthu Pillai* v. *Maya Nadan* (2) and *Chamiyappa Tharagan* v. *Ramayyar* (3), not followed.

Second Civil Appeal from the decision of the District Judge, Aligarh, dated the 23rd March, 1929

Mr. *A. M. Khwaja*, for the Appellants.

Mr. *Panna Lal*, for the Respondents.

Judgment—This second appeal has arisen out of a suit brought by the plaintiff respondent for recovery of possession of certain properties, specified at the foot of the plaint. The first court dismissed the suit; but the lower Appellate Court, decreed the plaintiff's claim in full. Some of the defendants have appealed to this court.

The facts of the case are no longer in controversy. The property in dispute belonged to one Chiranji and *Musammat* Dharman, who executed a deed of simple mortgage in favour of the plaintiff's predecessor-in-interest (hereinafter referred to as plaintiff). The defendants-appellants' predecessor-in-title (hereinafter referred to as defendant) held a simple money-decree against the aforesaid mortgagors and had the mortgage property now in suit attached in execution of their decree shortly before the mortgagee instituted his suit for sale on foot of his mortgage. The sale in execution of the simple money decree in favour of the defendants was not made till after the institution of such suit. The holder of the simple money-decree himself purchased at the auction and obtained possession of the property was now in dispute. Subsequently a decree for sale was passed in favour of

the plaintiff. The mortgaged property (the property now in dispute) was sold and purchased by the mortgagee himself, who took out formal delivery of possession but was opposed in the Revenue Court on applying for mutation of names by the defendant, who had purchased it in execution of a simple money decree. Mutation of names was refused to the plaintiff. Accordingly, he brought the suit which has given rise to this appeal for recovery of possession.

The only defence, which it is necessary to mention for the purpose of this appeal, was that the plaintiff is not entitled in any case, to an unconditional decree that the defendant-appellants are entitled to redeem, and that only on their failure to exercise such right of redemption should the plaintiff be given a decree for possession. The learned District Judge overruled this defence The only question argued in second appeal is that the defendant being an attaching creditor had a right to redeem the mortgage in favour of the plaintiff, that the defendant should have been made a party to the plaintiff's suit on foot of the mortgage and that he, not having been impleaded and afforded an opportunity to exercise his right of redemption, is entitled to redeem now. Subject to the defendant's right of redemption, the plaintiff's right to possession has not been disputed by the learned Counsel for the appellant. The auction sale at which the defendant purchased the property in dispute in execution of his simple money decree took place during the pendency of the plaintiff's suit on foot of his mortgage. Thus the defendant's right, under the auction sale was affected by the rule of *lis pendens* and was, therefore, subject to the plaintiff's right under the decree for sale. In this view, the plaintiff's right to possession, subject to the defendant's right to redeem, if he has any, cannot be disputed

The important question for determination is whether the defendant has a right of redemption on the facts already stated. There can be no doubt that, under s. 91 (*f*), Transfer of Property Act, as it stood before the amendment of 1929, an attaching creditor among others, has a right to redeem the property under attachment. Under O. XXXIV, r. 1, Civil Procedure Code all persons having a right to redeem should be made parties to a suit brought by a mortgagee for sale of the mortgaged property. It follows that the defendant had a right to redeem the mortgage in favour of the plaintiff and that he should have been made a party to the plaintiff's suit on his mortgage.

The next question is whether the defendant, not having been made a party, can now exercise the right of redemption, which he undoubtedly had when the mortgagee's suit was brought The learned District Judge has held that an attaching creditor, such as the defendant was, has a right to redeem; but such right is extinguished when a sale in pursuance of the attachment takes place. According to this view, the defendant lost his right of redemption when he purchased the property during the pendency of the plaintiff's suit. There can be no doubt that this view makes the attaching creditor's right of redemption in a large number of cases, liable to be defeated with impunity by a mortgagee, because if the attaching creditor is not made a party and the property is allowed to be sold in execution of the simple money decree, the sale itself benig *pendente lite* can give no right to the auction purchaser against the auction-purchaser in the mortgagee's suit and the right of redemption is *ex hypothesi* lost in consequence of such auction sale. The logical result of the view taken by the learned District Judge may be as stated as above; but the same view has been taken in a Full Bench case decided by the Madras High Court in *Subramania Chettiar* v. *Sinnammal* (1), which merely gives effect to two earlier cases of that court, namely, *Veyindramuthu Pillai* v. *Maya Nadan* (2)and *Chamiyappa Tharagan* v. *Ramayyar* (3). On the other hand, a contrary view has been taken by this court in *Ghulam Husain* v. *Dina Nath* (4) and *Ram Prasad* v *Bhikari Das* (5). Both these cases appear to be on all fours with the present one, though the head-note of the 2nd case is misleading and shows that the sale in execution of the simple money decree had taken place before the institution of the mortgage suit. This, however, is not correct, and as would appear from the body of the judgment such sale was held during the pendency of the mortgage suit. In both of these cases the right of the attaching creditor to redeem the mortgage was deemed subsisting after the sale in execution of the simple money decree and when there was a con-

(1) 127 Ind. Cas. 624; 53 M. 881; (1930) M. W. N. 798; 32 L. W. 395; A. I. R. 1930 Mad. 801; 59 M. L. J. 634; Ind. Rul. (1930) Mad. 1008 (F. B.).
(2) 58 Ind. Cas. 501; 43 M. 696; (1920) M. W. N. 299; 39 M. L. J. 456; 28 M. L. T. 312.
(3) 62 Ind. Cas. 121; 44 M. 232; A. I. R. 1921 Mad 30 40 M. L. J. 65; (1921) M. W. N. 53.
(4) 23 A. 467; A. W. N. (1901) 143.
(5) 26 A. 464; A. W. N. (1904) 108.

flict between the auction-purchaser in the mortgage suit and the auction-purchaser in execution of the simple money decree, both claiming the right to possession of the property. It was clearly held that the auction-purchaser in execution of the simple money-decree could redeem. The *ratio decidendi* adopted in both of them is well stated in *Ram Prasad* v. *Bhikari Das* (5) in the following *dictum*:—

"The respondents (auction-purchasers in the simple money decree) are entitled to redeem. But they are not entitled to anything further by reason of the fact that the plaintiff in that suit omitted to implead them as defendants. The omission to implead them can neither improve their position nor the reverse. The plaintiff-appellant, who purchased the property at a court sale, in a suit in which the mortgagee, Nath Mal, was the plaintiff and the mortgagor was the defendant, purchased the proprty, that is, whatever rights the mortgagor and mortgagee then possessed, subject to the infirmity that the present respondents had not been impleaded, and consequently he must suffer by reason of the neglect of the plaintiff to implead the respondents. He did not get a clear title to the property, but he got all the title which Nath Mal and the mortgagor could give, and that was a title subject to the equity which the respondents had of redeeming Nath Mal's mortgage and preserving the property for themselves. That right will still be secured to them."

The case of *Ghulam Husain* v. *Dina Nath* (4) was followed in *Venkataseetharamayya* v. *Venkataramayya* (6), which was disapproved in *Parameswara Aiyar* v. *Land Acquisition Collector, Palghat* (7). To that extent there is difference of opinion among the learned Judges of the Madras High Court on this point. We are bound to follow the rulings of this Court which were not referred to before the learned District Judge, otherwise we have no doubt his decision would have been different.

The result is that the plaintiff-respondent is entitled to possession of the property in dispute as against the defendant-appellants This right, however, is so far qualified that the defendants are entitled to be placed in the position they would have been in if they had been impleaded by the plaintiff in the mortgage suit that is, they would have had a right to redeem within the period of six months fixed by the preliminary decree. The proper order in this case, therefore, is that the defendants should be given the opportunity to redeem the mortgage within six months from the date on which the court of first instance will declare the amount due to the plaintiff on his mortgage, which the defendants must pay if they desire to redeem and if they fail to redeem within such time the plaintiff shall be entitled to recover possession of the property in dispute. If they redeem within that period, the plaintiff's suit shall stand dismissed. Accordingly, we allow this appeal, set aside the decree of the lower Appellate Court and also that of the court of first instance, which dismissed the plaintiff's suit *in toto*, and pass a decree in favour of the plaintiff-respondent in the above terms Our decree should be considered to be a preliminary decree. We remand the case to the court of first instance to ascertain and declare the amount payable by the defendants for redemption of the mortgage in question and to pass a final decree dismissing or decreeing the plaintiff's suit according as the defendants redeem or fail to redeem by payment of the amount declared by the court within the period of six months, as already stated. The costs here and hitherto incurred by the parties shall abide the result to be embodied in the final decree which the court of first instance will eventually pass

A. *Case remanded*

(6) 15 Ind. Cas. 334; 37 M. 418.

(7) 49 Ind. Cas. 659; 42 M. 231 at p. 232; 36 M. L. J 95.

PATNA HIGH COURT.

Criminal Revisions Nos. 275 and 276 of 1931.

August 12, 1931.

MOHAMMAD NOOR, J.

Mahanth RAGHUNATH PURI AND OTHERS —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 204, 439—Order calling for charge-sheet, effect of —Enquiry under s. 202—Power to arrest without warrant, if affected—Quashing of criminal proceedings—Power of High Court.

An order calling for a charge-sheet on a report under s. 202, Criminal Procedure Code, when the Police drew-up a First Information Report is an order under s. 204, Criminal Procedure Code, and in practice an order for issue of process. *Isaf Nasya* v. *Emperor* (1), *Emperor* v. *Haji Nur Muhammad* (2) and *Ulfat Khan* v. *Emperor* (4), referred to. *Rampabittar Singh* v. *Kasim Ali Khan* (3), dissented from. [p. 847, col. 2.]

If an enquiry under s. 202 is held by a Magistrate or a Police Officer his power to arrest without a warrant remains intact. *King-Emperor* v. *Bhola Bhagat* (5), relied on. [p. 848, col. 1.]

Ordinarily if a Magistrate has ordered an accused person to be tried, the trial must proceed. But when the High Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will interfere to stop patent injustice calling for a prompt redress.

Jagat Chandra Mazumdar v. *Queen-Empress* (6), followed. [p. 848, cols. 1 & 2.]

[Significance and nature of charge-sheet discussed.]

Application against an order of the Session Judge, Gaya, dated the 8th June, 1931, dismissing an application against the order of the Sub-Divisional Magistrate, Nawadah, dated the 3rd May, 1931.

Sir *Ali Imam*, Messrs. *Manohar Lall*, *N. K. Prasad II* and *Chowdhury M. Prasad*, for the Petitioner.

Sir *Sultan Ahmad*, Government-Advocate, for the Crown.

Judgment—These cases along with Criminal Revisions Nos. 331 and 332 and Criminal Miscellaneous Case No. 36 of 1931 arise out of a dispute which has cropped up about the succession andpossession of certain *Math* called Mudra situated within the Gobindpur Police Station of the Nawadah Sub-Division in the District of Gaya and the properties appertaining to it lying in Gaya and Monghyr. The admitted *Mahanth* of the *Math* was one Tokhnarain Puri who died on the 12th of August, 1930. The rival claimants to the *gaddi* are Premnarain Puri on the one hand and Raghunath Puri on the other.

The case of Premnarain Puri is that on the death of Tokhnarain Puri he was formally installed as a *Mahanth* of the Mudra *Math*, which has also a branch at Dhondha, with the full approval and help of the *Mahanth* of Budhauli Ramdhan Puri. Sometime in March, 1931, he fell ill and went for treatment to Gaya. During his absence Raghunath Puri, who was only his servant, surreptitiously obtained possession of the key of the treasury and proclaimed himself *Mahanth* of the *Math* and, since then, has been adopting various illegal methods to dispossess him (Premnarain Puri) from the *Mahant* ship of the *Math* and the properties appertaining to it which are admittedly very valuable and are said to consist besides moveables landed properties yielding an income of Rs. 60 000 per annum The case of Raghunath Puri on the other hand is that he is the real *Mahanth* who succeeded Tokhnarain Puri and that Premnarain Puri was his servant who fraudulently got his name entered in the Collectorate register and has been posing himself as a *Mahanth*. In short each of the two rival claimants asserts himself to be the real *Mahanth* and calls his adversary a disloyal and dishonest servant who has raised standard of revolt against his master. Each claims to have obtained peaceful possession of the properties and charges the other with attempts to dispossess him

The litigation started with a petition sent by Premnarain sometime about the 8th of March, 1931, to the Superintendent of Police, Gaya, who deputed some constables to the Mudra *Math*, and a Police enquiry held in consequence of this petition led to the institution at Nawadah of a case under s. 107 of the Code of Criminal Procedure against Raghunath Puri and others in which *Mahanth* Ramdhan Puri and his manager Dhaneshwar Prasad have also been impleaded as being real persons at the bottom of the trouble and as helpers and abettors of Raghunath Puri. It is said by the Police that when Premnarain Puri was installed as a *Mahanth* he promised to make over the cash of the treasury to Ramdhan Puri. Premnarain backed out of his promise and, therefore, *Mahanth* Ramdhan Puri has become his enemy and has set up Raghunath Puri as a rival claimant to the *gaddi* of of Mudra *Math* and has been helping in dispossessing Premnarain Puri. The case under s. 107 of the Code of Criminal Procedure pending before the Sub-Divisional Officer of Nawadah is the subject-matter of Criminal Revisions Nos. 331 and 332 of 1931. In the meantime some associates and partisans of Raghunath Puri are alleged to have committed criminal trespass into a house at Nawadah appertaining to the Mudra *Math*. They have been prosecuted under s. 455 of the Indian Penal Code and this case is also pending before the Sub-Divisional Officer of Nawadah and an application to this court for its transfer from the district is the subject-matter of Criminal Miscellaneous Case No. 36 of 1931. There was another case under s. 144 of the Code of Criminal Procedure in respect of a village called Sukho Deora appertaining to the same *Math*. One Maulvi Malik Mokhtar Ahmad claimed to have taken a lease of this village from Premnarain Puri and alleged disturbance by Raghunath Puri. The Sub-Divisional Officer of Nawadah by an order passed under s. 144, Criminal Procedure Code (which was made absolute on the 27th of May, 1931,) directed the men of Raghunath Puri to vacate the kutchery of the village. Since then proceedings under s. 107 Criminal Procedure Code have been started against the parties. I now come to the facts of the present case.

On the 14th of March, 1931, one Ramdeo Singh, a servant of Premnarain Puri, filed a

petition of complaint before the Sub Divisional Officer of Nawadah and, on this complaint and on the report of the Police on that complaint the petitioners Raghunath Puri and others(including Ramdhan Puri and his manager Dhaneshwar Prasad) have been placed upon their trial. In these cases this court is asked to quash the proceedings of the prosecution. It is necessary that I should deal with the facts of this complaint and the various steps taken by the learned Sub Divisional Officer rather in detail. The petition of complaint is in Hindi, It is against five persons only, namely, Raghunath Puri, Ramdhari Singh, Baijnath Puri, Rajkumar Singh and Shankar Kahar, inhabitants of *Mauza* Mudra, *Thana* Gobindpur. The date of the occurrence is mentioned as the 14th of March, 1931, the very date on which the petition was filed. It said that the complainant was a servant of Premnarain Puri who being indisposed had gone to Gaya, for treatment. In his absence the accused were causing undue interference in the Mudra *math* for which proceedings had separately been taken. Then it said that the complainant went to Mudra under the orders of his master. Seeing him, Raghunath Puri became very much annoyed and directed his servants to shoot him, on which the other accused persons chased the complainant. The complainant thereupon went to the Police who were deputed there but they did not give him any help. The accused persons threatened the complainant. There is not one word in this petition which refers to any criminal offence having been committed by anybody except the five persons named in it and that also on the 14th of March when there was a criminal intimidation and assault by chasing the complainant. There is nothing in this petition about criminal trespass or conspiracy. The names of *Mahanth* Ramdhan Puri and his manager Dhaneshwar Prasad are not even suggested. However the Sub Divisional Officer examined the complainant on oath and in this examination the following are the only passages suggesting the commission of any criminal offence:

(1) "During his (Premnarain Puri's) absence Raghunath Puri entered into a conspiracy with the tenants and made preparations to dispossess Premnarain Puri.

(2) Raghunath Puri and others occupied the *math* at Mudra by force during the absence of Premnarain Puri.

(3) He (Raghunath Puri) and his colleagues are now changing the rent receipts granted to tenants by *Mahanth* Premnarain.

(4) They (presumably referring to Raghunath Puri and his colleagues not named) have also removed certain articles from the *math*. They have broke open one room by forcing the lock.

(5) They (perhaps again referring to Raghunath Puri and his men) have taken the key of the treasury in their possession.

(6) The story of intimidation and chase mentioned in the written complaint.

The learned Sub-Divisional Officer referred the complaint to the Police for investigation. The Police treated the complaint as a first information, filled up the required forms, and investigated the case presumably under Chap. XIV of the Code of Criminal Procedure and submitted a report in the prescribed form declaring the case to be false. The Police found that what really happened was that the complainant with a few companions of his went on a taxi car to Mudra and wanted to enter the *math*. The gate-keepers did not allow them to enter and there was some altercation. The complainant magnified this into an occurrence. The Police further stated that as the two parties Premnarain and Raghunath were fighting over the possession of the *math*, cases of this nature were likely to happen often. It is to be noted that the officer in charge of the Police Station investigated the case under the supervision of the Divisional Inspector and the Deputy Superintendent of Police and the final report was submitted under the orders of the Superintendent of Police. In the meantime on the 31st of March the complainant had filed a petition expressing his suspicion against the Police because the accused were helped by the *Mahanth* of Budhauli, and the latter and his men were fabricating false documents and changing receipts of the tenants. This was for the first time that the name of the *Mahanth* of Budhauli came in the proceedings. When the Police report came the learned Magistrate was not satisfied with it and on the 10th of April, 1931 wrote a note on the report and ordered a fresh enquiry. It will be desirable to mention that the Police confined their investigation to the occurrence alleged to have taken place on the 14th of March 1931. They were apparently not wrong. First of all the petition of complaint, as I have already stated, made absolutely no mention of any criminal offence having been committed by anybody prior to the date of occurrence (14th March, 1931). Secondly even in the statement on oath of the complainant the basis of the complaint is the occurrence of the 14th of March. The series of incidents mentioned do not appear

to be the basis of the complaint, because it was too indefinite and except Raghunath Puri nobody was mentioned in connection with them. Facts were not mentioned to enable the Magistrate to take steps on them. The complaint is defined in s. 4 (*h*) of the Criminal Procedure Code. "Complaint" means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some persons whether known or unknown have committed an offence etc etc. The written petition filed made absolutely no mention of anything else than the occurrence of the 14th of March and it is very difficult to construe the statements on oath as if they were made with a view to the Magistrate's taking action on them The learned Sessions Judge when he was asked to refer the matter to this court for the quashing of proceedings was of opinion that the allegation of other incidents besides that of the occurrence of the 14th of March was not a complaint and I agree with him On reading the complaint and even the statement on oath, the Police Sub Inspector, whose investigation was supervised by the Inspector of Police and the Deputy Superintendent of Police, was not wrong in concluding that the complaint referred to the incident of the 14th of March only. I have said that the learned Magistrate wrote a note on the final report of the Police. This note requires rather a detailed examination as its language and observations have been subjected to a severe attack by Sir Ali Imam who has appeared on behalf of two of the petitioners.

The learned Magistrate remarked:

"that the investigation was not properly made, that it was a matter of common knowledge of everyone who was in touch with the administration of criminal justice in this country that complaints were usually exaggerated before they reached the Police or the court."

He then analysed the complaint into the following elements: (1) that Premnarain Puri is the *Mahant* of Mudra; (2) that Raghunath Puri his manager committed the theft of key of the Mudra treasury; (3)that Raghunath Puri and others conspired to oust Premnarain from his possession over the Mudra *math* and its properties; (4) that Raghunath Puri occupied the *math* at Mudra and declared himself to be the *Mahant*; (5) that he committed the offence of house trespass after having made preparations to cause hurt; that he and others made preparations to obstruct the lawful entry of *Mahant* Premnarain in the *math* and (6) that on a certain date Ramdeo Singh, who entered the *math* on behalf of Premnarain Puri, was intimidated and chased away. He then found fault with the Police for their having confined themselves to No. 6 only and not arriving at any finding on the other points. He then said:—

"The enquiry should be completed as early as possible and report should be submitted to me within a week. The atmosphere is surcharged with dangerous possibilities and still the Police are taking months in the submission of their report."

This criticism of the Police was in my opinion unjustified. The investigation was ordered on the 14th of March and the Police report which is dated the 2nd April, 1931, was submitted to the Sub-Divisional Officer by the Inspector on the 6th of April. In my opinion the investigation, which was supervised by the Divisional Inspector and the Deputy Superintendent of Police, did not take such an unusually long time as the learned Magistrate seems to think The Magistrate further said:—

"I am sending a copy of my remarks to the Superintendent of Police and the District Magistrate for information. I would also request the Superintendent of Police to supervise the case personally if he can find time to do so.The matter is indeed very serious,the property involved being worth lakhs and lakhs It would be a fit case in which the highest Police Officer in the district may watch the proceedings himself."

Sir Ali Imam contends that in this note there are matters which were neither in the written complaint nor in the statement on oath nor in the Police report, and that the Magistrete introduced facts from his extra judicial knowledge and that by unduly criticising the Police and showing some warmth in the language, the learned Magistrate practically hinted what the Police was to do in the matter.

There is no doubt that this note contains matters which are not to be found in the records of the present case The learned Magistrate had before him the written complaint of Ramdeo Singh, his statement on oath, his petition of protest and the Police report declaring the incident of the 14th of March to be false. The learned Magistrate analysed the "complaint filed". If he meant by the'complaint filed' the written complaint, then it contained nothing except the incident of the 14th of March, 1931. But if he meant the statement on oath, even then there are certain matters in the note which are not to be found in that statement; and in my opinion the learned Magistrate could with advantage have avoided the little warmth which he has shown in his note and which has created apprehension in the mind of the accused. At the same time in fairness to the learned Magistrate I must say that he

did not introduce any extra-judicial information. It will be re-called that when Premnarain Puri sent a petition to the Superintendent of Police, an enquiry was held and a report under s. 107, Criminal Procedure Code was submitted. That case was pending before the learned Sub-Divisional Magistrate and the facts contained in his note of the 10th seem to have been taken some from the report, some from the arguments in that case which was partly heard and discussed on the 25th of March 1931 and some from another criminal case which was being heard. In my opinion the learned Magistrate somewhat confused the facts which came to his knowledge in s. 107 case and in another criminal case with the facts of the present complaint and much cannot be made of this.

Though the learned Magistrate ordered a further enquiry (as he says) into the complaint, in fact he ordered inquiries about incidents which though not the basis of the complaint were mentioned by the complainant leading to the occurrence of the 14th of March, 1931. The Police made further investigation and submitted a supplementary report on which the learned Magistrate on the 14th of May ordered the submission of charge-sheets against Raghunath Puri, Ramdhari Singh, Baijnath Puri, Rajkumar Singh and Shankar Kahar under s. 452, Indian Penal Code and under s. 452—114 against Dhaneshwar Prasad. Later on he ordered submission of charge-sheet against *Mahanth* Ramdhan Puri of Budhauli also under s. 452—109, Indian Penal Code. In these cases this court is asked to set aside this order of calling of charge sheets and to quash the entire proceedings. Applcations to the Sessions Judge to refer the case to this court were refused.

It is contended that as there was a complaint the learned Magistrate had no power to order the submission of charge-sheet and ought to have disposed of it under s. 203 and s. 204 of the Code of Criminal Procedure. Reliance has been placed upon the cases of *Isaf Nasya* v. *Emperor* (1), *Emperor* v. *Haji Nur Muhammad* (2) and the observations of Jwala Prasad, J, in the cases of 67 Ind. Cas. 499 *Rampabittar Singh* v. *Kasim Ali Khan* (3) and 108 Ind. Cas. 333 *Ulfat Khan* v. *Emperor*(4) In my opinion except for the observation in *Rampabittar's case* (4) none of the cases is an authority to show that the Magistrate in the case was not empowered to order a charge-sheet.

First of all there is no provision for a charge sheet in the Criminal Procedure Code. Charge-sheet is a form provided under Departmental rules of the Government presumably under s. 173 (1) (*a*) of the Criminal Procedure Code. That section requires the Police to submit to a Magistrate empowered to take cognizance of an offence on a Police report—meaning a Magistrate empowered under s 190 (*b*)—a report in the form prescribed by the Local Government. The Government have, as it appears, prescribed two forms. One is called charge-sheet to be used when the accused is sent up for trial and the other is called "Final report" which is used when the accused is not sent up for trial. When such a report is received by the Magistrate empowered under s. 190 (*b*) he takes cognizance of the offence under that section. Even if the accused is not sent up *i. e.*, not a charge-sheet but a final report is sent, the Magistrate when he applies his mind to that report takes cognizance of the offence and if he wants to place the accused on trial he can issue his process. This he can only do under s. 204 of the Criminal Procedure Code. Section 204 does not apply only when cognizance is taken on a complaint but also when cognizance is taken on a Police report. This is the first section of Chap. XVII, headed "Of the commencement of proceedings before Magistrates." A Magistrate empowered under s. 190 (*a*) and (*b*) can issue his process for compelling the appearance of the accused on the perusal of the Police report submitted to him under s. 173, Criminal Procedure Code declaring the case to be false. He can also do the same on perusal of Police report submitted to him after an enquiry under s. 202 on case of a complaint. In both the cases he will be acting under s. 204, the only section authorising the Magistrate in any case to proceed against the accused. In one case, if the report is under s. 173, he will be disposing of that report; and in the other case if there is a complaint he will be disposing of the complaint.

Now an order for submission of a charge-sheet may be an executive order or a judicial order. In the former category is the order which is sometimes passed by superior Police Officers and sometimes by

(1) 102 Ind. Cas. 545; 54 C. 303; 28 Cr. L. J. 577; 8 A. I. Cr. R. 238; A. I. R. 1928 Cal 24.
(2) 117 Ind. Cas. 329; 53 B. 339; 31 Bom. L. R. 84; A.I.R. 1929 Bom. 72; 30 Cr. L. J. 781.
(3) 67 Ind. Cas. 499; 23 Cr. L. J. 403.
(4) 108 Ind. Cas. 333; 29 Cr. L. J. 374; A. I. R. 1928 Pat. 359; 10 A. I. Cr. R. 31.

Magistrates to their subordinates engaged in the investigation and before the final report is submitted under s. 173. It is an executive direction of an Officer to his subordinate whether or not the accused should be sent up for trial. If the order is for submission of a charge-sheet it only means that superior officers direct the subordinate Police Officers to send the case for trial.

In the second category is the order which is passed by the Magistrate empowered under s 190 (*b*) when disposing of a Police report under s. 173, Criminal Procedure Code. In my opinion it is an order under s. 204, Criminal Procedure Code. It is nothing but a short way of saying:

"I give you warrant to arrest the accused, send them up either in custody or on bail according to the nature of the offence."

It is a mode of issuing process for compelling the attendance of the accused which has come into practical use.

In this case there was a complaint sent to the Police for enquiry under s, 202. The Police had drawn up a First Information on that complaint and submitted a report in the prescribed form. It is immaterial whether we hold this to be a report under s. 202 or s 173, Criminal Procedure Code. The Magistrate who had taken cognizance of the complaint was also empowered to take cognizance under s 190 (*b*) He was empowered to order further enquiry. When the supplementary report came he had again full power to act under s. 204, no matter whether the report was under s. 202 or s. 173. The order for a charge-sheet was practically a warrant under s. 204. If there was any technical irregularity it was rectified by the issue of warrants against the accused on the 9th of June, 1931. In the Calcutta case referred to above the District Magistrate took cognizance of the case on a complaint and ordered the Police to send up a charge-sheet to another Magistrate (Sub-Divisional Magistrate) if the case was found to be proved. The Police found the case proved and submitted the charge-sheet to the Sub-Divisional Magistrate of Nilphamari. The result was that the complaint before the District Magistrate remained undisposed of, and the District Magistrate who was under the law bound to dispose it of either under s. 203 or s. 204 was deprived of the opportunity to do so. The High Court directed the District Magistrate to dispose of the complaint according to law. Similar were the circumstances in the Bombay case. There also the Police of their own accord submitted a charge sheet which was placed before a Magistrate other than the one who had taken cognizance of the offence on a complaint and the former held that the accused were not properly before him and discharged them. This order was upheld by the High Court. In these two cases the Police submitted a charge-sheet on their own accord without having been directed to do so by the Magistrate before whom the complaint was pending. In the present case it has been ordered by the Magistrate before whom the complaint was made and who had ordered the enquiry. The observation of Jwala Prasad, J., in *Rampabitar Singh* v. *Kasim Ali Khan* (4) looks rather supporting the view urged by the learned Advocate for the petitioners (Mr. Manohar Lal) that the Magistrate had no power to order a charge-sheet. But a careful reading of the judgment will show that his Lordship's decision was not so much based upon the powers of the Magistrate to order a charge-sheet as upon the facts and circumstances of that case. There, after an enquiry the Police reported the case to be false. The Magistrate ordered a charge-sheet. Then his Lordship observed that the basis of the Magistrate's order was the Police report which did not justify him in calling for a charge-sheet. No doubt his Lordship observed that no order for submitting a charge-sheet could be made by the Magistrate. The Magistrate could only pass an order under s. 203 or s. 204 of the Code of Criminal Procedure, and, therefore, the order of the Magistrate was *ultra vires*. It is respectfully submitted that an order calling for a charge-sheet on a report under s. 202 when the Police drew up a First Information Report is an order under s. 204, Criminal Procedure Code and in practice is an order for issue of process. If the Magistrate on a perusal of the Police report submitted under s. 202, Criminal Procedure Code, orders the issue of a warrant of arrest for the production of the accused I fail to understand why he cannot achieve the same object by ordering the Police to send up the accused for trial. Then this judgment of Jwala Prasad, J, was prior to the Amendment of the Criminal Procedure Code. The new s. 190 (*b*) has been so amended as to authorize a Magistrate to take cognizance of offence on any Police report. Report of the Police after an enquiry under s. 202 of the Code of Criminal Procedure is after all a Police report and comes within s. 190 (*b*). If the Magistrate is applying his mind to

a report submitted by the Police after an enquiry under s. 202, I think he is at one and the same time applying his mind to the facts of the complaint as well as to the facts disclosed in the report. Then again I see absolutely no reason why the Police when they got the complaint could not treat the complaint as information and act upon it independently of the Magisterial orders. A written complaint signed by the complainant supported by a statement on oath made before a Magistrate is before the Police. Why can they not treat it as a First Information of a cognizable offence? Supposing for instance a Magistrate receives a complaint of an offence of murder. He sends it to the Police for investigation. Can it be said that if the Police are satisfied that a man has committed murder they are not entitled to arrest him or to send him to the Magistrate? Section 202 (2) says;

"If an enquiry or investigation under this section is made by a person not being a Magistrate or a Police Officer, such person shall exercise all the powers conferred by this Code on an Officer in charge of a Police Station, except that he shall not have power to arrest without warrant."

This clearly indicates that if the enquiry is held by a Magistrate or a Police Officer his power to arrest without a warrant remains intact. I respectfully agree with the view expressed by Mullick, J., in the case of *Emperor* v. *Bhola Bhagat* (5). In my opinion because a complaint has been sent to a Police Officer to investigate a case it does not deprive the Police of their rights to investigate a cognizable offence independent of the complaint. Nor do I think that if a Magistrate has taken cognizance of an offence on a complaint he is deprived of his power of taking cognizance of connected offences on a Police report The only thing which the law requires is a final disposal of the complaint lodged before a Magistrate; and this has been done in this case. As the learned Magistrate was empowered to take cognizance both on a complaint and on a Police report and the complaint was pending before him, I am not prepared to set aside his order on this ground. It is not necessary that the Magistrate should always record under what provisions of law he was proceeding

Now I take up the question whether the learned Magistrate had any material for the issue of a process. Ordinarily if the Magistrate has ordered an accused to be tried, the trial must proceed. But when this court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will be abdicating its function if it did not interfere to stop patent injustice calling for a prompt redress, see *Jagat Chandra Mazumdar* v. *Queen-Empress* (6). I wish to examine the case of each of the petitioners separately.

MOHANTH RAMDHAN PURI OF BUDHAULI.

I will confine myself to the materials which were legally before the Magistrate. They were five in number, (1) the written complaint of Ramdeo Singh; (2) his statement on oath before the Magistrate; (3) the petition of protest by the complainant; (4) the first Police report and (5) the supplementary Police report. In the first three there is absolutely no mention of *Mahanth* Ramdhan Puri, not even an insinuation against him. In the fourth the only allegation against him is that he is a helper of Raghunath Puri and he and his men are trying to change the receipts It discloses an offence of fabricating false evidence. This statement was not supported by oath and at any rate has no connection with abetment of house trespass and the material placed before the court is so meagre and so indefinite that no action can be taken upon it. Then last is the supplementary Police report. In this the accusations against the *Mahanth* of Budhauli are the following :

(1) that at his suggestion the manager Raghunath Puri was sent to Gaya from the Mudra *Math* through the accused Ramdhari Singh. Premnarain Puri made over to him the key of his cash box and made over to him the charge of domestic affairs etc.;

(2) It was decided at the instance of the Budhauli *Mahanth* to take Premanarain Puri to succeed him (Tokhnarain Puri). This being done the Budhauli *Mahanth* wanted certain concession from Premanarain Puri, one of which was that the treasure left behind by *Mahanth* Tokhnarain Puri should be made over to him etc, etc., etc After Premanarain Puri went back on his promise to deliver the treasure of Budhauli *Mahanth*, ill-feeling arose between them but the latter did not give vent to his feeling and continued to be on friendly terms with the former although he cherished hatred for him and had been apparently on the look out to avenge himself upon him as best as he could. This hardly discloses commission of any offence. However

(5) 72 Ind Cas. 375; 2 Pat 379; 4 P. L. T. 521; 24 Cr. L. J. 375; 1 Pat. L. R. 248 Cr.; A. I. R. 1923 Pat. 547.

(6) 26 C. 786.

objectionable the conduct of the *Mahanth* of Budhauli might have been—an attempt to make profit in the bargain and to get angry and vindictive when that attempt fails may be bad—but we are not moral preceptors. It is possible that this ill-feeling might have induced the *Mahanth* of Budhauli to give his help to Raghunath Puri, but every help to Raghunath Puri is not necessarily an offence;

(3) That a case under s. 452, Indian Penal Code was instituted against Premnarain Puri by one Paro Dhanuk of Budhauli, a domestic servant of the *Mahanth* of Budhauli. The case was found to be false. There seems to be an insinuation though not an assertion that the *Mahanth* of Budhauli was an abettor in the institution of this false case.

These can hardly be sufficient to place him upon his trial for abetment of an offence of house trespass in the *Math* at Mudra. The learned Sessions Judge in his order refusing a reference to this case has said that there are insinuations against the *Mahanth* of Budhauli. In my opinion no man should be placed upon his trial unless there is a definite assertion of facts against him which if believed, may lead to conviction. Even if every word said against Ramdhan Puri is true, it will be impossible to convict him of abetment of house trespass.

DHANESHWAR PRASAD.

The only allegation against him is that he was present when Raghunath Puri took *chaddar* (a ceremony of assumption of *Mahantship*). First of all a ceremony of assumption of *Mahantship* by itself is not an offence. Then it is not clear where it was performed. Raghunath Puri was living in the *Math* and in the petition of complaint he is described as a resident of Mudra. If one day he declared himself as the *Mahanth* or a rival of his master and Dhaneshwar was present at the occasion or even helped him in doing so, I do not think this can be said to constitute an offence under s 452—114, Indian Penal Code. It is to be noticed that the Police suggested the prosecution of Ramdhan Puri and Dhaneshwar Prasad under s. 120 B, Indian Penal Code and they did not mention a word about their having abetted the offence of criminal trespass. The learned Magistrate was also for some time of the same view. The various conflicting orders which I find on pages 1 and 2 of the supplementary report at the end of it changed one after the other show the difficulties the learned Magistrate felt in ordering the prosecution of these two men and in my opinion his earlier doubts were well-founded.

RAMDHARI SINGH, BAIJNATH PURI, RAJKUMAR SINGH and SHANKAR KAHAR.

Excepting in the petition of complaint and in the statement on oath I do not find their names mentioned anywhere in connection with any offence. In these they have been accused for the alleged occurrence of the 14th of March 1931 which was found by the Police to be false a finding which seems to have been accepted by the Magistrate. I fail to understand on what materials he has proceeded against them under s. 452, Indian Penal Code

RAGHUNATH PURI.

There are allegations against him in the complaint, in the statement on oath and in the supplementary Police report which disclose the commission of some offence of house trespass by him. In my opinion his prosecution should stand. Mr. Manohar Lal contends that trespass, if any, was of a civil nature. This is, however, a matter for trial. The prosecution of Ramdhan Puri, Dhaneshwar Prasad, Ramdhari Singh Baijnath Puri, Rajkumar Singh and Shankar Kahar must be set aside. While I have ordered this I entirely appreciate the point of view of the learned Magistrate. Perhaps he felt what may be called a righteous indignation at the alleged conduct of Raghunath Puri possibly helped by the *Mahanth* of Budhauli. The circumstances before him showed *prima facie* that the former was in the wrong and there were insinuations also against the latter. We are, however, bound by law, and the circumstances may be capable of explanations. We have to administer the law as it stands and not as we like it to be. The Legislature in their wisdom have provided procedure by which alone a man can be placed upon his trial. First of all a Magistrate must take cognizance of an offence and that he can do only in one of three ways, *viz.*, (1) on a complaint, (2) on a Police report or (3) on his own information. Therefore there must be some material before the Magistrate showing that the accused has committed the offence. These precautions have been provided by the Legislature in order to save persons from useless prosecution. No doubt inspite of them cases have occurred in which innocent persons have been convicted. On the other hand there are cases in which by the observance of procedure guilty ones

escaped punishment but inspite of this we must administer the law as it stands. Cases are not rare in which we find our private feelings in sympathy with the accused but we have to convict and punish him. On the other hand we feel indignant at the conduct of certain accused but have to let him off. In this case it is my considered opinion that the learned Magistrate had nothing else in view but the maintenance of law and order in his sub divison. He, however, ordered the prosecution of some men without there being any material before him and I feel it my duty to intervene.

Criminal Revision No. 275 is partly allowed and I direct the order of the Magistrate calling for charge sheets against Ramdhari Singh, Baijnath Puri, Rajkumar Singh and Shankar Kahar be set aside and they will be discharged from their bail. Raghunath Puri will be tried, but taking into consideration the various orders passed by the Magistrate not in this case but also in connected cases and which I shall deal in Criminal Miscellaneous Case No. 36 of 1931 and without any reflection upon the learned Magistrate I think that in the ends of justice he should be tried by some other Magistrate. I transfer the case to the file of the District Magistrate of Gaya who will either try it himself or make it over to such other Magistrate competent to try the case as he thinks fit. Raghunath will remain on bail as already ordered by this court, pending his trial. If required he will give fresh bail to the satisfaction of the District Magistrate.

Criminal Revision No. 276 of 1931 is allowed and the order of the submission of charge-sheets under s 452-114, Indian Penal Code against Ramdhan Puri Dhaneshwar Prasad is set aside and they are discharged from their bail This will not prevent their prosecution for any other offence in connection with dispute for which material may properly be placed before a competent Magistrate.

A. *Order accordingly*

MADRAS HIGH COURT.

Letters Patent Appeal No. 67 of 1927.

September 28, 1931.

REILLY AND ANANTAKRISHNA AYYAR, JJ.

UPADRASTA LATCHAYYA—DEFENDANT—APPELLANT

versus

GUDAPARTI SEETHAMMA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 152—Suit for sale on mortgage—Preliminary decree—Wrong survey number entered in mortgage-deed, plaint and decree—Mistake common to both parties—Suit for rectification of decree—Maintainability of—Proper procedure—Specific Relief Act (I of 1877), s. 31.

A preliminary decree was passed in a suit for sale on a mortgage. Subsequently the mortgagee found out that by a mistake a wrong survey number had been entered in the mortgage-deed and the mistake was repeated in the plaint as also in the preliminary decree The mortgagee sued for rectification of the deed of mortgage and also of the plaint and the preliminary decree in respect of the mistaken survey number. It appeared that as a matter of fact there had been a common mistake on the point by both parties:

Held, (*i*) that to attack by a 2nd suit the decree in a previous suit between the same parties would offend against the principle of *res judicata* which admits of exception only in cases where the previous decree was a compromise decree or a decree obtained by fraud of the other party and that consequently rectification of the mortgage-decree could not be granted. *Venkatarama Aiyar* v. *Elumalai Naicker* (2), explained. *Kushadhaj Bhukta* v. *Braja Mohan Bhukta* (4) and *Mahendra Narain* v. *Lal Jhari Kuer* (8), relied on. *Bepin Krishna Ray* v. *Jogeshwar Ray* (1) and *Kailas* v. *Bijoy* (3), not followed. *Ganesh Row* v. *Tuljaram Rao* (10) and *Partap Singh* v. *Bhabuti Singh* (11), referred to. [p. 852, col. 1.]

(*ii*) that in proper cases the Court could grant rectification of a mortgage-deed which has ripened into a decree and that the limits after which rectification of an instrument should not be made are (*a*) the limit stated in s 31, Specific Relief Act, when 3rd parties have acquired rights in good faith and for value and (*b*) where a decree has been obtained on an unrectified instrument and that decree has been executed and money or property concerned has been recovered. *Caird* v. *Moss* (13) and *Marriat* v. *Hampton* (14), referred to. [p. 853, col. 2]

(*iii*) that after getting their mortgage-deed rectified and then amending their plaint the decree-holder then could apply for review or amendment of the preliminary decree under s. 152, Civil Procedure Code. [p. 854, col. 2.]

Per *Ananthakrisnna Ayyar*, J—The circumstance that a decree has been passed on a mortgage is not by itself a legal bar to such rectification being granted when otherwise a case for rectification is made out. *Bepin Krishna Ray* v. *Jageshwar Ray* (1), relied on. [p. 855, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Waller, in S. A. No. 473 of 1925, preferred against the decree of the Court of the Subordinate Judge, Amalapur, in A. S. No. 16 of 1924 (A. S. No. 84 of 1924 of the Sub-Court, Rajahmundry—A, S. No. 249 of 1923 of the District Court, Godawari) preferred against the decree of

the Court of the District Munsif, Razole, in O. S. No. 411 of 1921.

Mr. *K. Bhimasankaran*, for Mr. *B. Satyanarayana*, for the Appellant.

Mr. *Kasturi Seshagiri Rao* for Mr. *B. Somayya*, for the Respondents.

Reilly, J.—In 1906 the brother of defendant No. 1 mortgaged some land to the mother of the three plaintiffs. After their mother's death the plaintiffs in 1919 brought a suit for sale on that mortgage, O. S. No. 302 of 1919 on the file of the District Munsif of Razole, and got a preliminary decree. There was no appeal against that decree. Not long after that decree had been made the plaintiffs discovered that in the mortgage deed Survey No 166 had been entered by mistake for Survey No. 168, and that that mistake had been repeated in their plaint and in the decree which they had obtained. They then brought the present suit, praying for rectification of the mortgage deed by the substitution of Survey No. 168 for Survey No. 166 and for a similar rectification of the decree in O. S. No. 302 of 1919. It was found both by the District Munsif and by the Subordinate Judge on appeal in the present suit that there had been a common mistake by the parties to the mortgage-deed and that in consequence of that mistake Survey No. 166 had been entered in the deed when the parties intended to deal with Survey No. 168. That finding of fact in regard to the common mistake made is binding upon us. The District Munsif ordered rectification, as prayed by the plaintiffs, both of the mortgaged-deed and of the preliminary decree, and that decision was confirmed by the Subordinate Judge on appeal. Defendant No. 1 preferred a second appeal to this Court which was dismissed by Waller, J The present appeal is again by defendant No. 1, against Waller, J's decision.

Waller, J., in a brief judgment remarks that it has been contended before him that though the mortgage-deed might be rectified, the decree made upon it could not be rectified in the suit. That contention he overruled on the strength of 66 Ind. Cas. 345 *Bepin Krishna Ray* v. *Jogeshwar Ray* (1), and *Venkata rama Aiyar* v. *Elumalai Naicker* (2). We have examined the records in *Venkataramaj Aiyar* v. *Elumalai Naicker* (2), so far as they are available, and that case does not appear to be capable of the interpretation which Waller, J., put upon it. It is not clear from the records available whether the decree in the first suit was ever rectified in the second suit; but it is quite clear from the judgment of Schwabe, C. J., in the second appeal that he found no rectification even of the deed to be necessary as the land was in his opinion sufficiently identified by the description originally given in the deed and in the decree in the first suit. Nor was there any discussion in his judgment, with which Wallace, J., agreed, of the question whether the decree in the first suit could have been rectified in a second suit. But 66 Ind. Cas. 345 *Bepin Krishna Ray* v. *Jogeshwar Ray* (1), is a clear authority, if it is to be followed, in support of Waller, J's judgment. That was a decision of Mookerjee and Buckland, JJ. of the Calcutta High Court. There in the second suit the mortgage deed and the decree obtained upon that mortgage-deed in a previous suit had been rectified. It was found that there had been a common mistake in making the mortgage-deed, and the decision was that the deed and the decree obtained upon it might both be rectified in the second suit, provided that would not infringe the rights of any third party acquired in good faith and for value, as the learned Judges found that it would not. That decision was followed a short time afterwards by Mookerjee, J., himself and Cumming, J. in *Kailas* v. *Bijay* (3), but without any further discussion It is in conflict with an earlier decision of Jenkins, C. J., and Holmwood, J., in *Kushodhaj Bhukta* v. *Braja Mohan Bhukta* (4), and in conflict with another earlier decision of a different Bench of the Calcutta High Court in 14 Ind Cas. 93 *Bhonda Singh* v. *Dowlat Ray* (5) In the previous suit which led to *Kushodhaj Bhukta* v. *Braja Mohan Bhukta* (4) the plaintiff had claimed an one-third share of certain property, and the Judge in his judgment had found that he was entitled to that share. But in the decree by some accident a half-share was provided as the share which the plaintiff was entitled to recover. In the second suit, which came before the High Court as *Kushodhaj Bhukta* v. *Braja Mohan Bhukta* (4), one of the defendants in the previous suit sued to set aside the decree in the previous suit on the ground of mistake. Jenkins, C. J., and

(1) 66 Ind. Cas. 345; A. I. R. 1921 Cal. 730; 34 C. L. J. 256; 26 C. W. N. 36.

(2) 72 Ind. Cas. 464; 44 M. L. J. 357; 17 L. W. 402; A. I. R. 1923 Mad. 442; (1923) M. W. N. 217; 32 M. L. T. 246.

(3) 72 Ind. Cas. 680; 36 C. L. J. 436; A. I. R. 1923 Cal. 18.

(4) 31 Ind. Cas. 13; 43 C. 217; 19 C. W. N. 1228.

(5) 14 Ind. Cas. 93; 15 C. L. J. 675.

Holmwood, J., found that such a suit, to set aside the decree in the previous suit on the ground of mistake, was unsustainable. They referred to a previous decision of the Calcutta High Court, *Jogeshwar Atha* v. *Ganga Bishnu* (6), in which it had been held that such a suit to set aside a previous decree was possible; but Jenkins, C. J., pointed out that that decision was based on a misapprehension of the law in England as disclosed by a case which had been cited namely, *Ainsworth* v. *Wilding* (7). In 66 Ind. Cas. 345 *Bepin Krishna Ray* v *Jogeshwar Ray* (1), the decision in *Jogeshwar Atha* v. *Ganga Bishnu* (6), was followed; but the reason Jenkins, C. J., had pointed out why that case should not be regarded as a sound precedent does not appear to have been observed. With great respect I am not able to understand exactly how the learned Judges in 66 Ind. Cas. 345 *Bepin Krishna Ray* v. *Jogeshwar Ray* (1), came to the conclusion that the second suit to set aside a decree in a previous suit upon the ground of mistake was possible, nor how it was that they felt themselves at liberty to differ from the decision of Jenkins, C. J., and Holmwood, J., in *Kushudhaj Bhukta* v. *Braja Mohan Bhukta* (4). In *Mahendra Narain* v. *Lal Jhari Kuer* (8), Wort, J, held that a suit for rectification of a decree in a previous suit and for delivery of property in accordance with the rectified decree could not be sustained in this country any more than it could in England. And in *Janakdular Saran* v *Ambica Prasad* (9), Chapman, J, expressed the opinion *obiter* that courts in India should refuse relief against previous judgments on the ground of mistake in pleadings or in the conduct of cases.

To attack by a second suit the decree in a previous suit between the same parties is, speaking generally, against the principle of *res judicata*. It is recognised that there are certain classes of cases in which it is possible for one of the parties to a decree to attack it in a second suit. For instance, a compromise decree may be attacked in a subsequent suit by one of the parties to it on the ground of mistake, as indeed it can be attacked upon other grounds such as fraud, misrepresentation, coercion etc. But that is not really in conflict with the principle of *res judicata*, because such a compromise decree is not the result of adjudication between the parties. It is merely the contract between the parties put into the form of a decree, and so it can be attacked subsequently in the same way in which a contract or the document embodying a contract can be attacked. In such cases the decree is indeed itself the instrument of contract, made by the hand of the Court but by the will of the parties. Such compromise decrees can be attacked as contracts can be attacked for such reasons as I have mentioned, or in cases where one of the parties is a guardian acting for a minor without the consent of the court, as in *Ganesh Row* v. *Tuljaram Row* (10), or where one of the parties is a minor ostensibly represented by a guardian who has not been properly appointed, as *Partab Singh* v. *Bhabuti Singh* (11). Then there are cases in which it is alleged that the previous decree has been obtained by fraud. It is well-known that a second suit may be brought to set aside a previous decree between the parties on the ground that it was obtained by fraud There again there is no conflict with the principle of *res judicata*, because in such cases there has been no real and true adjudication between the parties. As was said long ago "Fraud vitiates everything" or, as Lord Coke said, "Fraud avoids all judicial acts." If it can be shown that a decree in a previous suit has been obtained by fraud, the very foundation of that decree has gone: what was supposed to have been a decision founded on the rights of the parties is shown to rest on inequity and deception. Both these two classes of cases, where the previous decree is a compromise decree and where the previous decree can be shown to have been obtained by fraud, we can put upon one side as not affecting the question whether decrees made after real adjudication between the parties can be attacked by any of them in a subsequent suit. As Wort, J., pointed out, judgments cannot be attacked in that way in subsequent suits or actions in England Before the Judicature Act of 1873 the Court of Chancery could interfere with the proceedings of the Courts of Common Law by injunction; but, so far as I am aware, even the Court of Chancery could not formally set aside

(6) 8 C. W. N. 473.

(7) (1896) 1 Ch. 673; 65 L. J. Ch. 432; 74 L. T. 193; 44 W. R 540.

(8) 133 Ind. Cas. 366; A. I. R. 1931 Pat. 296; 12 P. L. T. 466; Ind. Rul. (1931) Pat. 366.

(9) 39 Ind. Cas. 126; 2 P. L. J. 313.

(10) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 1 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 624; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.).

(11) 21 Ind. Cas. 288; 35 A. 487; 40 I. A. 182; 16 C. C. 247; 17 C. W. N. 1165; (1913) M. W. N. 785; 14 M. L. T. 299; 25 M L. J. 492; 11 A. L. J. 901; 18 C. L. J. 384; 15 Bom. L. R. 1001 P. C.

a judgment of one of the other Courts, and certainly that cannot be done since the Judicature Act of 1873. If that cannot be done in England, why is it possible to do it in India? There are various ways of attacking a decree—by appeal, review, amendment, applications to set aside *ex parte* decrees and applications to restore suits which have been dismissed *ex parte*. But what we are asked to say in this case is something quite different, that a decree made between the parties and final between them can be attacked in a subsequent suit and rectified on the ground of mistake. It is well-known that a right of appeal does not exist except when it is given by Statute or statutory provision. How can this right to attack a previous decree arise, and how can it exist consistently with the principle of *res judicata*? If there were any doubt about the matter, the fact that our procedure provides so many other ways of attacking a decree when necessary and provides them explicitly might be taken as an indication that this supposed method of attack by a subsequent suit did not exist. In my opinion this suit, so far as it was for rectification of the decree in O. S. No. 302 of 1919, was not sustainable.

On that Mr. Bhimasankaran, who appears for defendant No. 1, would have us say that the whole suit should have been dismissed. But the suit was not only for the rectification of the decree: it was also for the rectification of the mortgage-deed, and that was in itself clearly an admissible prayer. Mr. Bhimasankaran, however, contends that, as the mortgage-deed has ripened into a decree in O. S. No. 302 of of 1919, the mortgage-deed has been swallowed up in the mortgage-decree and no longer remains for rectification. He would have us apply the principle that, when a mortgage decree for sale has been obtained, the mortgage security has been extinguished and the decree has been substituted for it, as laid down by Lord Haldane in *Het Ram* v. *Shadi Ram* (12). But although the mortgage may have been extinguished by the mortgage-decree, does it follow that the mortgage-deed can no longer be rectified? What a mortgage-decree for sale gives is the right to sell the mortgaged property, whatever it may be. Is it impossible after such a decree has been made to show in necessary cases what the mortgaged property is and in order to do that to get the mortgage deed rectified. In such a case, as in all cases of rectification of instruments, it is not the contract which is being corrected—that can never be done—but it is the instrument embodying the contract incorrectly which has to be rectified. I do not think that the fact that the mortgage has ripend into a decree for sale is enough to preclude the Court from rectifying the mortgage-deed in proper cases when that can be done for proper purposes.

It has been suggested at a late stage in this case that the plaintiffs are guilty of laches. That might well be an argument in some cases against a plaintiff who asked for rectification after he had himself sued upon his document and got a decree upon it; but it cannot be put forward necessarily in all such cases. And it may be remarked that no such contention was, so far as we can see, ever put forward in any of the Courts before which this case has come until to day. It must be noticed that in this case the original mortgagee was a woman—probably an illiterate woman. She was not responsible in any way, so far as we can see, for the mis-description of the property in the mortgage deed. And the plaintiffs are not the original mortgagees: they come into this matter only as daughters and heirs of their mother, the original mortgagee, and were not responsible in any way for the mistake which has been made. In these circumstances I do not think we can attach any weight to this very belated accusation of laches.

But there are of course limits after which rectification of an instrument will not be made. The limit stated in s. 31 of the Specific Relief Act is when third parties have acquired rights in good faith and for value. But that does not apply in this case. There is also another limit, which as Mr. Bhimasankaran has contended, is exemplified in *Caird* v. *Moss* (13), where a decree has been obtained upon an unrectified instrument, and that decree has been executed and the money or property concerned has been recovered. *Caird* v. *Moss* (13), rests upon the old case of *Marriot* v. *Hampton* (14) that money paid under legal process cannot be recovered, and it was on that principle that in *Caird* v. *Moss* (13) the Judges of the Court of Appeal refused to allow rectification of the deed after judgment had been obtained

(12) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. J. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.).

(13) (1886) 33 Ch. D. 22.

(14) (1797) 7 Term. Rep. 269; 2 Esp. 546; 2 Sm. C. C. 481; 4 R. R. 439; 101 E. R. 969.

upon it and the money concerned had been recovered and distributed. That too does not apply in this case. We are here still in the stage of a preliminary decree. In my opinion it was not too late in the circumstances when the plaintiffs came forward and prayed for rectification of the mortgage-deed.

And I see no difficulty in separating the mortgage-deed for this purpose from the decree which was obtained upon it. Mr. Bhimasankaran contends that even the rectification of the deed is not possible because the plaintiffs are shut out after the decree in the previous suit by the rule embodied in Expl. IV to s. 11 of the Code of Civil Procedure that "any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." Can we say that this ought to have been a matter of attack in the previous suit? Possibly it might have been urged, if it were the defendants who were seeking rectification, that it ought to have been made a matter of defence in the previous suit that a decree was asked for on the basis that the plaintiffs should bring to sale land which was never mortgaged. But here it has been found that both the parties to the deed made a mistake in having Survey No. 166 entered for 168. In my opinion we certainly cannot apply the principle of the Explanation to the plaintiffs.

So far as I can see therefore there is no reason why the decree made in favour of the plaintiffs for the rectification of the mortgage-deed should not stand. Now, if the plaintiffs could get so far as that, why could they not get what they want in this matter. If the mortgage-deed is rectified and the right survey number is entered in it, though survey number was copied into plaint in O. S. No. 302 of 1919, the deed as it then stood why could they not apply for amendment of their plaint? An amendment of a plaint may be applied for at any stage in the proceedings; and in this case we have not even got to execution proceedings—the suit is still pending, and a final decree has not yet been made. Certainly such an application for amendment would be very late now and would have been very late at the date of the plaint in the present suit. But in the circumstances it might have been made, and I do not see any reason why it should have been refused. Amendments have been allowed by this Court as late as execution proceedings, as is shown by *Appassa Rowthen* v. *Muhamad Rowthen* (15), and the cases quoted in it. And, if the plaintiffs got to that stage and had their plaint amended, what would prevent them from going to the court which had disposed so far of their first suit, O. S No. 302 of 1919, and applying for review of the preliminary decree on the ground that there was an error patent on the face of the record, as it would be patent if the survey number were altered in their plaint? That is a course they could have adopted and can adopt now. They might even, I think, in such a case as this without applying for review ask the District Munsif to amend his decree under s. 152 of the Code of Civil Procedure. Whichever of these courses were adopted, they would arrive at the same position at which they have now arrived, namely their preliminary decree would be amended. It must be noticed that in this case the second suit was brought in the same court as the first suit, so that there is no difficulty about their decree having been amended by another court. In my opinion the plaintiffs in this case adopted the wrong course. They sued for rectification of their decree on the ground of mistake, which, so far as I can see was an inadmissible prayer. But they got the amendment of that decree, which is exactly what they might have got by first getting their mortgage deed rectified and then amending their plaint and applying for review of the preliminary decree or amendment of that decree under s. 52 of the Code of Civil Procedure. That being so, although in my opinion they have adopted the wrong course, I can see no reason why at this stage we need interfere with Waller, J.'s decree, and I would dismiss this appeal with costs.

Anantakrishna Ayyar, J.—I agree. The plaintiffs represent the mortgagees, defendants Nos. 1 and 2 represent the mortgagors—,(the mortgage being dated 1st October 1906), and the 3rd defendant is a subsequent mortgagee from the mortgagors under a document dated 12th February 1921. The plaintiffs obtained a preliminary decree on the mortgage of 1906 in O. S. No. 302 of 1919 on the file of the District Munsif of Razole. They subsequently discovered that a mistake was made in the mortgage-deed in mentioning the correct survey number of the property mortgaged. Instead of mentioning the

(15) 99 Ind. Cas. 655; 25 L. W. 102; (1927) M. W. N. 38; 38 M. L. T. 24; A. I. R. 1927 Mad. 435.

correct survey number—168—,the mortgage document mentioned the mortgaged property as survey number 166,—in Munganda village. The plaintiffs applied to the District Munsif, after the preliminary decree was passed in O. S. No. 302 of 1919, to have the mistake corrected. The District Munsif was of opinion that the question whether there was, or was not,—a mistake in respect of the survey number in the mortgage-deed could not be gone into except in a fresh suit. The present suit was accordingly instituted by the plaintiffs —the mortgagees—in the very same District Munsif's Court against defendants Nos. 1 and 2 who represent the mortgagors and the 3rd defendant, the subsequent mortgagee from defendants Nos. 1 and 2. The first prayer in the plaint was to have the mortgage bond dated 1st October 1906 amended by substituting Survey No. 168 in the place of No. 166,—the property really intended and agreed to be mortgaged being Survey No. 168. Plaintiffs also prayed that the decree in O. S. No. 302 of 1919 mentioned above, should be amended suitably by substituting the correct survey number. The 3rd defendant pleaded that he was a *bona fide* mortgagee from defendants Nos. 1 and 2 subsequent to the mortgage of 1906, whereas defendants Nos. 1 and 2 seem to have contended that there was no mistake at all in respect of the survey number. The lower Courts have found against the contentions of the defendants. The finding is that there was a mutual mistake between the parties in mentioning the survey number in the mortgage-deed and that it was Survey No. 168 that was really intended and agreed to be included in the mortgage document. In fact, as the lower Appellate Court remarks, the mortgagors had no land bearing Survey No. 166 in that particular village. That is a finding of fact, and we are bound by it in second appeal. The trial court also found that the 3rd defendant was not a *bona fide* subsequent mortgagee. That would seem to be the finding of the lower Appellate Court also That finding also is binding upon us. On these findings the second appeal preferred by the 1st defendant to this court was dismissed by Waller, J. It was argued before the learned Judge that a suit would not lie to correct a mistake in a decree passed by a Court. The learned Judge overruled that contention relying on 66 Ind. Cas. 345 *Bepin Krishna Ray* v. *Jogeshwar Ray* (1). The learned Judge also relied on a decision of this Court reported as *Venkatarama Aiyar* v. *Elumalai Naicker* (2). The first defendant has preferred this Letters Patent Appeal against the decision of the learned Judge.

The first question that arises is whether a mortgage deed could be rectified in respect of a mutual mistake, after a decree had been passed on the basis of that mortgage. The learned Advocate for the appellant argued that after the decree was passed on such mortgage, the right to amend the mortgage-deed came to an end. I am unable to agree with that contention. Section 31 of the Specific Relief Act indicates the limits of the power of the court to rectify an instrument when a mutual mistake is proved. The circumstance that a decree has been passed on such mortgage is not,—in my opinion, by itself—a legal bar to such rectification being granted, when otherwise a case for rectification is made out. In this respect I am inclined to follow the observations made by the learned Judges in *Bepin Krishna Ray* v. *Jogeshwar Ray* (1). At page 273* the learned Judges state the point for decision as follows :

"Here the question of fundamental importance, stripped of all technicalities, is, whether the mutual mistake of the parties to the mortgage transaction manifested in the mortgage-deed, which has extended into judicial proceedings, automatically as it were, without mistake on the part of the Judge, is still capable of rectification."

They answer the question as follows :

"On principle, the answer should clearly be in the affirmative; for, as Neville, J., observed in *Thompson* v. *Hickman* (16), to grant relief by way of rectification where the error has crept into one document and refuse it where it is embodied in two, is inconsistent with equitable principles, for equity regards the substance rather than the form of a transaction. There is no substantial reason, for instance, why we should not hold that where the same mutual mistake has been repeated in each one of a chain of conveyances, under such circumstances as to entitle any one of the purchasers to a reformation—('reformation' seems to be the term used in American text books, whereas our Act uses the word 'rectification,'—as against his immediate vendor, equity may work back through all, and entitle the last purchaser to a reformation against the original grantor."

So far I agree with the observations made by the learned Judges in the Calcutta Law Journal case. In the case before us, the proceedings have not gone beyond the stage of passing the decree; the case is not complicated by the existence of a purchaser in court-auction in execution of the decree,—the purchaser having brought the property with the wrong survey number mentioned in the proclamation and sale certificate. I

(16) (1907) 1 Ch. D. 550 at p. 562; 74 L. J. Ch. 254; 23 T. L. R. 311; 96 L. T. 454.

*Page 34 C. L. J.—[*Ed.*]

therefore, overrule the contention of the learned Advocate for the appellant that simply because a decree has been passed in this case, the court's jurisdiction to rectify the mortgage-deed has ceased.

The second contention is really more difficult to deal with. The learned Advocate for the appellant argued that no suit lies in India to rectify a decree passed by another competent court on the allegation that there was mutual mistake in respect of the mortgage-deed which was the subject-matter of suit in the prior litigation. Cases of mutual mistakes in respect of compromises —or compromise decrees subsequently passed on the basis of such compromises— on which the learned Advocate for the plaintiffs-respondents relied, are, in my opinion, distinguishable. For, as observed by Jenkins, C. J., in *Kushodhaj Bhukta* v. *Braja Mohan Bhukta* (4),

"But that class of cases is governed by a principle that has no application here. It is well-settled that a contract of the parties is none the less a contract because there is superadded to it the command of a Judge. It still is a contract of the parties, and as the contract is capable of being rectified for an appropriate mistake, so, as the necessary consequence is the decree which is merely a more formal expression given to that contract."

The case in *Huddersfield Banking Company Ltd* v. *Henry Lister & Son, Ltd.* (17), is an English authority on that point. But it does not, in my opinion, follow from the above that the decree of a competent court is liable to be corrected in another litigation by an independent suit for the purpose, even though the said decree accurately expresses the court's intention in passing it. No doubt, it has been held that when a prior decree was obtained by fraud, a subsequent suit would lie to have it declared that the said decree is null and void on that ground. That stands upon quite a different footing, in my opinion. The point that has to be considered now is whether a fresh suit is maintainable to rectify an alleged mistake in the decree passed in a prior suit when the prior decree appropriately expresses the intention of the court which passed it. No case was cited before us in which an English Court has held that such a suit would lie. Even if any English authority on that point be available, one would find it difficult to apply such a decision to a case governed by our Code of Civil Procedure. When once a decree between the parties has been passed by a court of competent jurisdiction, the Code provides the various methods by which such a decree could be amended or reversed. The Privy Council in *Venkata Subbamma Rao* v. *Venkata Rama Rao* (18) held that a decree passed by a competent court is subject to alteration only in the modes prescribed by the Code. See I. L. R. 24 Mad P. 10. See also *Sri Gopal* v. *Pirthi Singh* (19), *Somasundaram Chetty* v. *Subramanian Chetty* (20). I may also refer to *Drew* v. *Willis* (21) where Lord Esher, M. R., observed as follows at page 452*.

"No Court has such a power of setting aside an order which has been properly made, unless it is given by Statute"

The subsequent observations are also instructive and may be referred to. The difficulty therefore arises whether the particular prayer in the present plaint which asks that the decree in the prior suit might be suitably amended and rectified is such as could properly be granted in the present suit. Our attention was drawn to the case *Jogeshwar Atha* v. *Ganga Bishnu* (6) decided by Maclean, C. J., and Pargiter, J., as authority for the position that such a suit would lie,—being one of a civil nature and not being expressly prohibited by any provision of law. The question arose in Calcutta subsequent to the decision in *Jogeshwar Atha* v. *Ganga Bishnu* (6) and in *Kushodhaj Bhukta* v. *Braja Mohan Bhukta* (4) Jenkins, C. J., and Holmwood, J., were not prepared to follow the decision in *Jogeshwar Atha* v. *Ganga Bishnu* (6). Having regard to the scheme and provisions of the Code of Civil Procedure, I find it difficult to understand how a subsequent suit would lie to rectify the decree in a prior suit. The Patna High Court in *Mahendra Narain* v. *Lal Jhari Kuer* (8) and *Janakdular Saran* v. *Ambica Prasad* (9) also had difficulty in holding that such a suit would lie. See also 14 Ind. Cas. 93 *Bhonda Singh* v. *Dowlat Ray* (5) Now, on examining the reasons given by the learned Judges in the case in 66 Ind Cas. 345 *Bepin Krishna Ray* v. *Jogeshwar Ray* (1) I do not find that the arguments advanced in *Kushodhaj Bhukta* v. *Braja Mohan Bhukta* (4) have been really refuted. If *Venkata-*

(17) (1895) 2 Ch. D. 273; 43 W. R. 567; 72 L. T. 703; 12 R. 331; 64 L. J. Ch. 523.

(18) 24 M. 1 at p. 10; 27 I. A. 197; 7 Sar. 678 (P. C.).

(19) 24 A. 429 at p 437; 29 I. A. 118; 8 Sar. 293 (P. C.).

(20) 99 Ind. Cas. 742; 25 L. W. 163 at p. 170; A. I. R. 1926 P. C. 136; (1926) M. W. N. 832; 4 O. W. N. 1 (P. C.).

(21) (1891) Q. B. 450; 55 J. P. 373; 60 L. J. Q. B. 264; 64 L. T. 760; 39 W. R. 310.

*Page of (1891) Q. B.—[Ed.]

rama Aiyar v. *Elumalai Naicker* (2) be a decision on this question, of course we should ordinarily be found to follow the same. But on this point, there is no real discussion by the learned Judges. The reason would seem to be that the decree complained against in second appeal in that case did not,—from what appears from printed papers—,contain any direction regarding amendments of any prior decree. The decree in that case simply rectified the mistake in the mortgage document. That being so, the decision in *Venkatarama Aiyar* v. *Elumalai Naickr* (2) is no real authority on this point. One should rather be very careful before laying down that, *prima facie*, fresh suits would lie to rectify decrees already passed between persons who were properly represented in the same when the prior decree correctly expressed the intention of the court. It seems proper that rectification of a decree should ordinarily be done by the court by which it was passed. What, then, is the relief that should properly be granted in such cases, which, while working for justice, would also be in accordance with the procedure prescribed by our Code? It seems to me that the proper prayer to be asked in the second suit in such a case is to have the mortgage instrument rectified. The result of obtaining such a decree would be that the decree-holder in the prior suit would be in a position to ask the court which passed the decree in the first suit to allow necessary amendments to be made in the plaint and in the decree passed therein. Courts would always be anxious to give effect to the decision passed between the parties relevant to the matter before them. If after obtaining a decree in the latter suit, the decree-holder should make a request to the court which passed the decree in the mortgage suit to have the necessary corrections carried out, it goes without saying that the courts would—in ordinary cases—allow its records to be rectified accordingly. There are cases which show that a decree-holder could be prevented, by an injunction issued in a subsequent suit, from executing the prior decree; and courts would give effect to such subsequent decree and refuse execution of the prior decree. By analogy, we may also refer to cases where decrees and other proceedings passed by court have been, by later decisions, declared to be not binding upon some or all of the parties to the same. When such a decision is passed between the parties in a later proceeding, then, as the Privy Council has pointed out, when the courts which passed the prior decree or proceedings are approached to give effect to the later decision, they would always endeavour to give effect to such later decision passed between the parties and do the needful. I may refer to *Ganesh Row* v. *Tuljaram Row* (10).

The question therefore is reduced to a simple matter of procedure—whether the plaintiffs in this particular case could properly ask for the second relief, when the first relief would substantially be enough to safeguard their rights, and whether the second relief should be granted to them. But I am unable to agree with the contention of the learned Advocate for the appellant that the present suit should be held to be not maintainable simply because the plaintiffs have also asked for the second relief by way of amendment of the previous decree. Here I should like to mention that so far as this High Court is concerned it has always been anxious to have mistakes regarding boundaries and survey numbers of properties in suit, corrected, though such mistakes have crept in, not only in the plaints but also in decrees subsequently passed on the basis of such plaints, whenever the same could be done without working injustice in any way. The cases are all referred to in *Appassa Rowthen* v. *Muhammad Rowthen* (15) There is, therefore, no real difficulty in practice,—since the plaintiffs by obtaining a decree in respect of the first prayer would ordinarily be able to have the corrections carried out in the prior decree and proceedings.

While agreeing with the appellant's learned Advocate that the second prayer, would really be unnecessary, and should not be granted in the view mentioned already, I do not however see any real reason for modifying the decree passed in the particular case before us. As I already remarked, after obtaining such a decree, it would be open to the plaintiffs to ask the court in which prior proceedings took place to have the necessary amendments made. Here the two courts are the same, and with that advantage, the court by its decree in the present suit directed the necessary rectifications to be made both in the mortgage-deed and in the decree and proceedings in the prior suit That portion of the decree has been confirmed by the lower Appellate Court also. In these circumstances, the objection is not a substantial one, but rather a technical one;—and further I do not think that the appel-

lant has in any way been materially prejudiced by reason of the same. The merits have been found against the appellant by both the lower Courts. On the whole, having regard to all the circumstances of this case, no sufficient grounds have been made out for our interference in Letters Patent Appeal.

On the question whether a second suit on the basis of the amended mortgage document is the only—or, appropriate—remedy open to the plaintiffs it is not necessary for me to say anything in the present case. The mortgage before us comprises other items also, so does the decree in the prior suit; and there is, further, no question of limitation.

For these reasons, I agree that this Letters Patent Appeal should be dismissed with costs.

N K./A. *Appeal dismissed.*

PRIVY COUNCIL.

Appeal from the Court of King's Bench for the Province of Quebec.

February 23, 1932.

LORD TOMLIN, LORD THANKERTON, AND LORD MACMILLAN

THE MONTREAL LIGHT, HEAT AND POWER CONSOLIDATED AND OTHERS—APPELLANTS

versus

THE CITY OF OUTREMONT—RESPONDENT.

Municipal Corporation—Taxation—Gas mains laid in streets, whether immoveable property—Liability to be taxed as such—'Immoveable property', 'Buildings', meanings of.

The term 'buildings' covers constructions such as gas mains laid under public streets, and gas mains so laid must be regarded as immoveable property by their nature in the territory in which they are physically situate and are therefore taxable as immoveable property in the Municipality in which they are laid. [p. 862, col. 1.]

Mr. *Warwich Chipman, K. C.*, for the Appellants.

Mr. *C. P. Beaubien, K. C.*, for the Respondent.

Lord Tomlin—The question under consideration in this appeal is whether the appellants or either of them are or is liable to the respondent City of Outermont for Municipal and school taxes in respect of gas mains lying under the public streets of the city. The mains are the property of the second appellant. The gas undertaking of the second appellant is operated by the first appellant. The soil of the streets under which the mains lie is not owned by the appellants or either of them.

The mains were laid and are maintained and the supply of gas is given under a contract dated the 24th August, 1904, between the respondent and the second appellant, by which the second appellant agreed upon the conditions therein set out to supply gas in the City of Outremont for the term of 30 years.

The gas works of the second appellant at which the gas supplied under the agreement is generated, and with which the mains are connected, have throughout been and are situate in the City of Montreal.

Under the terms of an agreement dated the 7th June, 1916, the first appellant (then called the Civic Investment and Industrial Company) took over, from the 1st August, 1916, the operation of the undertaking of the second appellant, and has since continued and still continues to operate such undertaking.

For the years ending respectively the 31st October, 1925, the 31st October, 1926, and the 31st October, 1927, the respondents assessed for Municipal taxation purposes the gas mains of the second appellant's undertaking lying under the public streets of the City of Outremont and entered in the valuation rolls the name of the second appellant as proprietor of such mains

School taxes in respect of the same mains for the year ending the 30th June, 1925, were included in the collection rolls of the respondent as the result of certain resolutions of the respondent and of the School Commissioners and School Trustees of the City of Outremont, ratified by Act 11 Geo. V, c 114, s. 3, which section was repealed and re-enacted by the Act 16 Geo. V, c. 74.

School taxes in respect of the same mains for the years ending respectively the 30th June, 1926, and the 30th June, 1927, imposed by the Act 15 Geo. V, c. 45, s. 16, as amended by the Act 16, Geo. V, c. 47, s. 1, were also included in the respondent's collection rolls.

The respondent launched an action in the Superior Court against the first appellant to recover the Municipal and school taxes on the gas mains in question for the years 1924-25, 1925-26, 1926-27, with interest.

The second appellant was subsequently added as *mis en-cause* The Superior Court (Loranger J.) maintained the respondent's action for $ 3,262·82 and condemned each of the appellants to pay the said sum with interest at 6 per cent. from 1st December, 1926, and declared their immoveables situated in the territory of the respondent affected by the respondent's privilege for

the payment of the taxes in question, the whole with costs.

The main reasons given by the trial Judge for his decision were:—(*i*) That the gas mains were immoveable by nature as being buildings, within the meaning of Art. 376 of the Civil Code (following *Montreal Light, Heat and Power Consolidated* v. *City of Westmount* (1), and were situate within the territorial limits of the respondent and were taxable by it; (*ii*) That the *mis-en-cause* was the owner of the gas mains and that the defendant was in possession thereof as owner and was the lessee and in possession thereof and that both were liable for the tax imposed; (*iii*) That the Superior Court had jurisdiction in respect of the school taxes on the ground that they were merged with the Municipal taxes, the demand affected future rights and was subject to evocation to the Superior Court and the exclusive jurisdiction of the Circuit Court did not pertain where the claim was made by the Municipality.

The appellants appealed to the Court of King's Bench for the Province of Quebec (Appeal Side) and on the 30th October, 1930, the Court (Tellier, Howard, Letourneau, Hall and Galipeault JJ.) affirmed the trial Judge. Letourneau, J., however, dissented in respect that he was of opinion that the first appellant was not liable for the Municipal taxes because such appellant was not entered on the valuation rolls and because the mains, in his view, were not "land" within the meaning of s. 534 of the Cities and Towns Act permitting the collection of taxes from the tenant, occupant or other possessor of land.

The matter then came before their Lordships' Board at the instance of the appellants, who contended:—

First, that the gas mains were not liable to taxation unless they were immoveables within the meaning of the term "immoveable" in s. 521 of the Cities and Towns Act, which confers the taxing power.

Secondly, that the meaning of the word "immoveable" in that section was not to be ascertained by reference to the Quebec Civil Code; and that upon the true construction of the Cities and Towns Act without reference to the Code the word did not cover the gas mains in question.

Thirdly, that even if the word "immoveable" was to be construed by reference to the Quebec Civil Code, gas mains such as these were not immoveables within the meaning of the Code.

Fourthly, that even if gas mains under public streets were taxable subject-matter, they were only taxable as immoveables by reason of the object to which they were attached, in this case the gas works in Montreal, and that, therefore, they were not taxable in Outremont.

Fifthly, that the first appellant, not being on the valuation rolls as owner, was not liable and could not be attacked as occupant or possessor, because immoveables are not land within s. 534 of the Cities and Towns Act.

Sixthly, that the second appellant could not be made liable as *mis-en cause* if the first appellant was not liable.

Seventhly, that there was no jurisdiction in the Superior Court to deal with the case so far as the claim was to recover school taxes, exclusive jurisdiction to deal with school taxes residing in the Circuit Court; and

Eighthly, that the form of the judgment was in any case wrong inasmuch as under it the respondent could recover the sum sued for twice over, once from each appellant.

The first four points are branches of one principal question whether these gas mains are taxable subject matter in Outremont, having regard to their nature and to the terms of the Statutes conferring the taxing power. These points can, therefore, be dealt with together.

The power of the respondent to raise Municipal taxes depends upon the Cities and Towns Act (R. S. Q. 1925, Ch. 102).

The provisions of the Act directly relevant to the taxing power are those next set out:—

Section 485 corresponds to Art. 5696, 1909 R. S. Q., which by the Act 5 Geo. V, cap. 93, s. 72, was replaced for the respondent by the following:—

"5696. The assessors shall, each year, at the time and in the manner ordered by the Council, assess the taxable property of the Municipality, according to its real value. In assessing every property, they shall value separately the land, the buildings thereon erected, and the annual value of such property, and enter each valuation in a separate column of the roll.

"They shall also enter in the roll the names of all occupants, and the amount of annual rent paid by each of them. The Council may, by resolution, relieve the assessors from the duty of making a valuation roll of the taxable property oftener than every three years; and in such case, the Council shall revise the roll every year, or cause it to be revised by the assessors, as it deems expedient, giving

(1) (1926) S. C. R. 515.

the same notices and delays as for the making of the yearly valution roll."

"488. The actual value of the real estate in the Municipality assessable for purposes of taxation shall comprise lands and buildings, workshops and machinery and their accessories thereon erected, and all the improvements made thereto"

"521 (in part). The Council may impose and levy, annually, on every immoveable in the Municipality, a tax of not more than 2 per cent. of the real value as shown on the valuation roll".

There are, however, a number of other sections relating to ancillary matters which are said by the appellants to be relevant as throwing light upon the meaning of the word "immoveable." These sections include the following :—

"502 After every change of owner or occupant of any lot of land set forth in the valuation roll in force, the Council, on a written petition for that purpose, and upon sufficient proof, may erase the name of the former owner or occupant, and enter on such roll the name of the new one."

"520.—(1) The following property shall not be subject to taxation:—

(*a*) Lands belonging to His Majesty or held in trust for the service of His Majesty;

(*b*) The property of the Federal and Provincial Governments and the Municipal corporation;

(*c*) That belonging to *fabriques* or religious, charitable or educational institutions or corporations, or occupied by such *fabriques*, institutions or corporations for the purposes for which they were established and not possessed by them solely for the purpose of deriving a revenue therefrom;

(*d*) Property possessed and used for public worship, episcopal residences, presbyteries, parsonages and cemeteries, and their dependencies. The presbyteries and parsonages above mentioned include any house occupied as a residence by the priest or minister in charge of any church, whether such house be the property of the *fabrique* or of the religious institution or corporation, the owner of the church, or whether it be occupied by the priest or minister as a tenant, provided that only one presbytery, parsonage or residence for each church shall benefit from the exemption granted by this section;

(*e*) Immoveables used for libraries open to the public free of charge;

(*f*) All educational establishments which receive no grant from the Municipality where they are situate, as well as their dependencies and the lands on which they are erected.

"(2) The exemptions mentioned in sub-s 1 of this section shall not apply to persons occupying under a title other than that of owner, immoveable property belonging to His Majesty or to the Federal or Provincial Government, who shall be assessed as if they were the actual owners of such immoveables, and be liable for the payment of the general and special real estate taxes.

"(3) The owners and occupants of the property mentioned in paras. (*c*), (*d*), (*e*) and (*f*) of sub-s. 1 of this section shall nevertheless be bound for the cost of the works required for the maintenance of the streets situate opposite such property in the Municipalities where such streets are not, wholly or in part at the charge and expense of the Municipality under the provisions of this Act. Such properties shall nevertheless be taxable for public lighting for the purchase and maintenance of fire-fighting apparatus, and for the use of water.

"They shall also be taxable for the opening and maintenance of streets, when such work is wholly or in part at the charge and expense of the Municipality, provided that the opening or maintenance work on streets dependent on such property be assumed by the Municipality.

"For the purposes of this sub-s. 3, only the actual value of the lands shall be considered, notwithstanding the provisions of s. 488, to establish the tax to be imposed on the property mentioned in paras. (*c*), (*d*), and (*f*) of sub-s. 1 of the section."

"530. The cadastral number given to immoveable property upon the official plan and in the book of reference for the territorial division in which such property is situated shall, for taxation purposes, be a sufficient description and identification of such property in the valuation and collection rolls".

"534. Municipal taxes, imposed on any land may be collected from the tenant, occupant or other possessor of such land as well as from the owner thereof, or from any subsequent acquirer of such land, even where such tenant, occupant, possessor or acquirer is not entered on the valuation roll"

"550. Within fifteen days of the order of the Council, the clerk shall give public notice of the day, hour and place where the sale by auction will be held. The notice shall contain a description, according to the provisions of Art. 2168 of the Civil Code, of the immoveables the sale whereof is so ordered, and it shall be posted up at the places fixed by the Council for publication of Municipal notices.

"If the publication of Municipal notices be made in the newspapers in accordance with s. 373 the clerk shall post up the notice of sale in two public places in the Municipality"

"555. The purchaser shall thereupon be seized of the immoveable adjudged, and may enter into possession thereof, subject to the same being redeemed within the year following, but shall not remove timber nor the buildings therefrom during the said year."

"556. Within the eight days following the adjudication, the clerk shall transmit to the registrar a list of the immoveables so sold for Municipal taxes, with the name of the purchaser of each of such immoveables."

Before commenting upon the provisions of the Cities and Towns Act it will be convenient to set out also the relevant provisions of the Quebec Civil Code. Such provisions are as follows:—

"374. All property incorporeal as well as corporeal is moveable or immoveable."

"375. Property is immoveable either by its nature, or by its destination, or by reason of the object to which it is attached, or lastly by determination of law."

"376. Lands and buildings are immoveable by their nature."

"377. Windmills and water-mills, built on piles and forming part of the buildings, are also immoveable by their nature when they are constructed for a permanency."

"378. Crops uncut and fruits unplucked are also immoveable.

"According as grain is cut and as fruit is plucked, they become moveable in so far as regards the portion cut or plucked. The same rule applies to trees; they are immoveable so long as they are attached to the ground by their roots and they become moveable as soon as they are felled."

"379. Moveable things which a proprietor has placed on his real property for a permanency or which he has incorporated therewith, are immove-

able by their destination so long as they remain there.

"Thus, within these restrictions, the following and other like objects are immoveable:—

(1) Presses, boilers, stills, vats and tuns;

(2) All utensils necessary for working forges, paper mills and other manufactories.

"Manure, and the straw and other substances intended for manure, are likewise immoveable by destination."

"380. Those things are considered as being attached for a permanency which are placed by the proprietor and fastened with iron and nails, embedded in plaster, lime or cement or which cannot be removed without breakage, or without destroying or deteriorating that part of the property to which they are attached.

"Mirrors, pictures and other ornaments are considered to have been placed permanently when without them the part of the room they cover would remain incomplete or imperfect."

381. Rights of emphyteusis, of usufruct of immoveable things, of use and habitation, the right to cut timber perpetually or for a limited time, servitudes, and rights or actions which tend to obtain possession of an immoveable, are immoveable by reason of the objects to which they are attached."

"382. All moveable property, of which the law ordains or authorises the realisation, becomes immoveable by determination of law, either absolutely or for certain purposes"

"2168. When a copy of the plans and books of reference for the whole of a registration division has been deposited in the office for such division, and notice has been given by proclamation in the manner mentioned in Art. 2169, the number given to a lot upon the plan and in the book of reference is the true description of such lot, and is sufficient as such in any document whatever; and any part of such lot is sufficiently designated by stating that it is a part of such lot and mentioning who is the owner thereof and the properties coterminous thereto; and any piece of land composed of parts of more than one numbered lot is sufficiently designated by stating that it is so composed and mentioning what part of each numbered lot it contains.

"No description of an immoveable in the notice of application for confirmation of title, or in the notice of a sale by the sheriff or by forced licitation, or of any sale having the effect of a sheriff's sale, or in the sheriff's deed, or in the judgment of confirmaiton, will be deemed sufficient unless it is made in conformity with the provisions of this article.

"As soon as such plans and books of reference have been deposited and notice thereof has been given, notaries passing Acts concerning immoveables indicated on such plan are bound to designate such immoveables by the number given to them upon such plan and in the book of reference, in the manner above prescribed; in default of such designation the registration does not affect the lot in question, unless there is filed a requisition or notice indicating the number on the plan and book of reference as being that of the lot intended to be affected by such registration."

Having regard to the terms of the Education Act (R. S. Q. 1925, Ch. 133) and the Protestant School Act (15 Geo. V, c. 45), the taxable subject matters in respect of school taxes are admittedly to be determined by the same considerations as the taxable subjects in respect of Municipal taxes, inasmuch as the school taxes under the Education Act are exigible upon "all taxable property in the School Municipality," and those under the Protestant School Act are exigible upon "all immoveable property" in the Municipality inscribed in the neutral panel.

It is to be observed that in regard to the question now being considered the appellants' case involves an impeachment of the conclusions reached by the Supreme Court of Canada in *Montreal Light, Heat and Power Consolidated* v. *The City of Westmount* (1). In that case gas mains and electric poles and wires were held to be taxable in the Municipality in which they were situate.

Their Lordships, after full consideration, are of opinion that the reasoning of the majority of the court contained in the judgment in the last-mentioned case delivered by Anglin C J. C. is well founded.

The word "immoveable" in s 520 (1) of the Cities and Towns Act must, in their Lordships' view of the construction of that Act, bear the meaning given to it by the Quebec Civil Code. It is true that there is in the Cities and Towns Act a lack of precision in the use of terms which renders the task of construction unnecessarily difficult, but there is nothing in that Act to restrict the meaning attributed to the word "immoveable" by the Civil Code. The words "land" and "lands" are in the Cities and Towns Act used in a sense wide enough to cover immoveables (*see* and compare sub-s. (1) (*a*) of s. 520 and sub-s. 2 of the same section), but this use of "land" and "lands" does not restrict the meaning of immoveables. Nor does the reference in s. 530 to the cadastral number given to immoveable property have the effect of excluding from immoveables those immoveables which have not or cannot have any cadastral number. Section 530 only renders a reference to the cadastral number, where there is one, a sufficient description of the immoveable

What then is an immoveable under the Civil Code? A gas main laid in the earth is an immoveable in the sense that it is physically a construction fixed in the earth, though the individual pipes of which it is made up were moveable before they came to form part of the construction.

Of the four means specified in s. 375 of the Civil Code by reason of which property is to be treated as immoveable, three can certainly be excluded. The gas mains are

not immoveable by destination, because the soil in which they are placed does not belong to the appellants. They are not immoveable by reason of the object to which they are attached. Into that category fall only things in themselves moveable which are permanently attached to an immoveable. The gas mains were never moveables, though constructed out of things which were moveables. It is not suggested that the gas mains are immoveable by determination of law. There therefore remains only the category of immoveables by their nature. These are in s. 376 defined in the words "Lands and buildings are immoveable by their nature."

It is said that gas mains are not buildings (*batiments*) within the meaning of that term as used in s 376, and an argument based upon Art. 523 of the Code Napoleon, which makes "*tuyaux*" immoveable, was addressed to their Lordships in support of that view. Their Lordships are of opinion that the term buildings (*batiments*) covers constructions such as these gas mains, and that these mains must be regarded as immoveable by their nature in the territory in which they are physically situate, and are therefore taxable subjects in the City of Outremont.

With regard to the fifth point, it has already been indicated that the term "land" in the Cities and Towns Act includes immoveables, and this being so, their Lordships think that the first appellant is liable for the taxes under s. 534 of the Act as occupant or possessor of the mains. In these circumstances the sixth point does not arise, and the second appellant is liable as owner, whose name is on the rolls.

The seventh point raises a matter of jurisdiction. Could the school taxes be recovered in the Superior Court?

Section 48 of the Code of Civil Procedure provides that the Superior Court has original jurisdiction in all suits or actions which are not exclusively within the jurisdiction of the Circuit Court or of the Exchequer Court of Canada.

Section 54 of the same Code is, so far as material, as follows:

"54. The Circuit Court has ultimate jurisdiction, to the exclusion of the Superior Court:—

(1) * * * *

(2) In all suits for school taxes or school fees, and all suits concerning assessments for the building and repairing of churches, parsonages and churchyards whatever may be the amount of such suits."

The school taxes for the first year of assessment (*viz.*, 1924-25) of the three years under consideration were exigible under the provisions of the Education Act.

That Act empowered the School Commissioners and Trustees to cause to be levied by taxation the taxes necessary for the support of the schools under their control.

Section 398 of the Act was as follows:

"The local Council of any city, town, village, or rural Municipality, when required by the school board of a School Municipality situate wholly or partly in its territory, shall collect the taxes of such School Municipality at the same time as its own."

The Cities and Towns Act contained the following provisions with regard to the collection of school taxes:—

"537. The Council shall, on the requisition of the school commissioners or trustees of any School Municipality situated with the Municipality, accept the school assessment roll or the certified extract therefrom presented by them, and order the Treasurer to collect such taxes, in the same manner and at the same time as Municipal taxes."

"539. If the Municpal Council has ordered, by resolution, that the collection of school taxes be made at the same time and in the same manner as Municipal taxes, the Treasurer shall enter in the general collection roll the amount of such taxes, collect them and remit them forthwith to the Secretary-Treasurer of schools. In such case actions to recover taxes shall be taken by the Municipal corporation."

In the year 1919 certain resolutions were passed by the School Commissioners and School Trustees of Outermont and by the City Council of the City of Outremont providing for the collection by the City of the school taxes.

These resolutions were confirmed by 11 Geo. V. c. 114 (repealed and re enacted by 16 Geo. V, c 74), whereby the following articles were added for the respondent to the provisions of the Cities and and Towns Act:—

5748A. The city may, under agreement with the school commissioners or trustees of any school Municipality situated within the Municipality, upon resolution to that effect passed by said school commissioners or trustees, as the case may be, and by the City Council, acquire the school assessment roll or a certified extract therefrom presented by said school commissioners or trustees, and pay the said school commissioners or trustees the amount mentioned on such school assessment roll or certified extract therefrom, less the amount of a commission of not more than 1 per cent., at the dates and in the manner agreed upon."

5748B. The resolution passed by the school commissioners of the municpality of the city of Outermont, in the county of Westmount, on the 10th day of March, 1919, the resolution passed by the school trustees for the Municpality of the city of Outremont,, in the county of Westmount, on 11th day of March, 1919, and the resolution passed by the City Council of the city of Outremont on the 2nd day of April, 1919, are hereby declared legal and valid for all intents and purposes.

"5755. The payment of Municipal taxes and of school taxes, in cases provided for in Arts. 5748, 5748A and 5748B, may be also claimed by an action brought in the name of the corporation before the

Magistrate's court, or the Circuit Court for the county or district, on before the mayor, or two or more Councillors acting *ex-officio* as justices of the peace, or before the recorder's court if there be one."

The courts in Canada have taken the view that under the statutory provisions referred to above the Municipality could recover the school taxes in the Superior Court. On such a matter of domestic procedure their Lordships' Board would be reluctant to differ from the conclusions reached by the courts in Canada unless such conclusions were clearly shown to be wrong. Their Lordships are, however, satisfied that upon the true construction of these provisions the Municipality are empowered to sue for the school taxes in the Superior Court. The words "in the same manner and at the same time" in s. 537 of the Cities and Towns Act, read with the words "may be also claimed" in Art 5755, introduced by 11 Geo. V, c. 114, render it clear, in their Lordships' view, that the Municipality were empowered to recover school taxes in the Superior Court, and that to that extent the provisions of s. 54 of the Code of Civil Procedure were repealed. This point of the appellants therefore fails so far as the school taxes for the year 1924-25 are concerned.

The school taxes for the year 1925-26 and 1926-27 were exigible under the Protestant School Act, which provides as follows:—

"16—(2) From and after the 1st of July, 1925, in the various cities, towns or other local Municipalities mentioned in para. 1 of this section, there is hereby imposed a uniform tax, [to be entitled the Protestant School Tax, (see sub-s 1], at the rate of 12 mills in dollar, upon all the immovable property inscribed in the neutral panel of each such city, town or local Municipality. . . .

"(5) The taxes above mentioned shall be levied and collected by the proper Municipal authorities, at the same time as the Municipal taxes, and, notwithstanding any special or general provision of law governing any such Municipality, the amount of the said Protestant school tax so levied and the share of the said tax upon the neutral panel accruing for the benefit of Protestant education, shall be paid over to the Central Board by the proper Municipal authorities. . . ."

Their Lordships are of opinion that upon the true construction of these provisions the Municipality had the same powers for recovering the taxes under this Act as they had for recovering the Municipal taxes, including a power to sue for them in the Superior Court, and that to that extent the provisions of s. 54 of the Code of Civil Procedure were repealed. In regard, therefore, to the school taxes for the two last-mentioned years the conclusion must be the same as with regard to the school taxes for the first of the three years in question.

With regard to the eighth point, their Lordships having heard and taken note of the statement of the respondent's Counsel that the respondent did not desire to treat, and could not treat, the order which has been made as entitling them to recover more than the one sum of $3,262·82 and interest on the footing of the joint and several liabilty of the appellants, their Lordships do not think it necessary to take the point into consideration.

In the result, therefore, in their Lordships' judgment the appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty accordingly.

The appellants must pay the respondent's costs of this appeal.

A. *Appeal dismissed.*

Solicitors for the Appellant.— Messrs. *Lawrence Jones & Co.*,

Solicitors for the Respondents.—Messrs. *Blake & Redden.*

PRIVY COUNCIL.

Appeal from the Supreme Court of Canada.

March 8, 1932.

VISCOUNT DUNEDIN, LORD BLANESBURGH, LORD MERRIVALE, LORD RUSSELL OF KILLOWEN AND SIR LANCELOT SANDERSON.

KING—APPELLANT

versus

THE B. C. FIR AND CEDAR LUMBER CO. LTD —RESPONDENTS.

Income-tax—Insurance against loss of profits, resulting from fire—Moneys received by assured, whether liable to be taxed—'Income,' 'profits,' meanings of—Interpretation of Statutes—Words and phrases—Includes', meaning of.

Moneys received by an assessee under use and occupancy policies insuring him against loss of profits resulting from cessation of business caused by fire are liable (under the British Colombia Taxation Act, 1924) to be brought into account by them for assessment to income-tax. Such moneys can fairly be regarded as 'income from the business.' [p. 867, cols. 1 & 2.]

Moneys which are not strictly 'profits' of a business may yet be the 'income' of the tax-payer and the real question in cases of this nature is whether the insurance moneys constitute 'income', and not whether these moneys are 'profits' of the assessee's business, *The Commissioners of Inland Revenue* v. *Newcastle Breweris* (1) and *Gliksten & Son, Limited* v. *Green* (2), referred to. [p. 866, col. 1.]

Where the interpretation clause of a Statute states that certain things are 'included' in a term, the term includes, unless the context otherwise requires, not

only those things which the interpretation clause declares that it shall include, but such things as the term signifies according to its natural import. [p. 866, col. 2.]

Messrs. *Geoffrey Lawrence, K. C.* and *Wilfred Barton*, for the Appellant.

Messrs *W. N Tilly, K. C.* (Canadian Bar) and *J. W. Scobell Armstrong*, for the Respondent.

Lord Blanesburgh.—This, by special leave, is an appeal from a judgment of the Supreme Court of Canada of the 13th May, 1931, whereby, in effect, judgment in favour of the plaintiff-appellant, pronounced at the trial by the Supreme Court of British Columbia and affirmed on the 7th October, 1930, by the Court of Appeal of the same Province, was discharged. The appellant now seeks to have these two earlier judgments restored.

The broad question for decision is whether certain moneys received by the respondents under use and occupancy policies insuring them against loss of profit resulting from the cessation of business consequential upon fire are liable, under the British Columbia Taxation Act, 1924, to be brought into account by them for assessment to income-tax.

This question has led, in these proceedings, to an acute difference of judicial opinion. The learned Judges of the Supreme Court unanimously favoured a negative answer to the question and their view had the support of Mr. Justice Martin in the Court of Appeal of the Province. On the other hand, the four remaining learned Judges of that court, supporting the learned trial Judge, were all in favour of the view that the moneys in question must be brought into account by the respondents for taxation purposes.

The respondents are a company incorporated under the Companies Act of British Columbia. Since 1921 they have been carrying on business at the city of Vancouver as manufacturers of and dealers in lumber and lumber products. On the 21st August, 1923, their plant and premises were destroyed in a conflagration. These subjects were insured against loss and damage by fire under annual policies, taken out or renewed in the previous March with some seventeen insurance companies. The respondents were also insured by the same companies against the further loss or damage they might sustain in the event of their plant either in whole or in part and for a period long or short being shut down or its working suspended in consequence of fire. These policies, the use and occupancy insurances already referred to, were separate from but complementary to the main policies. They insured the respondents in the total sum of $84,000 in respect of loss of "fixed charges" and $60,000 in respect of loss on "net profits." The nature of the liability so assumed by the insuring companies, with the character and quality of the payments made to the respondents in its discharge, is made sufficiently apparent by the definitions of the expressions, "fixed charges" and "net profits," contained in the policies themselves. "Fixed charges" are there defined to mean: "All the standing charges and expenses which must necessarily continue to be paid or incurred by the assured during the time the said plants shall be inoperative." "Net profits" are defined to mean "the net profits that would have accrued had there been no interruption of business caused by fire."

The annual premium upon the use and occupancy insurances amounted to $3,828.29 This premium had, in ordinary course, been brought into the accounts of the respondents as a revenue charge, and it is stated to have been allowed by the taxation authorities as a permissible deduction in the computation of the net income of the respondents for the purpose of income tax under the Taxation Act. This payment of premium out of revenue and its allowance as a disbursement are circumstances of importance in the case.

The loss payable under the main fire policies was, it would appear, separately adjusted with the Companies, was duly received by the respondents, and as to that receipt, admittedly a receipt on capital account, no question is raised. As to the claims of the respondents under the use and occupancy policies, the respondents and the adjuster of the insuring companies agreed that the period of interruption of the respondents' business was 215 business days, this being the length of time estimated to be required for the rebuilding of the plant, and the loss was adjusted on the following basis :—

Loss of net profits, estimated for $317.23 per day, and allowed at $200 per day	...	$43,000.
Payment of fixed charges, estimated and allowed at $234.80 per day	...	$52,427.90
Total	...	$95,427.90

It is not disputed that as between the tax years 1923 and 1924 this sum if assessable to tax at all is properly apportionable as follows:—

1923—113 business days:

Net profits	...	$22,600.00
Fixed charges	...	$27,555 05

1924—102 business days:

Net profits	...	$20,400.00
Fixed charges	...	$24,872·85

The sum of $95,427.90 having been duly received, the respondents in their income tax returns to the Province for the year 1923 included the sum of $41,293.20 as an income receipt and in their return for the year 1924 they included as a similar receipt the sum of $33,706 80 In the result, provincial income-tax for the years 1923 and 1924 was in fact paid in respect of these sums aggregating $75,000 out of the total sum of $95,427.90 received as already stated.

The respondents did not bring into account for either year the balance—$20,427.90. Their view even then was that that sum was exempt from liability to tax for the reason that it represented moneys received from the insurance companies in excess of the actual loss sustained, the rebuilding of the plant having in fact taken a less number of days than that estimated for and allowed by the adjusters.

Now, with reference to these matters two things can at once be said. On the one hand, the $75,000 were brought in before any advice was taken, and it is agreed between the parties that the mere fact that income-tax was inadvertently paid by the respondents thereon is not to prejudice them to the extent to which in these proceedings it is not established that these moneys were liable to be brought into charge. On the other hand, it has not been contended by the respondents that any distinction in the matter of liability to tax can really be drawn between the $75,000 in respect of which its existence was originally assumed by them, and the balance of $20,427.90 in respect of which exemption was always claimed.

On the 28th November, 1927, the action out of which this appeal arises was commenced. There was a claim for arrears of personal property tax for interest and for penalties. But it soon emerged that there was no dispute between the parties with reference to the personal property tax The claim which remained—not, it must be agreed, very clearly alleged—was originally, in effect, one for income tax, upon the balance figure of $20,427.90 already mentioned. At the trial, however, as a result of preliminary admissions of fact between the parties, it was found that, for special reasons which for the moment their Lordships pass by, the accountability of the respondents to income-tax in respect of the receipts representing fixed charges need not be further disputed, and that the real question, effective in result, was confined to the alleged liability of the respondents for income-tax in respect of "the loss of net profits" receipt, and it was agreed that, if it were held that the respondents were liable to income tax on that receipt the sum remaining recoverable in the action after all adjustments, was $3,922 86, any question of liability to penalties being held over. Thus it was that the learned trial Judge who held the respondents to be so accountable, entered judgment for the Crown in the sum stated. Thus also it was that in all the courts attention has been focussed on this one major issue, and it is with reference thereto alone that the judgments under review have been given.

The question whether this "loss of net profits" receipt is one which must be brought into calculation for the purpose of arriving in each of the tax years in question at the sum for which the respondents are assessable to Provincial income-tax must depend upon the provisions, properly construed, of the taxing Statute of the Province But it will be convenient before these provisions are applied to that receipt to ascertain apart from any question as to income-tax its precise place and character in the economy of the respondents' business. And there is, it would appear, little difficulty in ascertaining this.

The main purpose of the respondents, as it is of all similar industrial units, is the acquisition of gain, such acquisition in the case of each unit being effected by the exercise of such of the powers conferred upon it by its constitution as it may determine to exercise. In the case of the respondents acquisition of gain was primarily to result from their carrying on of the business of manufacturers of and dealers in lumber and lumber products. In the conduct of that business they were exposed to the grave risk of fire, and the insurance of their premises and plant was an insurance against a possible capital loss dictated by every consideration of prudence. If the risk were not so guarded against, then by a fire sufficiently disastrous the whole operations of the respondents might, definitely be brought to a close and acquisition of gain for them definitely ended.

But such a fire, even if so far insured against, might still prove a hindrance more or less prolonged to the unbroken acquisition of gain from their business by reason of the fact that its continuance might not be possible during the period of reinstatement.

This insurance receipt therefore was the product of a revenue payment prudently made by the respondents to secure that the gains which might have been expected to accrue to them had there been no fire should not be lost, but should be replaced by a sum equivalent to their estimated amount.

Further, this was a receipt which had to be brought into the respondents' revenue account, so that it might enter into the calculation necessary to determine their profits available for dividend. It had been produced by a premium out of revenue, and therefore out of potential profits—a premium paid for the express purpose of ensuring in an event a sum in substitution for and the equivalent of net buisness profits over a defined period of time. All this is clear from the terms of the insurances themselves. Accordingly this insurance receipt was necessarily a revenue receipt of the business, which must not only have been brought into the respondents' revenue account, but if, for instance, it had happened that any of the stockholders were specially interested in the profits of a particular year, being, for example, non-cumulative preference stockholders, then the receipt must have been brought into credit proportionately for the years in which the profits represented would but for the stoppage presumably have been earned.

Finally, the receipt was one of which, as their Lordships think, it can be fairly said that it arose from the business of the respondents. The two English cases of *The Commissioners of Inland Revenue* v. *Newcastle Breweries* (1), and *J. Gliksten & Son, Limited* v. *Green* (2) are authorities for this proposition. This receipt was inseparably connected with the ownership and conduct of the respondents' business. Had the respondents not been insured under their main fire policies, these particular use and occupancy policies would not have been available to them. As a result, the respondents have secured for themselves, a net receipt involving gain—an unusual mode of deriving gain from the business, it may be agreed, but, as Lord Warrington said in similar circumstances in the *Newcastle Breweries case* (1) not so divorced from the business as to prevent it entering the accounts as a receipt arising therefrom. And it was not a windfall. As observed by Sargant, L. J. in *Gliksten's case* (2) it was an ordinary receipt in the sense, not that it would occur every year or regularly at stated intervals, but in the sense that in the case of a business prudently conducted it would ordinarily be received so often as the risk insured against materialised.

This then as applied to the respondents' business is the nature of the receipt with reference to which the inquiry must now be made, whether under the Taxation Act, 1924, it is of a character to be brought into charge.

That Act is very lengthy, it consists of 200 sections, but its provisions relevant to the inquiry in hand are not numerous. Section 2 is an interpretation section. It places a meaning upon 28 expressions used in the Statute. In 13 instances the definitions which follow are said to be "included" in the term defined; in 15 instances the term defined is said to "mean that which follows."

The word "income" is in the former class, and their Lordships cannot doubt that in consequence the word, as used in the Statute, includes, unless the context otherwise requires, not only those things which the interpretation clause declares that it shall include, but such things as the word signifies according to its natural import. See *Dilworth* v. *New Zealand Commissioner of Stamps* (3). By s. 2, unless the context otherwise requires,

"income," amongst many other things, "includes" the gross amount "earned derived accrued or received from any source whatsoever, the product of capital labour industry or skill . . . and includes all income revenue rent interest or profits arising received gained acquired or accrued due . . . . from real and personal property or from money lent deposited or invested or from any indebtedness secured by deed mortgage contract agreement or account or from any venture business or profession of any kind whatsoever."

"Person" includes corporations.

By s. 4 (1) it is provided that:—

"To the extent and in the manner provided in this Act and for the raising of a revenue for Provincial purposes—

(a) All property within the Province and all output and income of every person resident in the Province . . . shall be liable to taxation."

Part III of the Act relates to taxation of

(1) 12 T. C. 927.

(2) (1928) 2 K. B. 193 at p. 204; 97 L. J. K. B. 433; 139 L. T. 12; 72 S. J. 239; 44 T. L. R. 418; 31 Ll. L. Rep. 1 affirmed in (1929) A. C. 381; 98 L. J. K. B. 363; 140 L. T. 625; 45 T. L. R. 274; 63 Ll. L. R. 132.

(3) (1899) A. C. 99; 68 L. J. P. C. 1; 79 L. T. 473; 47 W. R. 337.

income, and certain classes of income are made exempt from taxation by s. 42.

Section 44 (1) is as follows:—

"The net income of every person shall be ascertained for the purposes of taxation by deducting from his gross income the exemptions provided in s. 42 . . . and all expenses incurred in the production of that part of his income which is liable to taxation . . . and the income-tax thereon payable to the Crown in right of the Dominion . . . but the following shall not in any case be allowed as expenses incurred in the production of income.

* * * * * *

"(e) Any loss or expense recoverable under any insurance policy or contract of indemnity.

"48.—(1) A return of income as required by this Act shall be made by each taxpayer annually without any notice or demand and filed with the Assessor of the assessment district in which the income is liable to taxation. . . .

* * * * * *

"(3) Where the return contains a statement of income derived from any business the taxpayer shall attach thereto a copy of his certified balance sheet and profit and loss account relating to that business for the period covered by the return.

* * * * * *

"51. The tax on income shall be assesssed levied and paid annually upon the net income of the taxpayer during the last preceding calendar year."

A reference to s. 44 (1) (*i*) and s. 48 (3) shows very clearly why in this case the receipt by the respondents in respect of "fixed charges" disappeared from the discussion. In their accounts for the purpose of arriving at their 'net income" the respondents were entitled to the benefit of a deduction for fixed charges as an expense: they were, however, required by s. 44 (1) (*i*) as against these lost fixed charges to bring in the fixed charges insurance receipt. The effect (the account being otherwise in credit) was necessarily to increase by the amount of that receipt the ultimate net income of the respondents.

Leaving therefore that item, the question is whether within the meaning of the Act the insurance receipt in respect of "loss of net profits" was also "income" to be brought into account so as to enter into the calculations for determining the "net income" of the business for income-tax purposes.

In view of the nature and origin of the receipt, as they have traced these, their Lordships have reached the conclusion that within the meaning even of the interpretation clause this receipt was 'income from a business" and that in ordinary parlance it was income "or gain derived from the business of the respondents which had necessarily to be brought into receipt as such in the profit and loss account of the business referred to in s. 48 (3) of the Statute.

In effect, this was the view taken by the learned trial Judge and by the majority of the Court of Appeal of British Columbia. Mr. Justice Martin's dissenting view, although perhaps less clearly expressed, may be taken to coincide with that of the learned Judges of the Supreme Court, which was that the Statute nowhere provides for taxation of moneys paid by way of indemnity for profits not earned but irretrievably lost: that the moneys in question represented insurances placed by the respondents in order to meet the possibility of destruction by fire of its means of earning profits: that that event occurred, with the result that the respondents made no profit out of the property which could be taxed for the period in question: that there were therefore no profits to tax, and in the absence of clear language authorising such a course, there was no warrant for taxing money substituted for profits by way of indemnity for their loss.

Their Lordships feel that the true question at issue has not in this statement been really dealt with by the learned Judges of the Supreme Court. The real question was whether the insurance moneys in question constituted "income" of the respondents within the meaning of the Taxation Act, and not whether these moneys were "profits" of its business. Moneys which are not strictly "profits" of a business may yet be income of the taxpayer. But even on the question whether the moneys here could properly be described as "profits" the learned Judges do not seem to have referred to the reasoning of the House of Lords in *Gliksten's case*, (2) *supra*, which would appear to be in conflict with their own.

But however the receipt be described, it is because it is truly "income" of the respondents that it must be brought into charge in their revenue account for the purpose of arriving in respect of the year of charge at the respondents' net income. Whether the whole or any part of it is finally chargeable depends upon the result of the whole annual expenditure and revenue accounts of which it constitutes one item only.

For these reasons their Lordships find themselves in the result in agreement with the learned trial Judge. They are unable to concur in the conclusion of the Supreme Court. They think accordingly that this appeal should be allowed, and the judgment of the Court of Appeal of British Columbia restored. This will automatically revive the judgment of the learned trial Judge.

And their Lordships will humbly advise His Majesty accordingly.

The Crown must have its costs before the Supreme Court, but in view of the observations of their Lordships upon this subject made on the application for special leave there will be no costs of this appeal.

A. *Appeal allowed.*

Solicitors for the Appellant:—Messrs. *Gard Lyell & Co.*

Solicitors for the Respondent:—Messrs. *White & Leonard.*

BOMBAY HIGH COURT.

Criminal Revision No 243 of 1931.

November 3, 1931.

BEAUMONT, C. J AND BROOMFIELD, J.

RUSTAM CURSETJI LAM—

APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

*Bombay Prevention of Gambling Act (IV of 1887), ss. 4(a), 7—Keeping common gaming house—Search by Police—Finding of slips of paper with names of horses and sums of money—Presumption—How presumption rebutted—*Panchnama*—Evidentiary value—Criminal Procedure Code (Act V of 1898), s. 103 (1), (2).*

The accused, a medical practitioner, was charged with keeping a common gaming house and thereby committing an offence under s. 4 (*a*) of the Bombay Prevention of Gambling Act. He was convicted on the evidence that on a Police raid of his dispensary some slips of paper with names of horses with sums of money marked against some of them were found. The Police could not find betting books of any sort:

Held, (*i*) that if a presumption arose from the evidence under s. 7 of the Act that the house or room was used as a common gaming house, then that presumption was rebutted by the fact that nothing was found in the house to suggest that it was being used as a common gaming house; [p. 869,col. 1.]

(*ii*) that the documents found in the house were perfectly consistent with the persons who were there, that is the accused, being merely engaged in making private bets for their own entertainment and the total absence of any books relating to book-making showed that no business of a common gaming house was being conducted. [*ibid.*]

Putting in *panchnamas* signed by *panchas* as part of the evidence of a Police Officer is worthless except to corroborate the evidence of the officer that *panchas* were employed and to show that the provisions of s. 103 (1) and (2) of the Criminal Procedure Code have been complied with. [p. 870, col. 1.]

Criminal Revision against the conviction and sentence passed by the Presidency Magistrate, Fourth Court, Bombay.

Mr. *Sohrab R. Davar*, (with him Mr. *R. J. Thakor*), for the Applicant.

Mr. *P. B. Shingne*, Government Pleader, for the Crown.

Beaumont, C. J.—These are two applications in revision against two convictions passed by the Presidency Magistrate, Fourth Court. In application No. 243 Dr. Lam was charged with keeping a common gaming house and thereby committing an offence punishable under s 4 (*a*) of Bombay Act IV of 1887, and in the other case four persons who were in Dr. Lam's premises were charged with being found in a common gaming house and thereby committing offences under s. 5 of the said Act.

Now the evidence is of two kinds. In the first place there is the evidence of a witness named Chand Gulab who says that he was given by the Police a marked five rupee note and five marked rupee coins and that he went with that money to Dr. Lam's room and there made certain bets and that Dr. Lam took the marked money for the purpose of the bets. The learned Magistrate says that Chand Gulab is a reliable witness, and he accepts his story. But the difficulty I have in accepting the story is that as soon as he left Dr. Lam's premises he informed the Police of the bets there made, and the Police at once raided Dr. Lam's premises. It is quite clear from the evidence of Sergeant Taylor, who was the Police-Officer-in-charge, that Dr. Lam and the other accused persons who were in Dr. Lam's premises were not anticipating a raid. Although no raid was expected the marked money was not found on the premises, and the conclusion I draw from that is that Chand Gulab did not effect bets with the ten rupees; if he had, they would certainly have been recovered when the Police raided the premises a few minutes afterwards. On his own showing Chand Gulab is not a person with a very high sense of honour, because he says that he had made bets previously with Dr. Lam (which Dr. Lam denies), although for the last two years he had been a member of the Anti-Gambling League. He probably thought that he could find a better use for the Rs. 10 which he had been lucky enough to obtain from Police than handing them over to Dr. Lam for the Police to recover. That is the only direct evidence of any betting. The other evidence is the result of the Police raid.

There were discovered in the premises of Dr. Lam various slips of paper on some of which were names said to be names of horses and on some certain sums of money were marked. The document on which the learned Government Pleader relies most strongly is Ex. G, which has the names of ten horses which were running at the Bombay races on that day, the day of the raid, and against the names of some of

those horses in two columns of the slip headed respectively "W" and "P" were sums of Re. 1 4 0, from which I think one may infer that bets of Re. 1-4-0 had been made or were to be made on certain horses for a Win or a Place. But no betting books of any sort were found. The suggestion apparently is that Dr. Lam was carrying on a book-maker's business. If so, one would expect to find books with records of the bets made. The slips of paper which were found appear to me to be consistent with the view that Dr. Lam was interested in horse racing, as he says, and was making a note of bets which he proposed to make at the races, possibly for himself and his friends as well. But I see absolutely no evidence of anything in the nature of a betting business or of a book-maker's business being carried on by Dr. Lam or by the other accused who were in his rooms.

The way the learned Government Pleader puts the case is this He says that under s. 3 of Bombay Act IV of 1887, that is to say, the Prevention of Gambling Act, "instruments of gaming" is defined as including amongst other things any document or record of any gaming, and "common gaming house" is defined as meaning "a house, room or place in which any instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, room or place" and the learned Government Pleader says that having discovered on the raid certain record of gaming transactions, that is to say, slips of paper with names of horses and sums of money upon them, a presumption arises under s. 7 of the Act that the house or room is used as a common gaming house. Well, if that presumption does arise from the mere finding in the house of a slip of paper with the names of horses and sums of money against them, I should say that the presumption is rebutted by the fact that nothing was found in the house which really suggests that it was being used as a common gaming house.

I do not propose to go in any detail through the evidence which has been analysed by the learned Magistrate, but the conclusion I come to is that the documents found in the house are perfectly consistent with the persons who were there, that is the accused, being merely engaged in making private bets for their own entertainment, and the total absence of any books relating to book-making shows that no business of a common gaming house was being conducted. That being so, I think that we must set aside the convictions.

There are two observations of a general character I desire to make in connection with this case. The first is that I cannot help thinking that the Police exercised their discretion unfortunately in launching this prosecution. It must, I think, have been apparent to Sergeant Taylor, who was in charge of the Police, when he found that his marked money was not in Dr. Lam's premises, that his witness Chand Gulab was not a very reliable person, and when he also found on the raid that there was no serious evidence of any gambling business being carried on at this house, I think he must have appreciated that, putting his case at the very highest, there had been a merely technical breach of the Prevention of Gambling Act. If there could be no more than a technical offence, it was, I think, unfortunate to take up the time of a Presidency Magistrate, a very busy man, and the time of this Court which is much in arrears with its work in dealing with such a case.

The other observation I desire to make is in connection with the *panchnama* which was put in. Sergeant Taylor in giving evidence says that he made a search of the premises of Dr Lam in company of two *panchas* and he then puts in the *panchnama* signed by the *panchas* and apparently that *panchnama* was treated as being evidence that the *panchas* had agreed with the accuracy of Sergeant Taylor's evidence as to what he found on the search. Of course the *panchnama* is not evidence of anything of the sort. If a Police Officer conducts a search in company of *panchas* he may give evidence of that fact. He may say, "I searched the premises in company of two independent persons whose names were so and so". But if he desires that the evidence of the *panchas* is to be used to fortify his own evidence and show that his evidence as to the search is correct, then, he must call these *panchas*. He is not entitled to put in a signed *panchnama* and rely on that as evidence that the *panchas* agree with his evidence. If Sergeant Taylor's evidence had been challenged in this case as to the correctness of what he found on the premises, I should have thought that his evidence was open to this comment that there had been independent persons whom he could have called to supplement and fortify his evidence but whom he had neglected to call or ask the court to call. The learned Government Pleader says that

in Bombay City the practice prevails of putting in these *panchnamas* as part of the evidence of the Police witnesses. That is a practice which does not prevail in the *mofussil*, in which the general practice is to call the *panchas*, and the same rules of evidence are applicable in Bombay City as in the *mofussil*. I desire to make it perfectly clear that in my opinion putting in *panchnamas* signed by *panchas* as part of the evidence of the Police Officer is worthless, except to corroborate the evidence of the officer that *panchas* were employed, and to show that the provisions of s. 103 (1) and (2) of the Criminal Procedure Code have been complied with. If the evidence of the *panchas* is sought to be relied upon, then the *panchas* must be called and the accused must have an opportunity of cross-examining them. To my mind the last words in s. 103 (2) do not negative this right.

The application in revision will in both cases be allowed and the accused will be discharged and the fines refunded and and the alleged instruments of gaming will be returned to the persons to whom they belonged.

Broomfield, J.—R. C. Lam, who is the principal accued in these two cases, is a Medical Practitioner, apparently of some standing, who has his consulting rooms and laboratory in the Raval Building in Lamington Road. It appears that Inspector Taylor, having received information from one Basdeo, a witness in the case, that Dr. Lam was using these premises for the purposes of a common gaming house, obtained a warrant under s. 6 of the Bombay Prevention of Gambling Act, and on the day in question, that is February 14, 1931, sent one Chand Gulab with some marked coins and a slip of paper containing the names of horses to the doctor's premises to lay a bet with him. Information having been given by Chand Gulab that the bet had been duly laid, the Police thereupon raided the premises, and certain articles which have been described by the learned Chief Justice, principally some scraps of paper containing the names of horses with in some cases figures against them, were found partly on the persons of other people present in the rooms and partly in Dr. Lam's waste paper basket and in a cupboard in one of his rooms.

The charge against Dr. Lam is under s. 4 (*a*) of the Act. No details have been given. He has been charged with and convicted simply of keeping a common gaming house. Similarly the charge on which the other accused have been convicted is simply that of gaming in a common gaming house. We understand, however, from the learned Government Pleader that the gist of the prosecution case is that Dr. Lam was in the habit of taking bets on horses running in the Bombay races and that he used his premises in Lamington Road for this purpose, also that the other accused were present on the occasion in question for the purpose of placing bets with him.

The evidence to substantiate these charges is partly direct and partly indirect. The direct evidence consists of the statements of the witnesses Basdeo and Chand Gulab, who state that on certain previous occasions they had visited the doctor at his quarters in Lamington Road and placed bets with him which were accepted. The witness Basdeo describes himself as a cotton broker, but he is also as he admits a professional Police informant. On two occasions he has himself been convicted of gambling. It has been alleged by Dr. Lam that there is personal enmity between him and this witness. That allegation can hardly be said to have been proved. But it has been proved that in a certain case No. 38 of 1929 in which this Basdeo was the complainant, the trying Magistrate came to the conclusion that he was a person utterly unworthy of credit who should not be believed upon his oath. I think, therefore under the circumstances, it would be quite unsafe to rely upon the evidence of Basdeo as a basis for convicting the accused.

The other witness Chand Gulab is in the service of an onion seller and has been for two years a member of the Anti-Gambling League, whatever that may be. It is not alleged that there is any personal *animus* on his part against any of the accused. But I agree with the learned Chief Justice that his evidence must be said to be completely discredited by reason of the fact that the marked coins, which he states he handed over to Dr. Lam a few minutes before the Police raid, were never found. It is also to be borne in mind that though he states that on two previous occasions he had placed bets with the accused, no record of those transactions has been discovered either. The prosecution case appears to be that Dr. Lam was in the habit of receiving bets, *i. e.*, made a business of it, and it is difficult to see how such a business could have been carried on without some acknow-

ledgment of the transactions being given to the punters and some record being kept by the book-maker himself.

The circumstantial evidence consisting of the finding of these slips of paper containing the names of the horses, etc., is obviously deprived of almost all its value once the evidence of Basdeo and Chand Gulab is not accepted. The articles found could be reasonably explained on the hypothesis that the accused and some of his friends were taking shares in tickets to be purchased by one or other of them on the totalisator. It is to be noted that the premises were raided on the morning of February, 14, the afternoon of that day being a race day. The Government Pleader argues that this is not the defence put forward by the accused themselves; but in the written statement of Dr. Lam we find this allegation: "On one occasion I was to meet a few friends at the course and we had decided to back a few horses in partnership on the '*tote*', and this is how one of the old slips found from the cupboard bears the names of horses and the amounts I had backed on these horses in partnership with my friends."

As regards the presumption under s. 7 of the Act, on which reliance was placed by the learned Government Pleader, that presumption only arises when "instruments of gaming" are found "in any house, room or place entered under warrant." The definition of "instruments of gaming" contained in s. 3, as amended by s. 2 of Act VI of 1919, is extraordinarily wide, so wide that if the words were to be taken literally they would apparently include perfectly innocent articles, for instance, the mere record of private bets It seems to follow that where the alleged instruments of gaming are of the character which we have in the present case, the presumption under s. 7 is one which requires very little evidence to rebut it. It is rebutted in this case in my opinion, by the failure to find any books of account or any evidence whatever to show that Dr. Lam was carrying on anything in the nature of a betting business in these premises.

I agree, therefore, that the convictions in each case should be set aside.

A. *Convictions set aside.*

CALCUTTA HIGH COURT.

Civil Revision No. 1551 of 1930.

March 9, 1931.

MITTER, J.

SURYA KUMAR MITRA AND OTHERS —PETITIONERS

versus

Munshi NOABALI AND OTHERS— OPPOSITE PARTIES.

Bengal Tenancy Act (VIII of 1885), ss. 26-C, 26-E, 26-F—Sale of occupancy—Pre-emption—Right of landlord to whom notice was not given—Exercise of right within reasonable time.

Section 26-F, Bengal Tenancy Act, gives the right of pre-emption not only to those landlords on whom notices have been issued but also to those on whom notices have not been issued under s. 26-C and 26-E, but who are landlords of the occupancy holding. In the case of the latter the right is to be exercised within a reasonable time of the knowledge of the sale. [p. 872, col. 2.]

Civil Revision against an order of the Munsif, Central Court, Dacca, dated the 6th September, 1930.

Mr. *Hiralal Chakravarty*, for the Petitioners.

Mr. *Nripendra Chandra Das*, for the Opposite Parties.

Judgment—The question which arises in this rule relates to the new provisions of s 26 F, Bengal Tenancy Act, as amended by Act IV of 1928. This case illustrates one of the difficulties which arises in the working of the provisions of the Act. With great respect to the Legislature I think that it seems to have left much that ought to have been stated for clarifying the provisions of the Act. In this case it appears that an occupancy holding was sold in execution of a money decree and was purchased by the decree-holder. The decree-holder had notices served on some of the co-sharers landlords whom he named in the notices as contemplated by s. 26 E, cl. 4 of the amended Act. He issued notices on five of the tenure-holders who were the immediate landlords of the *raiyats* whose occupancy holding had been sold by the compulsory sale. It is said that there are about 30 tenure holders who are the immediate landlords of the *raiyats*. An application was made on 16th April 1930 by eight of the co sharers under s. 26 F, cl. (1), for exercising their right of pre-emption. They applied that the entire holding be transferred to themselves. Of these eight persons who applied under s. 26 F, two of them namely Prokash Kumar Mitra and Chandra Kumar Mitra were served with notices under s. 26 E, cl. (4), on 15th February 1930. The application of these two persons was filed evidently beyond the two months

prescribed in s. 26 F, cl. (1). The other six persons who joined alleged that they had received no notices under s 26 E, cl. (4) but they came to know of the sale in execution some time on 25th February 1930 and they joined in the application with Prokash Kumar Mitra and Chandra Kumar Mitra. The Munsif has thrown out the application on the preliminary ground that so far as Chandra Kumar and Prokash Kumar are concerned, the application is beyond two months and therefore not entertainable having regard to the provisions of s. 26 F cl. (1). He has also thrown out the application of the other six persons who alleged that they received no notices as their names do not appear in the notice under s. 26 E, cl (4). A rule has been obtained in this Court at the instance of seven out of eight applicants, one of them having died without leaving any issue. The present Rule has been applied for not only at the instance of the applicants on whom notices were served but also on behalf of the rest.

It is said that one of the tenure-holders died and his heirs have been made parties to the present suit as petitioners. It is argued in support of this Rule that the Munsif has clearly acted without jurisdiction in refusing to entertain this application at the instance, at any rate, of those petitioners on whom notices were not served under s. 26 E, cl. (4) In order to consider the soundness of this contention, it is necessary to consider the scheme and policy of the amended provisions of the Bengal Tenancy Act. It appears to me that it was intended by s. 26 F to give a right of pre-emption to the landlord of an occupancy holding in case of transfer of the occupancy holding either by private treaty or in execution sales in favour of persons who are strangers to the holding. That is the principle which is recognized undoubtedly by the provisions of that section. But certain limitations are provided as to the time during which this right must be exercised and it is said in that section that this right should be exercised within two months of the service of the notice under s. 26 C or s. 26 E. The Act does not make any provision with regard to cases where no notice has been issued on persons who claim to be the landlords of the occupancy holding which has been sold as contemplated by s. 26 C or s. 26 E. In such a state of things I think it would be right to construe the section as giving the right of pre-emption not only to those landlords on whom notices have been issued but also to those on whom notices have not been issued under s. 26 C or s. 26 E but who claimed to be the landlord of the occupancy holding—the right to be exercised within a reasonable time of the knowledge of the sale.

It cannot be contended that although the Legislature intended clearly by the provisions of s. 26 F to give a right of pre-emption to the landlord, it could only be exercised by persons who would be described in the notices served through the Collector as the landlords of the holding although in reality there may be persons other than those named in the notices who are co-sharers in the superior interest. This could not have been the intention of the Legislature. In those circumstances I think it is right to treat the application of the petitioners other than Chandra Kumar and Prokash Kumar as an application made under s. 26 F for the exercise of the right of pre-emption, they not being the tenure holders who are in any way bound by the limitation provided for in that section, namely that the right has to be exercised within two months of the service of notice issued under s. 26 C or s. 26 E. It is admitted that no notice has been served on them.

In these circumstances I think the Rule must be made absolute and the case be sent back to the Munsif in order that he may entertain the application and decide if there is any contention as to whether the present applicants except the applicants Prokash Kumar Mitra and Chandra Kumar Mitra are tenure holders and hold the superior interest either wholly or in part. If the Munsif comes to the conclusion that they are the immediate landlords of the occupancy holding he will grant their application and permit them to exercise the right of pre-emption as I understand the entire purchase-money has been deposited in pursuance of the provisions of s. 26 F, cl. (*b*). If on the other hand he decides that these persons are not co-sharer tenure-holders he will dismiss the application.

There will however be no order as to costs.

A. *Case sent back.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Miscellaneous Civil Appeal No. 42 of 1930.

March 21, 1931.

MACNAIR, J. C.

LADURAM—APPELLANT

versus

SAKHARAM—RESPONDENT.

Provincial Insolvency Act (V of 1920), s. 27 (2)—Application for discharge — Extension of time — Creditors' right to apply.

Section 27 (2) of the Provincial Insolvency Act, authorises a Court to extend the time for an application for discharging an adjudicated insolvent even if an application for extension of time is made after the period specified for making the application for discharge has expired. *Gopal Ram* v. *Magni Ram* (2) and *Palani Goundan* v. *Official Receiver, Coimbatore* (3), followed. *In re Ram Krishna Misra* (1), distinguished. [p. 873, col. 2.]

It was not the intention of the framers of the Provincial Insolvency Act, that the debtor should derive advantage from his failure to apply for discharge. Therefore, an application to extend time for discharge made by a creditor should be granted if the annulment of the adjudication is calculated to prejudice the creditor. [*ibid.*]

Miscellaneous Appeal against an order of the District Judge, Chhindwara, dated the 28th January 1930.

Mr. *T. J. Kedar*, for the Appellant

Mr. *B. V. Pradhan*, for the Respondent.

Judgment.—Sakharam presented an insolvency petition: he was declared an insolvent on the 17th July 1928 and was allowed six months' time to apply for a final discharge Laduram, a creditor, asked that certain transfers made by the applicant should be annulled. While proceedings in this application were pending, Laduram, on the 9th January 1930, asked that the order of adjudication should be annulled on the ground that the debtor had not applied for an order of discharge within the period specified by the Court. The insolvent appeared and agreed that the order of adjudication should be annulled but Laduram discovering that the annulment of the order of adjudication would put an end to proceedings for annulling transfers, asked that the order of adjudication should remain in force.

The learned District Judge, without deciding whether he had power to extend the time fixed for the application of discharge, held that there was no reason for the exercise of that power and annulled the order of adjudication. Laduram, after obtaining, the leave of this Court, has filed an appeal.

In *In re Ram Krishna Misra* ( ), Das and Ross, JJ., held that the provisions of s. 43 of the Insolvency Act were mandatory and that the order of adjudication must be annulled if a debtor had not applied for an order of discharge within the period specified. But this decision was overruled by a Full Bench in *Gopal Ram* v. *Magni Ram* (2). A Full Bench of the Madras High Court in *Palani Goundan* v. *Official Receiver, Coimbatore* (3), approved of the Patna Full Bench decision. I agree with the reasoning in the Patna and Madras High Courts' Full Bench decisions and hold that s. 27 (2) of the Provincial Insolvency Act authorizes a Court to extend the time for an application for discharging an adjudicated insolvent even if an application for extension of time is made after the period specified for the application for the order of discharge has expired. The learned District Judge then had power to allow the application made by Laduram and to extend the period within which the debtor could apply for his discharge: in my opinion, there was good reason for the exercise of the power.

It is not material that the creditor had applied for annulment of the order of adjudication, as this application was made owing to misapprehension of its success and had been withdrawn. It seems obvious that it was not the intention of the framers of the Provincial Insolvency Act that the debtor should derive advantage from his failure to apply. I remark that in *Palani Goundan* v. *Official Receiver, Coimbatore* (3), the application to extend the time for the application for discharge was made by a creditor. Laduram will be prejudiced if he is unable to pursue his application for annulment of transfers. I, therefore, set aside the order of the District Judge and direct that the period within which the debtor should apply for discharge be extended up to a date which will allow of a decision on the application for annulment of transfers: costs in this Court will be borne by the respondent: Counsel's fee Rs. 40.

R. L. *Order set aside.*

(1) 88 Ind. Cas. 70; 4 Pat. 51; A. I. R. 1925 Pat. 355; 6 P. L. T. 776.

(2) 107 Ind. Cas 830; 7 Pat. 375; 9 P. L. J. 329, A. I. R. 1928 Pat. 338 (F. B.).

(3) 124 Ind. Cas. 61; 53 M. 288; 31 L. W. 365; A. I. R. 1930 Mad. 389; Ind. Rul. (1930) Mad. 573; 58 M. L. J. 369 (F. B.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Second Civil Appeal No 9 of 1929.
September 17, 1931.
JACKSON, J. C.
NURUL HASAN—APPELLANT
versus
SK. IMAMBUX AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 92, Proviso 4—Registered deed of partnership for fixed term—Oral evidence to prove dissolution and payment of share before term—Admissibility.

When an oral agreement is made which in respect of the manner of payment rescinds or modifies a contract in writing and registered and any payment is made in accordance with that oral agreement, s. 92 of the Evidence Act does not exclude evidence of that payment or of the oral agreement that explains it. Therefore, it is open to a partner to adduce oral evidence to prove that a partnership which has been formed for a fixed period under a registered deed had, in spite of the term, been dissolved within that period and that he paid the share of the other partners. [p. 875, col. 1.]

[Case-law discussed.]

Second Appeal against the decree in C. A. No. 160 of 1928, in the Court of the District Judge, Nagpur, dated the 27th October 1928, in C. S. No. 200 of 1925, dated the 26th January, 1928.

Messrs. *R. N. Padhye*, and *A. Razak*, for the Appellant.

Mr. *M. B. Kinkhede*, R. B. and Messrs. *V. R. Dhoke* and *A. R. Kulkarni*, for the Respondents.

Judgment—In this case the plaintiff sued for dissolution of partnership and for rendition of accounts. It is admitted that the plaintiff and the defendants formed a partnership in 1921 to carry on the business of buying and selling oranges in Nagpur. Under the terms of the contract which were reduced to writing and registered the partnership was to continue for five years, that is, from 13th June, 1921, to 13th June, 1926. The defendants pleaded that as the partnership had resulted in loss it was dissolved in June, 1922, and a sum of Rs. 3,270 was paid to the plaintiff as his share of the partnership assets. This defence has succeeded in both of the lower Courts but the trial Court held that there had not been a complete accounting and passed a decree declaring that the partnership was dissolved from the 25th June 1922 and ordering that a Commissioner be appointed to examine the accounts of the partnership from 13th June, 1921, up to date; that decree has been upheld by the lower Appellate Court.

The main question that I have to consider in second appeal is whether the evidence adduced to prove the dissolution of partnership in June 1922 is admissible in view of proviso 4 to s. 92 of the Evidence Act, which prohibits evidence of a subsequent oral agreement to rescind or modify a contract that has been reduced to writing and registered. This point has been dealt with by the lower Appellate Court in para. 2 of its judgment, in which it is held that the evidence is admissible.

A number of rulings on the point have been cited before me by both sides: one of those relied on by the lower Appellate Court appears to me to have no relevance that is, *Herambdev Dharnidhardav* v. *Kashinath Bhaskar* (1). In that case there was a grant followed by a re-grant of property, and it was held that the two transactions were entirely distinct, and that proviso 4 to s. 92 had no applicability. *Tan Chew Hoe Neo* v. *Chee Swee Cheng* (2), is also not in point. In that case oral evidence was admitted to prove that joint tenants had become tenants-in common because this involved no violation or contradiction of the terms of conveyance to the tenants. In *Srinivasaswami Aiyangar* v. *Athmarama* (3) it was held that proviso 4 to s 92 precludes evidence of an oral agreement to rescind a registered contract or of conduct of the parties showing that such contract is non-existent. But the latter part of this decision is directly opposed to the decision in *Shyama Charan Mandal* v. *Heras Mollah* (4) in which evidence of conduct was admitted to prove that a lease was intended to be inoperative. The decision and also *Khankar Abdur Rahman* v. *Ali Hafaz* (5) followed a Full Bench decision in *Preonath Shaha* v. *Madhu Sudan Bhuiya* (6). In the latter two cases oral evidence of conduct was admitted to show that a document operated as a mortgage and not as a sale.

In *Jagannath* v *Shankar* (7), it was held that oral evidence was inadmissible to prove that a smaller sum than what was due had been received in full satisfaction of the mortgage-debt. The correctness of that decision has been doubted in *Sukhlal* v.

(1) 14 B. 472.
(2) 116 Ind Cas. 385; A. I. R. 1929 P. C. 72; 29 L W. 534; 56 M. L. J. 643 (P. C.).
(3) 2 Ind. Cas. 612; 32 M. 281; 5 M. L. T. 84; 19 M. L. J. 280.
(4) 26 C. 160.
(5) 28 C. 256; 5 C W. N. 351.
(6) 25 C. 603; 2 C. W. N. 562.
(7) 54 Ind. Cas. 689; 44 B. 55; A. I. R. 1920 Bom. 115; 22 Bom. L. R. 39.

Jetha (8), and it has been dissented from in *Bhaba Sundari* v. *Ram Kamal* (9), and *Balasundara Naicker* v. *Ranganatha Iyer* (10). In the latter two cases and in *Mohim Chandra Dey* v. *Ramdayal Dutta* (11), oral evidence has been held admissible to prove that a debt had been discharged partly by payment and partly by release of the debt. So also in *Kattika Bapanamma* v *Kattika Krishtnamma* (12), in which a suit was brought on a registered deed agreeing to give maintenance, it was held that, though a subsequent oral agreement to give the plaintiff land to hold in lieu of maintenance was not provable, actual discharge of the claim by possession of the land could be proved. *Mullappa* v *Matum Naga Chetty* (13), and *Sukhlal* v. *Jetha* (8), do not really differ from the above cases. In both it was held that an agreement to take less than was due under a registered bond could not be proved; but it was not held that if payment had been made in pursuance of such agreement, that payment in full satisfaction could not be proved. The law is, I think, correctly stated in *Sambhu* v. *Tikaram* (14), which says that when an oral agreement is made, which in respect of the manner of payments rescinds or modifies a contract in writing and registered and any payment is made in accordance with that oral agreement, s. 92 of the Evidence Act does not exclude evidence of that payment or of the oral agreement that explained it

My conclusion in the present case is that it was open to the defendants to adduce oral evidence to prove that the partnership had, in spite of the terms in the contract that it would continue for five years, been dissolved in June 1922 and that the plaintiff had been paid his share of the assets. As to the adequacy of that evidence I can say nothing in second appeal. It has been accepted by both the lower Courts and that concludes the matter. The decree of the trial Court will stand and this appeal is dismissed with costs.

A. *Appeal dismissed.*

(8) 115 Ind. Cas. 382; 30 Bom. L. R. 1455; A. I. R. 1928 Bom. 522.

(9) 98 Ind. Cas 860; A. I. R. 1927 Cal. 27; 44 C. L J. 269.

(10) 122 Ind. Cas. 641; A. I. R. 1929 Mad. 794; 30 L. W. 293; Ind. Rul. (1930) Mad. 385; 58 M. L. J. 503; 53 M. 127.

(11) 91 Ind. Cas. 757; 30 C. W. N. 371; 42 C. L. J. 582; A. I. R. 1926 Cal. 170.

(12) 30 M. 231.

(13) 48 Ind. Cas. 158: 42 M. 41; 8 L. W. 522; (1918) M W. N. 719; 35 M. L. J. 555; 24 M. L. T. 400.

(14) 59 Ind. Cas 240; 17 N. L. R. 111; A. I. R. 1921 Nag. 51.

NAGPUR JUDICIAL COMMISSIONERS' COURT.

Appeal from Appellate Decree No. 176 of 1929.

April 9, 1931.

MACNAIR, J. C.

LILADHAR—PLAINTIFF—APPELLANT

versus

R. S. SUNDERLAL—DEFENDANT—RESPONDENT.

Contract—Deposit in connection with illegal contract—Suit for recovery.

A deposit made in respect of an illegal contract can be recovered by a suit provided the plaintiff has not to rely on such contract in support of his claim.

Appeal against the decree of the Additional District Judge, Chhindwara, dated the 26th November 1928, reversing that of the Subordinate Judge, Second Class, Chhindwara, dated the 9th January 1928.

Mr. *R. N. Padhye*, for the Appellant.

Mr. *G. R. Trivedi*, for the Respondent.

Judgment—The plaintiffs sued for return of a deposit of Rs. 1,000: the deposit was made in a village of the Chhindwara District. A document (Ex. D-1) states that the amount was to remain in deposit for three years and was then to be repaid or credited towards the price of coal.

The defendant urged that the suit filed before the expiry of three years was premature, but at the same time he urged that the object of the deposit was to secure him from loss in dealing with the plaintiffs, that these dealings ceased and that he had already brought a suit for recovery of the money due on these dealings.

In view of these admissions the plaintiffs' plea that it was understood at the time the deposit was made that it would be returned when the dealings stopped must, I think, succeed. The suit then was not premature.

In the lower Courts it was urged that the Chhindwara Court had no jurisdiction: that was not urged before me and admittedly the deposit was made in the Chhindwara District: the cause of action, in part, arose in the Chhindwara District.

The defence which has succeeded in the lower Appellate Court is that the suit cannot succeed because the contract with regard to coal was opposed to public policy. I have not been referred to any case in which this maxim has been applied to prevent recovery of a deposit as security merely on the ground that such security facilitated the carrying out of an illegal contract. In Broom's Legal Maxims at page 562 it is stated:—

"The well established test, for determining whether money or property which has been parted with in

connection with an illegal transaction can be recovered in a court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of the cause of action, necessarily relies upon the illegal transaction: if he requires aid from the illegal transaction to establish his case, the Court will not entertain his claim."

In the present case it was the defendant who urged that there had been an illegal transaction and that the result of this transaction was that he was entitled to retain the Rs. 1,000 on account of the price of coal. I do not think that the terms of Ex. D-1 made it necessary for the plaintiffs to allege and prove that they had obtained coal and paid for it. The plaintiffs could clearly succeed without mention of the fact that any transaction regarding coal had taken place. To show that the suit was not premature he had only to state that he had not had dealings with the defendant for some time before institution. I add that there is a finding of fact that nothing was due to the defendant on account of coal.

The case of course would have been very different if the Rs. 1,000 had been paid as an advance payment for coal. I am, therefore, of opinion that though the contract regarding coal has been found to be illegal, the plaintiffs are entitled to recover their deposit made on the understanding that it should remain as a deposit until all the dealings under the illegal contract were completed. I, therefore, set aside the decree of the lower Appellate Court and restore the decree of the first court: costs in all courts will be borne by the defendant.

S. L. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

First Civil Appeal No. 104 of 1930.
September 12, 1931.
GRILLE, A. J. C.

IRSHEDALI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
DASHRATH AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (I of 1920), s. 6 (5)—Mortgage of absolute occupancy—Pre-emption by malguzar—*Suit to enforce mortgage—Liability of pre-empted property.*

Under s. 6 (5) of the C P. Tenancy Act, 1920, when the proprietor exercises his right of pre-emption and deposits the amount which has been fixed by the Revenue Officer as the value of the land free from incumbrances, the mortgage-debt becomes a charge on the purchase-money in exoneration of the lien. And in a suit brought on the basis of the mortgage, such pre-empted land must be excluded when the mortgaged property is brought to sale. *Mahadeo* v. *Zingru* (1), relied on.

First Appeal against the decision in C. S. No. 83 28 passed by the Subordinate Judge, First Class, Khandwa, dated the 27 March, 1930.

Mr. *S. B. Gokhale*, for the Appellants.

Mr. *W. R. Puranik*, for the Respondents.

Judgment—Defendants Nos. 1 to 4 had in 1916 executed a mortgage in favour of the plaintiffs and among the property mortgaged were certain absolute occupancy fields with Jamunia. Subsequent to this mortgage defendant No. 5, Dewaji in execution of a simple money decree against the defendants had part of this mortgage property brought to sale in the civil court. Defendants Nos. 6 to 8 who are *co-malguzars* of the village (Defendant No. 6 Irshadali the *Lambardar* at the time of the mortgage), and defendants Nos. 9 to 11 who are also *co-malguzars* of the village exercised their right of pre-emption under s. 6 of the Tenancy Act of 1920 and defendants Nos. 6 to 8 in exercise of their right purchased the half-share of the absolute occupancy field No. 256 for which they paid Rs. 840 and defendants Nos. 9 to 11 purchased half of the absolute occupancy field No. 264 for which they paid Rs. 512. All these defendants including Dewaji have been made parties to the suit, Dewaji because the plaintiffs alleged he has acquired mortgage lien over the money which Dewaji received from the pre-emptors and the pre-emptors themselves as being in possession of the mortgage property. The mortgagors defended the suit on various grounds which need not be considered. Their contentions failed and they have not appealed against the decision. In the course of the judgment, however, the lower Court found that both sets of pre-emptors were bound by the mortgage and were not entitled to release as they claimed, but were only entitled to redeem. In respect of defendant No. 5 the finding is contained in para. 32 of the judgment. "The plaintiffs can follow the mortgage property for their mortgage-debt. The property is still in existence. Defendant No. 5 has received money for the property that has passed out of his hands. This property he had purchased subject to the plaintiff's mortgage lien. In case the property is not available, the defendant No, 5 is liable to pay the mortgage-debt out of the money received by him in exchange of the property. The plaintiffs have thus got a lien over the money received by the defendant No, 5."

Both sets of the pre emptors have filed separate appeals. They were represented by the same Pleader. The appeals were heard together and this judgment will cover them both. The grounds of appeal were that the mortgage of 1916 was not binding on the pre-emptors, that they were not the representatives of the tenant mortgagors and the equity of redemption did not vest in them and that after the pre-emption any mortgage lien on the property was transferred to the purchase money which they had deposited in the Revenue Court.

The appeals must succeed. The relevant portions of the judgment against the appellants run as follows:—

"Defenants Nos. 6 to 8 have purchased the property on payment of the amount fixed for pre-emption by the Revenue Officer. The property was in possession of the defendant No. 5 who purchased it in auction subject to the mortgage of the plaintiff. The mortgage of the field was effected in 1916. It was voidable at the option of the *malguzars*. They did not exercise their right till 1926. I do'nt think they can impeach the mortgage now. It was not a mortgage with possession. No third person has come into possession of the property in pursuance of the mortgage. Defendants Nos. 6 to 8 have come into possession of the property under their right of pre-emption from a person who purchased the property subject to the plaintiff's mortgage. I should think that the mortgage deed sued upon is binding on the defendants Nos. 6 to 8 and I decide the Issue No. 4 accordingly.. Defendants Nos. 9 to 11 have not shown how they are not liable to redeem the mortgage. They are liable to redeem the mortgage like defendants Nos. 6 to 8."

With respect to the remark that the mortgage was voidable as against the *malguzars* in 1916 and that they are debarred from impeaching the mortgage now since they have made no claim in respect of it for 10 years, the plaintiffs have not shown that the landlord's right to avoid the mortgage under s. 41 of the Tenancy Act of 1898 has ceased to exist; it is assumed that it was so since the landlords had not exercised their right for 10 years. The landlords have, however, pleaded lack of notice of the mortgage, that the mortgage was not one with possession and the mortgagee had taken no steps during these years to enforce his lien and the plaintiffs have not shown that the proprietors had any notice whatsoever of the mortgage. If a proprietor has notice of a mortgage of absolute occupancy holding he is put on his election whether he will pre empt or not immediately. But the fact that they had not received any notice and consequently had taken no action for 10 years cannot cause their right to lapse. They can still claim that the mortgage is void as against them. But apart from the considerations which arise under the Tenancy Act of 1898, the appeal must succeed by virtue of the provisions of s 6, sub-s. (5) of the Tenancy Act of 1920. It is clear that when the proprietor exercises his right of pre emption and deposits the amount which has been fixed by the Revenue Officer as the value of the land free from incumbrances, the mortgage-debt becomes a charge on the purchase money in exoneration of the lien This provision of the law appears to have been entirely overlooked by the learned Subordinate Judge. The sum obtained at the auction-sale by Dewaji was with full knowledge of the mortgage lien subsisting on the land. He had the land sold at the full value irrespective of any incumbrances, that is to say, far more than the land would have fetched if sold, had not the proprietors exercised their right of pre-emption. The proprietors in purchasing the land have also paid the full value clear from incumbrances. It is by the simplest process of reasoning clear that the mortgage lien passes on to the purchase money and that the land becomes entirely exempt from it.

The respondents in appeal could advance no better argument than that the exoneration of the lien from the mortgage is limited to the fixation of the price alone and that the purchaser is bound to see that the money deposited reached the mortgagee and that otherwise the lien subsists on the land. There is no provision to that effect in the Tenancy Act nor is there in existence so far as I am aware, any proposition of law to that effect. It is further contended that in respect of s. 41 of the Tenancy Act of 1898 the *malguzar* is bound to get a declaration that the mortgage was voidable as against him and as he failed to do so within the statutory period of six years he is unable to impeach the mortgage now. This argument is equally invalid since no proof has been brought forward that the *malguzar* had any knowledge of the mortgage at all. It is perfectly clear from the terms of s. 6 (5) of the C P. Tenancy Act of 1920 that if any mortgage lien on an absolute occupancy holding is transferred from the holding to the purchase money the *malguzar* pre-empts and that in any suit brought on the basis of a mortgage, such pre-empted land must be excluded when the mortgaged property is brought to sale *vide Mahadeo* v. *Zingru* (1).

The appeal succeeded and the decree of

(1) 124 Ind. Cas. 246; 26 N. L. R. 187; Ind. Rul. (1930) Nag. 262; A. I. R. 1930 Nag. 199.

the lower Court will be modified by excluding from the description of the mortgaged property which is to be brought to sale half share in the fields No. 259 and 264 in the possession of Irshad Ali, Abidali and Faridunnisa and Thakur, Onkar and Narayan respectively. I would not hold that the claim by the latter appellants was made in respect of a half share of field No. 295-1 as well. The field as correctly pointed out by the Pleader for the respondent was not claimed by these appellants as having been purchased by them and it is admitted on their behalf that the inclusion of this field is a mistake. The respondents will pay the appellants' costs in this Court and their costs in the court below. There will be only one set of Pleader's fee in this court.

A. *Appeal allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

First Civil Appeal No. 40 of 1930.
July 16, 1931.
JACKSON, J. C.

DALCHAND—APPELLANT
versus
Seth HAZARIMAL—RESPONDENT

Contract Act (IX of 1872), s. 202—"Interest in goods," meaning of—Agent for sale of goods entitled to retain price as remuneration, interest of.

An agent for sale of goods who is entitled to retain part of the sale-proceeds in lieu of his remuneration is not a person who has an interest in the goods within the meaning of s. 202, Contract Act *Vishnucharya* v. *Ramchandra* (1) and *Lakhmichand* v. *Chotooram* (2), followed.

First Appeal against the decree of the Subordinate Judge, First Class, Chhindwara, dated the 25th February 1930.

Messrs. *D. T. Mangalmoorti, A. V. Vazalwar*, and *N. T Mangalmoorti*. for the Appellant.

Mr. *M. R Bobde* for the Respondent.

Judgment—The plaintiff, on the 12th February 1926, appointed the defendants as his agents for the sale of cloth. The defendants were to account to the plaintiff for the cloth sold at the rates prevailing in Bombay and were entitled to keep for themselves any excess over those rates that they might secure from purchasers. The other terms of the contract are given in the two documents, dated the 12th February 1926, Ex P-2, executed by defendant No. 1 and Ex. D-1 executed by the plaintiff. The rent of the shop in which the defendants were to carry on their trade in cloth and the salary of one servant were to be paid by the plaintiff, and it was stipulated that, if the stock of cloth fell below Rs. 2,000 in value, the plaintiff would no longer be liable for the rent or the pay of the servant. The plaintiff supplied the defendants with cloth of Rs 6,008-9-0 on the 23rd February, 1926. Between that date and the 17th October, 1926, the defendants sold cloth worth Rs. 989 9-0 at Bombay rates and paid that sum to the plaintiff. On the 31st October, 1926, the plaintiff served them with a notice (Ex. P-3), terminating the agency and requiring the defendants, within eight days, to return the cloth remaining unsold and account for the cloth sold and intimating that his liability for rent and the pay of a servant would cease from the end of the month. In their reply (Ex. P-7) the defendants promised to comply within a fortnight. In reply to a second notice (Ex. P-5), dated the 8th November, 1926, the defendants (Ex P-8) denied their liability to return the cloth or to account and claimed that the plaintiff was liable to them for damages. Further notices from the plaintiff received no reply and on the 13th December, 1928, he filed the suit out of which this appeal arises, in which he has been given a decree for the delivery of cloth worth Rs 4,545-10-0 and the payment of Rs. 1 447-9-3 in cash or, if the cloth is not delivered, for the payment of Rs. 5,993 7-3.

It is the first ground of appeal on behalf of the defendants that the term relating to the payment of rent and the servant's salary really meant that the contract was to terminate when the plaintiff had not goods of the value of Rs. 2,000 to supply to the defendants and that the lower Court is wrong in holding that it meant that the contract was to terminate when the stock of the plaintiff's cloth in the defendants' hands fell below that value. There has been confusion in the use of pronouns in the two documents; but I consider that the lower Court is correct in thinking that the stipulation relates to the value of the stock in the defendants' hands. As I read the stipulation, however, it is not concerned with the termination of the contract but simply with the plaintiff's liability to pay the rent of the shop and the salary of one servant. There is, in fact, no term in the contract providing for the termination of it. It is entirely indefinite as to the time for which the agency was to continue, and the defendants cannot plead that, as they displayed, in selling the plaintiff's cloth the skill and diligence required by s. 212

of the Contract Act, it is the plaintiff who is liable to compensate them under s. 205 of the Act for revoking the agency without sufficient cause. The plaintiff was entitled, under s 203, to revoke the authority, given by him to the defendants, without any cause, unless s. 202 of the Act applies, that is, unless the defendants had an interest in the property which forms the subject-matter of the agency.

It is urged on behalf of the defendants that they had an interest in the cloth supplied to them by the plaintiff for sale, because they were entitled to keep for themselves any amount obtained by them above the Bombay rates. They rely upon illustration (*a*) to s. 202 of the Contract Act, which runs as follows:—

"*A* gives authority to *B* to sell *A*'s land, and to pay himself, out of the proceeds, the debts due to him from *A*. *A* cannot revoke this authority, nor can it be terminated by his insanity or death."

For the plaintiff, *Vishnucharya* v *Ramchandra* (1), has been cited, in which it has been held that an agent for the collection of rents cannot be regarded as having an interest in the property merely because he is authorized to take his salary out of the rents It is objected on behalf of the defendants that this decision runs directly contrary to illustration (*a*) to s. 202. But I find that a similar view has been taken in *Lakhmichand* v. *Chotooram* (2), in which the facts more closely resemble those of the present case and it was held that the interest which an agent has in effecting a sale and the prospect of remuneration to arise therefrom is not such an interest as would prevent the termination of the agency.

I am in respectful agreement with the decisions in these two Bombay cases. They and the case before me are clearly distinguishable from the case stated in illustration (*a*) to s. 202 of the Contract Act. In the illustration, the principal was under a liability to the agent quite apart from the contract of agency, and the authority given to him to sell the principal's land was by way of security for the discharge of that liability. In the present case, the agent had no interest in the property to be sold or in the sale proceeds thereof until a sale had been actually effected, and revocation of the agency, before sale had been effected, deprived him of nothing that had accrued to him

I hold that the plaintiff was entitled to revoke the agency of the defendants and did revoke it by the notice (Ex. P-3), dated the 30th October, 1926, and that the defendants are clearly liable to pay him damages for their failure to return the cloth that still remained in stock with them and to pay the plaintiff the sum received by them by the sale of cloth subsequent to revocation. The lower Court has allowed damages at the rate of 1 per cent. per mensem on the value of the cloth unsold and retained by the defendants. I consider that the lower Court's award is fair. *P. P. Deo, Receiver of the Estate of Balkrishna Koshti* v. *Narayan* (3) has no application to the present case, as it is not one in which interest has been claimed on money due of which payment has been withheld. The withholding of goods is quite a different matter.

There is a cross appeal by the plaintiff (First Appeal No. 120 of 1930). There are two grounds of appeal the first of which, I am informed, has been set up under a misapprehension. The second objects to the lower Court's allowance of interest at the low rate of 6 per cent. per annum from the date of the suit till realization; but it seems to me that this rate is adequate.

Both appeals are dismissed with costs.

K. L. *Appeal dismissed.*

(1) 5 B. 253.
(2) 24 B. 403.
(3) 116 Ind. Cas. 669; 25 N. L. R. 81: A. I. R. 1929 Nag. 170.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Second Civil Appeal No. 116-B of 1930.
February 28, 1931.
NIYOGI, A. J. C.

ABDUL—PLAINTIFF—APPELLANT
versus
KISAN—DEFENDANT—RESPONDENT.

Vendor and purchaser—Pre-emption—Covenant of title by vendor in favour of vendee—Pre-emptor coming into shoes of vendee—Defect in title—Pre-emptor's suit for damages as against vendor, whether competent.

A pre emptor is entitled to enforce a covenant running with the title against the vendor. Therefore, the vendor is as much liable to the pre-emptor as to his vendee for breach of warranty of title and a suit for damages for defect of title is competent by a pre-emptor against the vendor.

[Case law referred to]

Second Appeal against the decree of the District Judge Buldana, in C. A. No. 53 of 1929, dated the 21st February, 1930.

Messrs *A. V. Khare*, and *W. B. Pendharkar*, for the Appellants.

Messrs. *G. G Hatwalne*, and *M. D. Khandekar*, for the Respondents.

Judgment.—This appeal arises out to a suit for recovery of Rs. 2,000 as damages

for breach of a covenant for title. Kisan Tukaram, who was a defendant No 2 in the first court and is respondent No. 1 here, had executed a sale deed on 5th February, 1923, in favour of defendant No 1 (respondent No. 2) Nathu Akaji in respect of field No 16 2 for Rs. 1,500. The appellants who were plaintiffs in the lower court brought a suit for pre-emption and obtained a decree against Nathu Akaji in Civil Suit No 57 of 1924. They deposited Rs. 1,500 on 30th October, 1924 for payment to Nathu Akaji who withdrew the sum on 21st July, 1925. Then the plaintiffs discovered that there was a decree for sale already passed in respect of the field in Civil Suit No 240 of 1921 on the basis of the mortgage. In execution of the decree in that suit the pre empted field was sold. The plaintiffs consequently filed the suit out of which this appeal arises for recovery of damages The trial Court decreed the plaintiffs' claim against Kisan only. In appeal it was held that the plaintiffs were not entitled to any relief of compensation for the breach of the covenant of title for the reason that the pre-emption was not a voluntary sale.

It is contended for the appellants that a pre-emption sale could not be regarded as a compulsory sale. I have, therefore, to determine in the first instance whether pre-emption sale is a voluntary or a compulsory sale. A compulsory sale is defined as a sale which is forced upon an unwilling vendor and in which neither the purchaser is a man of his choice, nor the terms of the sale including the price are fixed by any contract with him, the sale being ordered by court conducted by its officer and subject to its approval before being treated as final. See Tagore Law Lectures, 1913, page 4. The sales such as those for public purposes under the Land Acquisition Act, those in execution of decrees or those made to equalise a partition or those made for recovery of arrears of revenue, rent or some public demands, can certainly be characterised as involuntary or compulsory sales. A voluntary sale on the other hand is a transfer effected by the owner of the property with his free consent in favour of another person chosen by himself and on terms mutually agreed, the price being immediately paid or promised or part paid and part promised: see *ibid* page 1. Whether pre-emption sale is voluntary or compulsory depends upon whether the vendor is free to sell or not to sell.

The sales can be broadly divided into four classes as follows: (1) sales by private treaty,(2) conveyances executed by the court to give effect to the agreement of sale by way of specific relief, (3) pre-emption sales (4) judicial sales including those under the Land Acquisition Act. In the case of the first three classes of sales there is one common element, it is that the vendor has full freedom to sell or not to sell before he either enters into a contract for sale or executes the actual conveyance. There is no outside pressure operating on the will of the vendor to leave him an alternative but to sell, In cases of specific relief the court simply carries out the terms of a contract to which the vendor was a willing party. Similarly in passing a pre-emption decree the court deals with a transaction which when it took place was purely voluntary. Neither the pre-emptor nor the court has any right or power to compel the vendor to sell the property. The pre-emptor's right arises only when the vendor sells of his own free will. The difference between a conveyance executed by way of specific relief and the pre emption decree lies only in the vendor's choice of the vendee, but in both cases the vendor has full discretion either to sell or not to sell and has freedom to fix his own price. It would, therefore, appear that the right of pre-emption is exercised is respect of a voluntary sale. In other words it is nothing but a culmination of the voluntary sale. As was observed in *Gobind Dayal* v *Inayatullah* (1):

"It is simply a right of substitution, entitling the pre-emptor, by reason of a legal incident to which the sale itself was subject, to stand in the shoes of the vendee in respect of all the rights and obligations arising from the sale under which he has derived his title. It is, in effect, as if in sale-deed the vendee's name were rubbed out and the pre-emptor's name inserted in its place."

The view enunciated here that right of pre-emption is simply a right of substitution and not a right of re-purchase was accepted by this Court in *Raijat* v. *Irbhan* (2). It is therefore evident that the pre-emption sale is in reality a voluntary sale. The learned Tagore Law Lecturer of 1913 also characterises a pre-emption sale to be a voluntary sale. He observes as follows:—

"The sale is not forced upon an unwilling vendor; indeed the price and the terms are determined by a contract with whom it is merely a substitution of one purchaser for another: '—

See *ibid* page 4. Similarly, Mr. Agarwala describes the nature of pre-emption as follows:—

(1) 7 A. 775 at p. 809; A. W. N. (1885) 228.
(2) 3 Ind. Cas. 923; 5 N. L. R. 136 at p. 142.

"Pre-emption confers an option to purchase a property in preference to others whenever its owner desires to sell it and of taking it from such of the latter as may have bought it. The person so entitled cannot compel the owner to sell the property but must wait until the latter is minded to part or has parted with the property, to put his option in motion."

(See Agarwala's Law of Pre-emption, page 1)

Now the next question is whether in cases of pre-emption sales there is no implied warranty of title within the meaning of s. 55 (2), Transfer of Property Act. It is urged for the respondents that the Transfer of property Act does not apply to pre-emption sales on the strength of a passage found at page 21, Vol I, Gour's Law of Property, wherein it is said that the provisions of Transfer of Property Act do not apply to a transfer *in invitum* as for example transfers in execution of a decree, sales under insolvency, pre-emption etc. It appears to me that these observations are true in so far as the formalities provided for in the Transfer of Property Act are concerned.

It may be illustrated by a case like this. If a Muhammadan were to orally sell property worth above Rs. 100 and deliver possession of the property to the vendee, such a sale would be invalid under the Transfer of Property Act, but it would not on that account fail to give rise to a right of pre-emption: see *Abdulla* v. *Ismail* (3), *Janki* v. *Giridat* (4), *Madho Bharti* v. *Bharti Singh* (5) and *Begam* v. *Muhammad Yakub* (6) It is in this sense that the Transfer of Property Act does not apply to a case of pre-emption. The respondents' learned Counsel relies on *Banti* v. *Mandu* (7) and argues that there is no warranty of title implied in favour of the pre-emptor. That case has obviously no application inasmuch as the court was considering the covenant of indemnity and not a warranty of title. In that case the sale-deed in respect of which a decree for pre-emption was granted contained a covenant by the vendor that if the are a owned by him in the land sold was found to be less than was stated in the deed, he would make good the deficiency out of some other land belonging to him. It was rightly held that that covenant was one of indemnity? In such a personal agreement between the vendor and the vendee the pre-emptor could have no right to enforce. In fact this decision can be quoted against the respondents. Their Lordships' undermentioned observations made the position clear :—

"In my opinion a covenant running with the land is to be distinguished from a personal covenant such as a covenant of indemnity entered into by the vendor in favour of the vendee. While the pre-emptor may be entitled to enforce the covenants running with the land he is not entitled to the same right with regard to a covenant of indemnity which is deemed to be a personal covenant."

Section 55, sub-s. 2, Transfer of Property Act, runs as follows :—

"The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists, and that he has power to transfer the same.. ..The benefit of the contract mentioned in this rule shall be annexed to, and shall go with the interest of the transferee as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested."

It is clear from this provision that the implied covenant for title is one which runs with the land *Bapu* v. *Kashiram* (8) and is, therefore, enforceable by the pre-emptor in whom vests the property *Hanwant Rai* v. *Chandi Prasad* (9). The contract of indemnity is only personal and does not run with the land. Since the covenant of title runs with the land, the pre-emptor has as much right to enforce the covenant and claim compensation for breach thereof as any vendee under a sale by private treaty. It appears to me that in all kinds of sales except the compulsory sale, there is an implied warranty of title since the vendee purchases the property and not merely the right, title and interest of the vendor. The principle that the seller is liable to the pre-emptor for breach of an implied warranty of title was recognised by the Muslim jurists: see Hamilton's Hedaya, page 557 quoted by Mr. Agarwala at page 200. In cases of judicial sales there can be no warranty of title because the court sells the property attached while it is in possession of the judgment-debtor without determining the title. As their Lordships observed in *Dorab Ally Khan* v. *The Executors of Khajah Moheeoddeen* (10), the execution-purchaser has no remedy against either the Sheriff or the judgment-debtor because the Sheriff is authorised by the writ to seize the prop-

(3) 64 Ind. Cas. 913; 46 B. 302; A. I. R. 1923 Bom. 124; 23 Bom. L. R. 1079.
(4) 7 A. 482; A. W. N. (1885) 97.
(5) 16 A. 337; A. W. N. (1894) 110 (F. B.).
(6) 16 A. 344; A. W. N. (1894) 101 (F. B.)
(7) 110 Ind. Cas. 425; 9 Lah. 689; A. I. R. 1928 Lah. 357; 30 P. L. R. 32.
(8) 119 Ind. Cas. 659; 31 Bom. L. R. 658; A. I. R 1929 Bom. 361; Ind. Rul. (1931) Bom. 531.
(9) 119 Ind. Cas. 243; (1929) A. L. J. 433; A. I. R 1929 All. 293; 51 A. 651; Ind. Rul. (1929) All. 995.
(10) 3 C. 806 at p. 813; 5 I. A. 116; 3 Sar. P. C. 818 (P. C.).

erty of the execution-debtor which lies within his territorial jurisdiction, and to pass the debtor's title to it without warranting that title to be good.

It is next contended that the appellants are not entitled to sue for compensation unless they had paid off the mortgage debt. Reliance is placed on *Bhagwati* v. *Banarsi Das* (11), *Nathu Khan* v. *Thakur Burtonath Singh* (12) and 55 Ind. Cas. 152 *Keshrimal* v. *Kadhai* (13). These cases lend no assistance because they do not lay down that the vendee who has purchased property subject to encumbrances without notice of such encumbrance is bound to discharge it as a condition precedent to the claim for damagas. It may be conceded that if they had paid off the mortgage debt they would have been entitled to be reimbursed. It does not however follow that their failure to redeem the mortgage of which they had no notice would deprive them of their right to claim refund of their purchase money. In the present case there was no opportunity for redeeming the mortgage debt because the decree had already been passed Their failure in execution to bid at the auction and purchase the property for which they had paid full consideration already cannot deprive them of their claim for damages. The suit is one substantially for compensation for failure of consideration. The argument therefore has no force.

Nathu, the vendee, cannot be compelled to pay back to the pre-emptor since he has received no benefit and he is, therefore, liable to the pre-emptor.

For the reasons aforesaid I allow the appeal and restore the first court's decree passed against Kisan. The respondent No 1 will pay the appellants' costs incurred in this court and the courts below.

The appellants will pay the costs of the respondent in all courts.

R. L. *Appeal allowed.*

(11) 108 Ind. Cas. 687; 50 A. 371; A. I. R. 1928 P. C. 98; 55 I. A. 135; 50 A. 371; 26 A. L. J. 550; 47 C. L. J. 539; 30 Bom. L. R. 834; 32 C. W. N. 705; 54 M. L. J 689; 28 L. W. 150 (P. C).

(12) 66 Ind. Cas. 107; 20 A. L. J. 301; 42 M. L. J. 444; 26 C. W. N. 514; 35 C. L. J. 417; 24 Bom. L. R. 571; 15 L. W. 635; (1922) M. W. N. 323; A. I. R. 1922 P. C. 176 (P. C.).

(13) 55 Ind. Cas. 152

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Second Civil Appeal No. 603 of 1929.

September 12, 1931.

GRILLE, A. J. C.

MADHORAO GADRE—PLAINTIFF—APPELLANT

versus

RAMLAL AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Land Revenue Act (II of 1917), s. 203, scope of—Abadi—*Erection of substantial building*—*Right to transfer site.*

Section 203 of the C. P. Land Revenue Act is not confined to the rights of agricultural house-holders only; their rights and liabilities are determined by the first three sub-clauses, and house-holders in general are governed by the remaining sub-clauses Clause 5 is governed by the general sub-s. (8). [p 883, cols. 1 & 2]

A license to occupy a village site cannot carry with it a right to transfer the site with permission to occupy unless such permission is proved and the fact that the licensee has built a substantial building on the site would not preclude the *malguzar* from ejecting a person to whom the licensee has transferred the site *Bhondusao* v. *Jagat Ram* (2), distinguished. *Narayan* v. *Behari* (1), referred to. [p. 883, col. 2.]

Second Appeal against an order of the District Judge, Hoshangabad, in Civil Appeal No. 209 of 1928, dated the 5th August, 1929.

Messrs. *M. R. Bobde* and *S. B. Gokhale* for the Appellant.

Mr. *J. Sen*, for the Respondents.

Judgment — *Musammat* Kamodi, a non-agriculturist, was the owner of two houses contiguous to each other in *Mouza* Sadalapur. These were brought to sale in execution of a civil court decree and were brought by one Ramratan who subsequently died and is now represented by his widow and others. The *malguzar* of the village, Madhorao, claimed possession of the site and as the defendants refused to vacate he brought a suit for possession. The defendants resisted the claim on the ground that as *Musammat* Kamodi was a non-agriculturist she had a right to transfer the houses with their sites. The plaintiff denied that the site could be transferred by her and an issue was framed. "Is the site in suit capable of being transferred with the houses as alleged?" No evidence was led in the case and the only document filed beyond postal receipts is a copy of the *wajib-ul-arz* which is of no assistance in the case as it does not more than repeat the first three sub-sections of s. 203 of the C. P. Land Revenue Act. The trial court decreed the plaintiff's claim on the strength of the

ruling in *Narayan* v. *Behari* (1), holding that the transferee has the same right as the transferor provided no objection is raised by the *malguzar* and that in this case there was an objection and that in the absence of any contract to the contrary the *malguzar* has a right to eject the transferee who is in possession of the site in the village *abadi* without obtaining his consent. The defendants appealed claiming that the provisions of the Land Revenue Act were not applicable in the case and that *Mussammat* Kamodi had full rights of ownership over the house and the site and consequently a transferable right therein irrespective of the *malguzar's* consent. The lower Appellate Court, while holding that the site undoubtedly did belong to the landlord, considered that the question raised is not one of ownership but is whether the landlord is entitled to enter into possession. Although the judgment is not very clear on the point, it appears that the learned District Judge, relied on the decision in *Bhandusao* v. *Jagat Ram* (2), and held that on the facts of the case the landlord was not entitled to revoke the license in which it was presumed that he must have given consent to the construction of these houses as the large one was a substantial house built of bricks; the smaller house is partially in ruins. The decree of the lower Court was set aside and the suit was dismissed The *malguzar* Madhorao has preferred this second appeal.

The ruling in *Bhondusao* v. *Jagat Ram* (2) has really no applicability to the present case. In that case one of two neighbours in an *abadi* sold a smaller strip of land from his site to the other and the *malguzar* claimed possession of the strip. The question as to whether ownership passed as a result of the alleged sale of this strip was expressly left undecided and it was held that the infringement if any of the *malguzar's* right in consequence of this transfer was not sufficient to entitle him to possession of the sirip transferred as the tenant vendor had a substantial house adjacent to the strip and the presumption was that he had obtained the *malguzar's* consent to the building of it. The parties in the case were non-agriculturists.

Section 203 of the Land Revenue Act is not confined to the rights of agricultural house-holders only; their rights and liabilities are determined by the first three sub-clauses of the section and house-holders in general are governed by the remaining sub-clauses. By sub cl. (5) the Financial Commissioner (now the Local Government) may declare in any village that the rights of non agricultural house holders in sites are to be heritable and transferable No such declaration has been made in respect of this village. The sub section, however, is governed by the general sub-s. (8) which says that nothing in the section shall affect the terms of any contract between the proprietor and the holder of a site in the *abadi*. *Musammat* Kamodi or her heirs must be presumed to have occupied the site in question by virtue of a contract either express or implied. No evidence has been led 'by either' side to show what this contract was and it cannot be presumed to be more than a license to occupy. It will not be revoked as far as *Musammat* Kamodi or her heirs are concerned; but this license cannot carry with it a right to transfer with permission to occupy unless such permission is proved. The right to transfer a site is an incident of ownership of the site which *Musammat* Kamodi admittedly never had. The effect of the decision of the lower Appellate Court would be to destory the *malguzar's* title in the site permanently inasmuch as the transferee would be entitled to hold in the same manner as *Musammat* Kamodi and would be entitled to transfer the site in a similar way when he himself no longer wished to occupy it. In this case the fact that the house was a substantial one and that the two houses together were sold for Rs. 600, appears to have been the deciding factor in the mind of the learned District Judge. The question of value seems to me in this case to be immaterial and in claiming the site to be transferable the defendants claim ownership of the site in *Musammat* Kamodi, a right which she did not possess. The transfer of this site as of other village sites is subject to the consent of the *malguzar* which in this case has been refused and the plaintiff's contention must succeed.

The decree of the lower Appellate Court is accordingly set aside and that of the trial Court restored. The respondents will pay the appellant's costs throughtout.

A. *Appeal allowed.*

(1) 31 Ind. Cas. 367; 11 N. L. R. 126
(2) 12 C. P. L. R. 146.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

Second Civil Appeal No. 450 of 1927.
November 18, 193:.
SUBHEDAR, A. J. C.

GULABCHAND AND OTHERS—DEFENDANTS—APPELLANTS
versus
HARBHAGAT—PLAINTIFF—RESPONDENT

C. P. Land Revenue Act (XVIII of 1881), s. 69—Dispute as to ownership of sir-*land—Order under s. 69, finality of—Omission to set up finality of order—*Res judicata—*Landlord and tenant—Tenancy for one year—Position of tenant after one year—Notice to quit, necessity of.*

Section 69, C. P. Land Revenue Act, relates to disputes as to whether or not land admittedly belonging to a particular proprietor is *sir* land or not *sir* land. It has no application to disputes as to whether a particular person is the proprietor of such land and the special rule of limitation laid down in s. 69 (4) of the said Act has, therefore, no application to a case where the dispute was of the latter kind. [p. 885, col. 1.]

Where in a suit for determination of the question of title in which the plaintiff claimed both the proprietary and cultivating rights, the defendant denied the plaintiff's title only to the cultivating rights in spite of the fact that an year prior to the institution of the suit the Settlement Officer had recorded his field as his *sir*:

Held, that the defendant might and ought to have set up his proprietary rights and he was barred by the rule of *res judicata* from setting up such right in a subsequent suit.

There is no presumption that a sub-tenancy for a single year continued after that year had expired, and the tenant, after the end of the year, is not entitled to any notice to quit. *Sheomangul* v. *Nanhelal* (2) and *Thakur Mooratsingh* v. *Munilal* (3), referred to. [p. 886, col. 2.]

Second Appeal against decision of the Additional District Judge, Khandwa, dated the 16th July, 1927.

Messrs. *M. R. Bobde*, *W. R. Puranik* and *R. M. Bhaghade*, for the Appellants

Mr. *Shridharrao Gokhale*, for the Respondent.

Judgment.—By my order dated the 3rd September, 1931, in Miscellaneous Judical Case No. 42 of 1930, I allowed the appellants an opportunity to argue grounds Nos. 3, second part of 4 (*a*), 4 (*b*), 5 and 10 of the original memorandum of appeal, as it was agreed by the parties that these grounds though touched in arguments, were not dealt with in my previous judgment.

The relevant facts may be restated thus:—

The field in dispute was originally *sir* field No. 376 which was mortgaged by Kashiram with the plaintiff as far back as 1886. This field was sold and purchased by the plaintiff on 15th August, 1908, in execution of the mortgage decree in Civil Suit No. 165 of 1907 and since only formal possession was then taken by the plaintiff, he, in 19'4 instituted Suit No. 236 of 1914 for *khas* possession of this land against the quondam mortgagor Kashiram the predecessor in-title of the defendants-appellants. When the case came up before this Court in Second Appeal No. 557 of 1915 it was held that the plaintiff purchased in the auction sale only the proprietory rights and not the cultivating rights in the *sir* field, which remained with Kashiram, in view of the provisions of s. 45 (1) of Tenancy Act then in force. The result of this litigation was a declaration by the highest Judicial Authority in the land that in the year 1914 when Suit No. 236 of 1914 was brought, field No. 376 had lost its character as *sir* land, the plaintiff becoming the proprietor and Kashiram the ex-proprietory occupancy tenant thereof.

This decision was given on 5th January, 1917, (Ex. P. 4) in spite of the fact that in the Settlement of 1912 13 of the land was still recorded as "*sir* of Kashiram" (Ex. P. 12), apparently in ignorance of the fact that it had lost its character of *sir* land under the provisions of s. 45 of the C. P. Tenancy Act of 1898. On 1st July, 1924 Sakharam having surrendered his occupancy rights, the plaintiff-respondent brought the present suit to eject the defendants-appellants who claimed to hold possession of the field under a prior lease from Sakharam.

Ground No. 3 runs as under:—

"That the settlement entry showed the field as *sir*, this entry was final and conclusive and was not challenged in proper time. The plaintiff cannot plead and prove in the present suit that the field was held in occupancy right by Kashiram and Sakharam."

The contention of the learned Advocate for the appellants is that this settlement entry of 1912-13, recording the land as "*sir* of Kashiram," not having been set aside in a regular suit under s. 83 of the Land Revenue Act of 1898, became final and conclusive and, therefore, in spite of the judgment of Batten, A. J. C., in Second Appeal No. 557 of 1915, the land remained as *sir* of the original proprietor and could not legally be surrendered by his son Sakharam, to the plaintiff on 1st July, 1924, as his ex-proprietory occupancy holding. It was, therefore, urged that the plaintiff acquired no title by the surrender to maintain the present suit for possession. This contention is indeed very plausible but clearly untenable for two very sound reasons.

In the first place, the argument completely ignores the interpretation placed by this Court, time and again, as to the limited scope of the provisions of s. 69 of the old C. P. Land Revenue Act, sub-s. (4) whereof declares that an order or entry of the Settlement Officer recording or omitting or refusing to record any land as *sir* land, shall be final, unless and until it is reversed or modified by the decree of a Civil Court in a suit instituted under s. 82 *ibid* within one year after the Settlement comes into effect. In *Dinanath* v. *Manbodhi* (1), Stanyon, A. J. C. held that the section in question merely deals with the classfication of land and does not in any way touch the question of proprietory rights therein, which may be decided whenever an occasion for such a decision arises, irrespective of a suit under s. 83 of the Land Revenue Act. The point was further made clear by Batten, O J. C., in *Hazarimal* v. *Shyanibahu*, Second Appeal No. 508 of 1917 decided on 6th April, 1918, the facts of which were almost identical with those of the present case. That was a suit by the plaintiff for the correction of a settlement entry, which recorded the defendant as a proprietor instead of as an occupancy tenant of *sir* land. The two Courts below dismissed the suit solely on the ground of limitation, holding that the special period of one year laid down in sub-s. (4) of s. 69 of the Land Revenue Act, was applicable to the case. In repelling this view the learned Officiating Judicial Commissioner made the following weighty pronouncement:—

"Section 69 relates to disputes as to whether or not land admittedly belonging to a particular proprietor is *sir* land or not *sir* land. Section 69 has no application whatever to disputes as to whether A or B is the proprietor of land. In this case the plaintiffs' claim is that they are the proprietors of the land and that the defendant No. 1 is only their occupancy tenant. They complain that at the settlement the defendant No. 1 was recorded as proprietor instead of as occupancy tenant. The mistake alleged to have occurred is that whereas defendant No. 1 was formerly the proprietor of the land as his *sir* and he has now ceased to be proprietor and has now become occupancy tenant, he is still wrongly recorded as proprietor of the *sir* land instead of as occupancy tenant of the land which was formerly *sir*. If the plaintiffs fail in their case they can have no possible objection to the defendant No. 1 being recorded as *sir* proprietor instead of ordinary proprietor. The question whether the land would be recorded as *sir* or not does not arise in the case. The sole question is whether or not plaintiff is the proprietor and defendant No. 1 the tenant. The special rule of limitation laid down in s. 69 (4) of the C. P. Land Revenue Act has, therefore, no application whatever to the case."

To the same effect is the decision of Baker, J. C. in *Jagatsingh* v. *Dharoopsingh*' S. A. No. 585 of 1922 decided on 5th January 1924. Accepting the view of law laid down in the aforesaid cases as absolutely sound I overrule the contention of the appellants' Counsel, that the settlement entry of the year 1912-13 could not be challenged as incorrect in the present litigation, simply because it was not set aside in a suit under s. 83 of old C. P. Land Revenue Act. That the entry is clearly erroneous has not been and cannot be disputed at all, because, long before it came to be made, the land had already lost its character of *sir* under the provisions of s. 45 of the C. P. Tenancy Act of 1898 and should not, therefore, have been recorded as *sir* land, even under the provisions of s 69 (1) of the old Land Revenue Act.

In the next place the matter under discussion is concluded as *res judicata* by the decision in Civil Suit No. 235 of 1914 (Ex. P. 8), which culminated in Second Appeal No. 557 of 1915 (Ex P 4). That was essentially a suit for determination of the question of title to the land in dispute in the present case; the plaintiff claimed both the proprietory and the cultivating rights therein by virtue of his auction-purchase, whereas the then defendant Kashiram denied the plaintiff's title only to the cultivating rights in the land In spite of the fact that an year prior to the institution of the suit the Settlement Officer had recorded the field as his *sir*, Kashiram did not, in his defence, rely on this entry, which he *might and ought to have done under* the fourth explanation to s. 11 of the Civil Procedure Code, in other words if he at all relied on the settlement entry it was obligatory upon him to defend that suit by pleading that the entry had wiped off even the proprietory rights which the plaintiff may have acquired in the land in dispute by his auction purchase. As would appear from the first Court's judgment in that suit (Ex P. 8), the only issue framed on the question of title was "Whether the plaintiff obtained only the proprietary rights or the cultivating rights also in the sale." The decision of the trial Court as well as of that Court on this issue was that although the decree obtained in Civil Suit No. 165 of 1907 directed the sale of both the proprietary and the tenant rights in the land, the plaintiff under the law then in force, could not acquire both, but that he simply got the proprietary rights and the cultivating rights in the land remained with the defendant. In other

(1) 36 Ind. Cas. 547; 12 N. L. R. 139.

words, the defendant was declared an ex-proprietory occupancy tenant of the land, and plaintiff the proprietor thereof, with the result that the settlement entry of 1912-13, recording Kashiram as the sole proprietor of the land, was constructively held incorrect. Since the defendants-appellants defended the present suit on a title derived from Kashiram's son Sakharam, they are precluded from challenging the plaintiff's title to the proprietary interest in the land and Sakharam's title as occupancy tenant thereof which were finally determined in the previous litigation. I hold then that on 1st July, 1914, Sakharam was only an occupancy tenant of the original *sir* field No. 376, which is the field in dispute, and that he could validly surrender his tenant right to the plaintiff, who was the landlord of the holding.

Even taking the position of the appellants as rank trespassers in possession of the land in dispute, because the five years' lease on the basis of which they originally resisted the plaintiff's claim for possession is held inoperative and fictitious, it is clear that they may not be bound by the decision arrived at in the previous litigation of 1914-17. It is however equally clear that on the facts ascertained in the present case the plaintiff has so well established his own title and that of Sakharam to the land in dispute as landlord and occupancy tenant respectively before the surrender that the surrender of the holding by Sakharam to the plaintiff has clothed the latter with all the legal rights to successfully claim eviction of the appellants as trespassers.

On grounds Nos. 4 (*a*) (second part) and 4 (*b*) it was argued that the lower Court's decision, that the surrender was not fictitious, fraudulent or champertous was wrong because the courts below failed to take into consideration the order of the Insolvency Court (Ex. P-24) which declared certain transfers made by Sakharam fictitious and fraudulent. There is undoubtedly no mention in the judgments of both the courts below of the Insolvency order, but it cannot be assumed that the matter was not before them when they gave their findings. However, in view of the fact that Sakharam himself as O. W. No. 1 clearly stated that he had received Rs. 1000, as consideration for the surrender, the lower Courts' finding that the surrender was genuine is perfectly correct. This matter has been dealt with by the lower Appellate Court in para. 13 of its judgment I agree with the concurrent findings of the courts below that the deed of surrender was a genuine transaction. In view of this clear finding it is obvious that the surrender could not be held fictitious, fraudulent or champertous.

Ground No. 5 could not be pressed in view of the conclusive finding that the lease in favour of the appellants was inoperative and fictitious.

On ground No. 10 it was argued that, since the evidence of Sakharam shows that the appellant Chaganlal was already in permissive possession of the land in dispute for some time prior to the filing of the present suit on 15th November 1924, a reasonable notice to quit should have been given to the appellants by the plaintiff before he could eject them. I find it difficult to appreciate this argument. In their pleadings the appellants did not assert anywhere that they were in permissive possession of the field at any time prior to 18-3-1923, when the five years' lease (Ex. D. 12) in their favour was to come into force. It has undoubtedly come out in the evidence of Sakharam that the appellant Chaganlal was associated with him in the cultivation of the field in suit for an year prior to the five years' lease. There are however no materials on the record to prove the exact terms under which the appellants were in possession of the land in 1922-23, except that in the *jamabandi* of that year (Ex D. 3) the appellant Gulabchand is recorded as holding the land on *batai*. The appellant's possession in 1923 was evidently under Ex. D. 12 which has been found by all the courts to be a fictitious lease. On such materials as are on the record it is difficult to hold that Gulabchand's or Chaganlal's possession in 1922-23 was that of a sub-tenant, holding from year to year, as was the case in *Sheomangal* v. *Nanhelal* (2), so as to entitle the appellants to receive a reasonable notice to quit before ejectment. It was observed in *Thakur Mooratsing* v *Munilal* (3) that where the person in possession of a holding is proved to have been a sub-tenant from year to year for a number of years, a presumption may arise that the sub-tenancy was renewed in subsequent years; but there is no presumption that a sub-tenancy for a single year continued after that year had expired. At the most, then, the possession of Gulabchand or Chaganlal for one year in 1922-23 was merely that of a licensee for a fixed term of one year.

(2) 43 Ind. Cas. 392; 14 N. L. R. 3.
(3) 103 Ind. Cas. 703; 23 N. L. R. 148; A. I. R. 1927 Nag. 320.

That being the position, the license must be deemed to have been revoked at the end of the year and the appellants were not entitled to any notice to quit, as is now contended for on their behalf, *vide* s. 62 (c) of the Indian Easements Act, 1882.

For the reasons given above I confirm my previous judgment and decree dismissing the appeal. The costs of this re-hearing of the appeal will be paid by the appellants in addition to the costs already scheduled. Pleader's fee Rs. 75.

A. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

First Civil Appeal No. 151 of 1928.
March 17, 1931.

MACNAIR, J. C., AND STAPLES, A. J. C.

PARASHRAM—PLAINTIFF—APPELLANT
versus
KRISHNA—DEFENDANT—RESPONDENT.

Mortgage—Interest—Presumptions as to rate—No provision as to rate of interest—Entire sum payable on default—Reasonable rate.

If a mortgage-deed contains stipulations regarding the payment of interest till the date fixed for payment, a presumption arises that the parties intended that interest should be paid after the date and where no inference regarding the rates can be drawn the presumption is that it was intended to pay interest at a reasonable rate. [p. 888, col. 2.]

A mortgage-deed in which prospective interest had been added as *sawai* and which provided for payment in instalments contained a clause that if instalments were defaulted interest at 2 per cent. per mensem compound was to be paid till satisfaction. There was, however, a further clause that, if two instalments were defaulted, the whole amount should become due. The deed made no provision for interest on the whole sum if it became due

Held, (i) that as there was no precise definition of the rate of interest prior to default, it was not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of *sawai* and payment by instalment; [p. 888, col. 1.]

(ii) that as the terms of the deed did not indicate what rate of interest should be paid after the entire amount became due the plaintiff was only entitled to a reasonable rate of interest. *Asaram* v. *Dnanoba* (1), *Sheoppa* v. *Rukhma* (2) and *Mahadeo Prasad* v. *Dhiraj Singh* (3), distinguished. [*ibid.*]

First Civil Appeal against the decree of the Additional District Judge, Nagpur, dated the 27th August 1928.

Mr. *W. R. Puranik*, for the Appellant.

Judgment.—The sole point raised in this appeal refers to the amount of interest included in the amount due on the mortgage in suit. The mortgage was executed to provide for the payment of old debts: 25 per cent. was added to the amount found due and the deed provided for payment in ten instalments. The learned Additional District Judge has stated that the amount of interest which would have been paid, if there had been no default, works out to Rs. 2½ per cent. per annum, but this is a miscalculation. As the debtors had to repay a portion of the debt each year, they were not to enjoy the use of the whole money for ten years: taking an average they were to enjoy its use for 5½ years and the rate of interest was 4½ per cent. per annum. The deed contains a clause that if instalments were defaulted, interest at 2 per cent. per mensem compound was to be paid till satisfaction. There is, however, a further clause that, if two instalments were defaulted, the whole amount should become due, and the deed makes no provision for interest on the whole sum if it became due.

The trial Judge relying on *Asaram* v. *Dnanoba* (1), has held that after the whole sum became exigible, the mortgagees were entitled to interest only at the rate at which the principal sum would have borne interest if there had been no default. The Judge states that this rate was 2½ per cent. per annum, but has allowed 6 per cent. per annum because the defendants agreed to pay interest at that rate.

In appeal it is urged that interest should throughout have been allowed at the rate which, it was agreed, should be paid on defaulted instalments. Reliance is placed on *Sheoppa* v. *Rukhma* (2): but that case merely decided how a particular bond should be interpreted. The deed provided for payment of instalments without interest; the interest on defaulted instalments was moderate. The Judge came to the conclusion that the deed read as a whole embodied the intention of the parties that

(1) 105 Ind. Cas. 758; 23 N. L. R. 168; A. I. R. 1928 Nag. 67.
(2) 5 N. L. R. 37.

interest should be paid after the whole sum became due at the rate agreed with respect to the defaulted instalments.

The next argument is that the decision in *Asaram* v. *Dnanoba* (1), has no application to the facts we are considering. In our opinion, this contention is correct. In the deed considered in *Asaram* v. *Dnanoba* (1), there was a clear and definite agreement to pay interest 14 annas per cent. per mensem on the principal amount up to the date fixed for payment: there was no express stipulation to pay interest after the whole sum became exigible, and it was held, following *Mahadeo Prasad* v. *Dhiraj Singh* (3), that the plaintiff was then entitled to interest at the original rate of 14 annas per cent. per mensem. In *Mahadeo Prasad* v. *Dhiraj Singh* (3), it is remarked that for five years the rate of interest was defined with precision, and an inference was drawn that, if the mortgagor failed to pay at the end of five years, it was intended that the mortgagor should pay interest at the same rate.

In the case we are considering there is no precise definition of the rate of interest prior to default: it is not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of *sawai* and payment by instalments.

The appellants' Counsel urges that the clause regarding interest on defaulted instalments shows that the parties intended that interest at the rate mentioned should be paid after the entire amount became due. But the rate of interest is very high and the condition may merely have provided for the period until the whole amount became recoverable.

In our opinion, then, as the terms of the deed do not indicate what rate of interest should be paid after the entire amount became due, a reasonable rate of interest should be allowed by the Court. Order XXXIV, r. 11 of the First Schedule to the Civil Procedure Code, directs that the Court should award such interest and though this rule was added after the trial Judge delivered his judgment, it reproduces the view previously held by the majority of High Courts. This view is based on the principles which were applied both in *Sheoppa* v. *Rukhma* (2), and *Asaram* v. *Dnanoba* (1). The presumption is that when a mortgage-deed is executed the parties contemplate the possibility that payment may not be made at the time when the entire amount becomes due. If the deed contains stipulations regarding payment of interest before this date, a presumption arises that the parties intended that interest should be paid after that date. Stipulations may be such as to justify an inference that interest on the due date is to be paid at a particular rate: but where no inference regarding the rate can be drawn, the presumption is that it was intended to pay interest at a reasonable rate.

We think that six per cent per annum is not a rate which might have been contemplated by the parties. We fix 12 per cent. per annum simple interest as a reasonable rate.

A fresh date for payment will now be fixed three months from the date of this judgment: the amount due on that date will be calculated, interest being allowed at the rate we have held to be reasonable. Costs in this appeal calculated on the amount to which it has succeeded will be added to the amount found due: the respondents incurred no costs. The trial Judge's order as to costs is not very clear. The plaintiff's costs, calculated by taking the amount for which he should have sued as a basis, will also be added to the sum found due.

A. *Order accordingly.*

(3) 77 Ind. Cas. 122; 44 A. 772 at p. 774; 20 A.L.J. 752; A. I. R. 1923 All. 7.

CALCUTTA HIGH COURT.

Letters Patent Appeal No. 1 of 1931.

June 12, 1931.

RANKIN, C. J., AND PEARSON, J.

DEBENDRA NATH DHANG AND OTHERS —DEFENDANTS—APPELLANTS

versus

PASHUPATI NATH DEB—PLAINTIFF —RESPONDENT.

Landlord and tenant—Permanent tenancy—Question of legal inference from proved facts—Weight of circumstances—Facts must be taken as a whole—Purpose of tenancy, prior transfers, etc.—Transfer of Property Act (IV of 1882), s. 106, applicability of, to tenancies before 1882.

The question whether a tenancy is permanent is not to be treated as itself a mere question of fact though the actual findings of fact are binding upon the High Court in second appeal. *Dhanamal* v. *Moti Sagar* (1), referred to. [p. 889, col. 2.]

In considering whether the proper legal inference from the facts proved is that the tenancy was a permanent one, it is necessary to bear in mind two considerations. The first is that the legal inference of permanency is to be drawn from the ascertained facts taken as a whole. The second is that even although there be a considerable number of facts which point to the tenancy having a permanent character, the effect of these facts as evidence may be entirely destroyed by a single piece of negative evidence. [p. 890, col. 1.]

Upon the question whether a tenancy is permanent or not the law of India attaches a good deal of importance to the question whether the tenancy was for residential purposes. [p. 890, col. 2.]

Prior to the Transfer of Property Act a tenancy which was not permanent was not transferable, and the fact that the transfer was recognized by the landlord without any claim being made to require the transferee to make terms with him for a new tenancy points very firmly in favour of a permanent right. [p 891, col. 2]

A statement in the rent receipts that the rents are paid for certain specified months or for a certain number of months is neutral. A tenant taking such a receipt cannot be held to have no higher right than a monthly tenant. [p. 892, col. 2.]

[Their Lordships held on all the circumstances that the tenancy was a permanent one].

Section 106 of the Transfer of Property Act is not applicable to tenancies created before 1882. [p. 892, col. 2.]

Letters Patent Appeal against the judgment of Mr. Justice Cuming, dated the 10th December, 1930.

Messrs. *Sarat Chandra Basak* and *Rupendra Kumar Mitter*, for the Appellants.

Messrs. *Brojo Lal Chakrawarti* and *Bijan Kumar Mukerji*, for the Respondent.

Rankin, C. J.—This is a Letters Patent Appeal from the judgment of Cuming, J., sitting in second appeal, the learned Judge having granted leave to appeal under s. 15, Letters Patent.

The suit has reference to a plot of land in Howrah lying between Howrah Road and the river. The size of the plot is 8 *cottas*. The Munsif inspected it on 7th April, 1926. He found an old boundary wall on the north side of it, a *pucca* privy and a square *pucca ghar* some 11½ feet long. 10 feet broad with a 3 feet wide verandah; height about 8 feet 10 inches above the plinth. There were certain tile-roofed huts some of which had brick walls. The plaintiff has a *mukarrari* right under the *zemindar* and he contends that the tenancy is a monthly tenancy which he has determined by service of defendants is that the tenancy is an old one, in origin anterior to the Transfer of Property Act of 1882, that it was given for residential purposes and is a permanent tenancy.

It was held by the Judicial Committee in the case of *Dhanamal* v. *Moti Sagar* (1), that the question whether a tenancy is permanent is not to be treated as itself a mere question of fact. Actual findings of fact by the lower Appellate Court however are binding upon us.

The plaintiff's original case was that defendant No. 1, Bhagaban, took settlement from the plaintiff himself as a monthly tenant upon a monthly rent of Re. 1-15 0. This case however has been disbelieved and is not further persisted in. Indeed it is manifestly false. The evidence shows that prior to 1874 this very tenancy was possessed by one Gourdas Bairagi. Secondary evidence, which both courts have accepted, has been given of a *kabala* (Ex. A-1) whereby Gourdas Bairagi sold it to Dinanath Sarkar. At some time before 1911 Dinanath was succeded by Bhagaban who is said to have been his adopted son. In 1920 (1327 *Aswin*) the plaintiff served a notice of ejectment upon Bhagaban. In the month of *Magh* thereafter, the present appellants purchased the interest of Bhagaban for a sum of Rs. 14,700 by the *kabala* Ex. A. This appears to have been a speculative purchase but there is no evidence to show or even to suggest that it was not a genuine bargain and on the question of the payment of consideration the witnesses for the defence were not cross-examined to any such case. By 1921 indeed it would seem clear that the defendants' interest in the suit land had very considerable value because at the time when the plaintiff was valuing this suit for purposes of jurisdiction upon the footing of the market value of the land he valued his suit at Rs. 10,808 as appears from the judgment of the Munsif.

(1) 101 Ind. Cas. 355; A. I. R. 1927 P. C. 102; 54 I. A. 178; 8 Lah. 573; 52 M. L. J. 663; 29 Bom. L. R. 870; (1927) M. W. N. 481 (P. C.).

The learned Munsif held in favour of the defendants, that the tenancy was a permanent one and transferable, finding that the origin of the tenancy was not known, that it was for residential purposes, that it was granted long before the Transfer of Property Act, that there has been uniform payment of rent, that there are old substantial *pucca* structures on the land and that there has been one case of transfer and one succession recognized by the landlord. On appeal the learned Subordinate Judge found in favour of the plaintiff, basing his judgment upon the language of certain rent receipts in the eighties and nineties from which he infers that the tenancy was a monthly tenancy. The learned Subordinate Judge explains in his judgment that but for these rent receipts he would not have differed from the trial court; but he thinks that they are fatal to the case of the defence and clearly shows that the tenancy is from month to month.

In considering whether the proper legal inference from the facts proved is that the tenancy was a permanent one, it is necessary I think to bear in mind two considerations. The first is that the legal inference of permanency is to be drawn from the ascertained facts taken as a whole. It may well be that the element of the uniformity of rent, of the existence of *pucca* structures or any other element taken by itself would not necessarily involve or demonstrate a permanent right. But in the present case there are a number of elements and it is only upon a complete review of all the relevant considerations that one is in a position to draw the proper inference. It will not do to take each element by itself and to reject them one after another as insufficient. The reasoning of the learned Judge in second appeal is I think open to some criticism on this score.

A second thing which it is important to bear in mind is that even although there be a considerable number of facts which point to the tenancy having a permanent character, the effect of these facts as evidence may be entirely destroyed by a single piece of negative evidence. In appreciating and acting upon this principle the learned Subordinate Judge is justified in his method, whether or not he has applied that method correctly to the facts.

Postponing for the moment the consideration of the question whether the rent receipts show that the tenancy was a monthly tenancy, I cannot doubt that the broader facts proved with reference to the tenancy, make an impressive case for the inference of permanency. There can I think be no doubt that the tenancy dates back to some considerable time before 1874. The recitals in the *kabala* of 1874 are not shown to have come to the notice of the landlord and while they are evidence, they are evidence only of the fact that the tenant in 1874 is making a claim to certain rights: *cf.* Evidence Act, s. 13. A tenant selling his holding, might of course very easily claim that it was permanent when it was not; but he would be soon found out if he misstated the rent and it would be of little use to misdescribe the structures on the land. In 1874 it appears that there were five huts with tiled roofs and one old *pucca* structure apart from certain thatched sheds and certain *cutcha* walls. The actual origin of the tenancy is unknown but it can hardly be doubted that prior to 1874 we find the property being used for residential purposes. At that date we find also the *pucca ghar* treated as an old structure which Gourdas had a right to sell. It has been contended for the plaintiff that when defendant No. 2 brought from Bhagaban in 1920 he says that he asked for the *patta* and was told that the *patta* had been lost, and that for this reason we should not treat this tenancy as one whose origin is unknown. This however seems to me unreasonable. Again it is said that Gourdas, according to the judgment of the Subordinate Judge, was an itinerant sort of person moving from place to place with his *thakurs*, having no place of residence. This is set forth in the judgment of the lower Appellate Court as something to be found in the evidence of D. W. No. 2 Sagor Chander Adhikari. But I have been unable to find any evidence to this effect. On the contrary, the witness remembers Gourdas living on the suit land with a *Thakurgarh* and some *Khola ghars*; he remembers Gourdas when he (witness) was 5 or 6 years old and he says that Gourdas went to Brindaban when the witness was 19 or 20 and Gourdas was about 40 years old.

Upon the question whether a tenancy is permanent or not the law of India, as I understand it, attaches a good deal of importance to the question whether the tenancy was for residential purposes. This is apart altogether from the question

whether substantial structures were built upon the land. Substantial structures may be built for the purposes of shops but in this country the old-fashioned notion at all events was that a place which was intended as a family home was very likely to be intended to be held in permanent right. There is a strong disinclination to move from the ancestral home whatever it may be, and it is this element that accounts for the importance attributed by the law to the question whether the tenancy was granted for the purpose of residence. It is contended that from this point of view a Bairagi is somewhat different from the ordinary member of the public and that in this case no great importance attaches to the fact that we find this tenancy being used and enjoyed for the purpose of residence. I doubt extremly whether any force should be attributed to this criticism. On the evidence Gourdas seems to have been on this land for a substantial time and when in 1874 he ultimately decided to go to Brindaban and to sell his right, it is clear I think that he had been erecting structures for living purposes upon the land in addition to the old *pucca garh*.

Prior to the Transfer of Property Act a tenancy which was not permanent was certainly not transferable, and the fact that the transfer was recognized by the landlord without any claim being made to require the transferee to make terms with him for a new tenancy points very firmly in favour of a permanent right. It is true that in this case there is only one transfer and that one cannot necessarily expect the plaintiff to have in his possession any detailed evidence as to his recognition of Dinanath; but the plaintiff gives no evidence of having obtained a *salami* or *nazar* and Dinanath having taken the *kabala* (Ex. A-1) had himself recorded in the landlord's *sherista* and paid rent in his own name There is no evidence of any difficulty having arisen by reason of Dinanath having bought a transferable right which Gourdas had no title to give him. It is true however that the fact that Gourdas professed to transfer the right as a permanent one is not brought home to the knowledge of the landlord. Again when Dinanath died, Bhagaban was allowed to continue in the tenancy. One succesion in a case of this kind has no great force of itself. It is readily seen that a landlord might not utilize the occasion of a tenant's death to oust his faimly. Whether or not he would utilize it as a suitable opportunity to make a claim for higher rent depends upon circumstances. In the present case it would appear that the facts are rather special.

There was a rent suit in 1903 in which the plaintiff claimed rent of Rs. 28-2-0 for the years 1311-1314 (1904-07) and which was decreed on compromise at a lesser rate. There was another suit against defendant No. 1 in 1911 which raised the question of the nature of the tenancy as well as the amount of the rent. This was compromised at the rate of Rs. 23-2-0 and the question of status was left open . It was however decided that the *jama* was an annual *jama* of Rs. 23-2-0. It would seem that from 1911 down to the time of the present suit, the plaintiff showed a certain willingness to challenge the defendants' permanent right, but had never forced it to a conclusion, and the origin of the present suit is plain enough. Proceedings having been taken under s. 145, Criminal Procedure Code, and the Magistrate having decided in favour of the defendants, the plaintiff had to bring his suit or lose his claim. On the whole however there is in these circumstances not much force in the fact that Bhagaban succeeded Dinanath. I now come to the question of uniformity of rent.

The learned Subordinate Judge in 1928 observed that the appellants in purchasing this property "purchased a litigation and took a chance as the price of town lands has gone up very high" There is ample evidence to support this finding and I have already referred to the plaintiff's own valuation, Rs. 10,808. In addition there were proceedings in 1908 whereby two *chittaks* of frontage of this land were taken for road widening purposes at Rs. 1,000, per *cotta*. As against a rent of Rs. 23-2-0, the capital value of this land had clearly risen very much both before 1903 and after. This circumstance seems to give much significance to the fact of uniformity of rent.

It would seem impossible to doubt that the rent of this holding was an annual rent of Rs. 23-2-0. This was stated in the *kabala* of 1874 and to this effect also is the compromise decree in the suit of 1911. The plaintiff's case was that the rent was a monthly rent of Re. 1-15-0, which would amount to Rs. 23-4-0 for the year. The rent receipts themselves show that the rent for a year was Rs. 23-2-0. From the first time to which we can

trace the matter down to present time rent at no other rate has ever been paid. Now,it was very important for the plaintiff to dislodge this figure of Rs 23 2-0; because if the tenancy was let at so much per month, the monthly rent must have been the curious figure of Re. 1-14-3 and $1\frac{2}{3}$ *gandas*. Hence the plaintiff falsely claimed that the annual rent was Re. 23 4-0, so that he might make out that the property had been let at Re. 1-15-0 per month.

Let us see then if the rent receipts of the eighties show a monthly tenancy. The ordinary *kists* in Bengal fall in the third, sixth, ninth and twelfth months of Bengali year—*Asar*, *Aswis*, *Pous* and *Chaitra*—rent being due and in arrear at sunset on the last day of these months. Every one of the receipts produced shows payment being made at or about the time of a *kist*—sometimes payment is made for the three previous months, sometimes for six previous months and sometimes for twelve. But all payments are in English language for one or more quarters and they are all at a rate which stated in terms of a year, is Rs. 23 2 0, and in terms of a month would work out to the figure given, *viz*, Re. 1-14-3, $1\frac{2}{3}$ *gandas* The statement in the rent receipts is a statement of the months, *e g*, from *Sravan* to *Aswin*, from *Baisak* to *Aswin*, from *Baisak* to *Chaitra*. In some rent receipts that is all that is given in explanation of the amount paid; in others there is added the phrase "for three months" or "for six months". It seems to me that such a statement in rent receipts is entirely neutral. It does not show whether it is done to explain that the rent is paid as a certain fraction of an annual rent or a certain multiple of a monthly rent. Nowhere does the corresponding figure for one month Re. 1-14-3, $1\frac{2}{3}$ *gandas* appear in these receipts. No payment is for less than a quarter and all payments are at the time of the *kist*.

The tenancy is clearly proved to have originated before the Transfer of Property Act of 1882 which did not apply to the tenancy at all: *cf.* s. 2. I think it is probably quite true that the ordinary Bengali custom, such as obtains in the *mufassil* and in respect of agricultural rents, would rather be to describe a payment as a payment for the *Aswin kist* than as payment from *Sravan* to *Aswin* for three months. But the mere fact that a receipt is not in the most usual form is not a reason for giving it a meaning which it does not necessarily bear. The receipts in question are on the printed forms which in some cases are adpoted to distinguish between current rent and arrears; but speaking generally, the distinction is not observed when making the manuscript entry and the entry is made as one, *e. g*, from *Baisak* to *Chaitra* rent for 12 months; or *Baisak* to *Aswin* for six months.

We have no evidence as to the practice of the *sherista* of the plaintiff or his predecessors at this time when dealing with rents in the town or environs of Howrah. They may very well have used such a form of receipt for old tenancies and for new, and it may have been used because it was noncommittal. But that a tenant taking such a receipt is to be held as ackowledging that he has no greater right than that of a monthly tenant because he did not quarrel with the form of the receipt seems to me to be unreasonable and unjust.

It was contended for the plaintiff that the view taken by the learned Subordinate Judge of these rent receipts was a finding of fact binding upon this court in second appeal and that even if he had mistaken the meaning or exceeded the meaning of the documents the question not being one of construction of a document of title, the error was not an error of law. I cannot however agree that under *Dhanamal's case* (1) the question whether a tenancy is permanent is or involves a question of law for us and that at the same time the finding that the tenancy is a monthly one is a finding of pure fact by the Subordinate Judge. Let us see what the findings are.

The learned Judge does not seem to doubt that the rent was an annual rent, but he thinks that these receipts refer to a monthly tenancy under s. 106, Transfer of Property Act. Under s. 107, Transfer of Property Act, a contract to pay a yearly rent, if it be not contained in a registered lease will in some cases be inoperative under s. 106 to make the tenancy anything more than a monthly tenancy. But while this is doubtless possible under such rule or some special stipulation a monthly tenancy at a yearly rent is an anomaly and difficult to infer. In view of s. 2, Transfer of Property Act, the opinion of the learned Subordinate Judge would seem to involve that the present tenancy does not go back before 1882, but is a renewed tenancy of later date to which the Act

applied since it is quite certain that the Act did not cut down an old tenancy into a monthly one. That however as I read his judgment is not really his finding. He considers if I understand him aright that the receipts show that prior to 1882 the tenant had no higher right, but does not appreciate that s. 106 of the Act would have no application to the tenancy at all.

The learned Subordinate Judge does however say of these rent receipts:

"At least the petitioners never acknowledged Dinanath as a permanent tenant but allowed him to stay on as a *thicca* tenant from month to month, a tenant-at-will. This is clear from the rent receipts filed by the defendants."

If this is a finding of fact based upon the unusual character rather than upon the necessary meaning of the receipt, it must mean that in, say, 1885 the tenant was known to be claiming a higher right and the landlord was not willing to admit it. I think the learned Subordinate Judge means also to find that the tenant knew his claim to be disputed. If that be so then in Dinanath's life-time the landlord did not try conclusions with him but in 1911 raised the question against Bhagaban and postponed the issue till 1920, when he served notice in ejectment.

Upon the whole I cannot agree that the rent receipts have the meaning which the lower Appellate Court has attached to them. I think that they are no evidence at all to show that the tenancy was being treated as a monthly tenancy and that the finding to this effect is partly due to the fact that the learned Subordinate Judge has interpreted them by s. 106 of the Act without appreciating that the section would not apply to any tenancy which originated before 1882. To hold on the basis of these receipts that in the eighties the landlord was disputing a claim to permanent right is I think a hazardous surmise. To negative such a claim a landlord must I think be less subtle and less ambiguous in the wording of his receipts.

Differing, as I think myself entitled to do, from the view taken by the learned Subordinate Judge of the rent receipts I think the correct inference in this case is that the tenancy was a permanent one which indeed, upon the same footing, would have been his view. The structures upon the land are I think substantial structures. Though not very costly ones, they are not of a character readily reconcilable with a precarious tenancy. The learned Subordinate Judge admits that there is some force in this contention, I do not think this force is lessened by the fact that Gourdas did not dedicate the *ghar* as a permanent temple when he left —as I read the translation of the *kabala* of 1874 it is not clear that Gourdas built the *pucca ghar* himself.

In my judgment the other elements in this case are complete and strong to show that the tenancy was permanent. The case law on this subject has been carefully laid before us, but I think that the principles upon which such cases as the present fall to be decided are now sufficiently well settled to make it unnecessary to discuss them once again in this judgment.

I would allow the appeal, set aside the decrees of Cuming, J., and the Subordinate Judge and restore the decree of the Munsif with costs throughout.

Pearson, J.—I agree.

A. *Appeal allowed.*

CALCUTTA HIGH COURT.

Civil Appeal No. 264 of 1928.

April 22, 1931.

MUKERJI AND GUHA, JJ.

(*Maharaja Sir*) MANINDRA CHANDRA NANDI—PLAINTIFF—APPELLANT

versus

SUDIR KRISHNA BANERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Executor—Borrowing money as executor—Liability of estate—Creditor's right—Mere right of indemnity—English and Indian Law.

Whatever differences there may be in the equity in favour of a creditor who has lent money to an executor according as it is applied for a purpose sanctioned by the will or a purpose not expressly sanctioned by it, the highest right that such a creditor may claim against the estate on the finding that it has been enriched or benefited by the money is a right to be subrogated to the right of the executor to be indemnified out of the estate to the necessary extent, and unless the right of the executor to the indemnity is established the creditor has none as against the estate where no charge has validly been created on the estate. [p. 898, col. 1.]

There is no difference between the English and Indian Law in this respect. A decree against the estate could not be passed in such cases under s. 70, Contract Act *Ramanath Paul* v. *Kanai Lal Dey* (1), *Debendra Nath Biswas* v. *Radhika Charan Sen* (3), *Sudhir Chandra Das* v. *Govinda Chandra Roy* (5), *Byramji Rustomji* v. *Heerabai* (21), *Swaminatha Aiyar* v. *Srinivasa Aiyar* (22), *Ammalu Ammal* v. *Namagiri Ammal* (23) and *Chidambaram Pillai* v. *Veerappa Chettiar* (24), relied on. [p 899,col. 1.]

[English and Indian case-law discussed]

Appeal against original decree of the Sub-Judge, Murshidabad, dated the 23rd December, 1927.

Messrs. *Sarat Chandra Basak* and *Rajendra Bhusan Bakshi*, for the Appellant.

Messrs. *Brojendra Nath Chatterji*, *Benoyendra Prasad Bagchi* and *Amarendra Narayan Bagchi*, for the Respondents.

Judgment—The plaintiff is the appellant in this appeal. The allegations on which his suit was founded were the following: That the husband of defendant No. 1, left a will appointing her and some other persons as executors, giving her permission to adopt and providing that she would remain in management of the properties until the adopted son came to be of 21 years of age; that defendant No. 1 obtained probate of the will and acted as executrix; that defendant No. 1 took defendant No. 2 in adoption, and the latter had instituted a suit against defendant No 1 in which defendant No. 3 had been appointed administrator *pendente lite*; that defendant No. 1 as such executrix borrowed money on handnotes (seven in number) for paying the Government revenue due on the estate but never repaid the same It was further alleged in the plaint that the loans were taken for legal necessities and that the estate was benefited thereby. In the suit as originally laid defendant No. 1 was impleaded in her capacity as executrix, and it was prayed that a decree might be passed for the amounts due together with interest etc, against all the defendants and for recovery thereof from the estate itself. The original plaint was filed on 6th February 1926.

The answer of defendant No. 1 was that the loans were taken for legal necessity and for payment of Government revenue due on the estate, that she had been removed from her position as executrix and defendant No. 2 had taken over the estate as *malik*, and that, therefore, defendants Nos. 2 and 3 and not she, were liable. She also averred that the account given in the plaint was not correct and that the claim for interest was unjust and exorbitant.

Defendant No. 2 in his written statement made various allegations, most of which are immaterial now as they are either not proved or are untrue. The only averments that require mention are the following:

"*Para. 6.*—That this defendant does not admit that there were any legal necessities for taking loans of the money covered by those handnotes or that the sums were borrowed for the benefit of the estate, or that the same were spent for the preservation of the estate."

"*Para. 7.*—That even admitting for arguments sake that the handnotes were legally executed and the sums were borrowed for the benefit of the estate, the estate, is not legally liable for them. They should be regarded as the personal debts of defendant No. 1 and a decree for the same may be passed against her only No decree can be passed for the said sums against the estate."

"*Para. 8.*—That the late Upendra Krishna Bandopadhya the adoptive father of this defendant, in the will executed by him, did not give any powers to the executors to raise any loan or to charge the estate in any way. On the other hand he made provisions so that the debts he had at the time of his death might be paid off early. Under such circumstances even if defendant No. 1 borrowed any money in any way, she alone is liable for that and the same is not binding on the estate nor is the estate legally liable for that."

"*Para 9.*—That shortly after defendant No. 1 had taken probate of the will..... a valuable property named (?) belonging to the estate was sold at public auction for the sum of Rs. 39,000 and by that all the debts of the time of her husband were paid off and about Rs. 8,000 remained as surplus to the estate The net income of the said estate would be a little over Rs. 7,000. Defendant No. 1 has either misappropriated or squandered away the said cash sum in hand And further by spending at her pleasure the income of the estate, she had also incurred debts to the extent of Rs. 60,000 during her time of management. If the estate has been run into debts through her mismanagement, the estate is not liable for that and even if a decree for the sum claimed in the suit is passed against defendant No. 1, she cannot get any indemnity for the said sum from the estate."

"*Para. 13.*—Even if the plaintiff was entitled to get any decree, he could not get a decree against the estate, nor was defendant No. 1 entitled to get any indemnity for the decretal money against the estate."

Defendant No. 3 filed a written statement adopting and embodying in it the substance of the averments which defendant No. 2 had made.

Thereafter on 23rd November, 1926, the plaintiff applied for amendment of the plaint alleging that defendant No. 1 had been made a defendant in the suit in her capacity as executrix but to facilitate the realization of the money it is necessary that she should be made a defendant in her personal capacity. He prayed that in the cause title defendant No. 1 might be described as impleaded in her personal capacity as well, and that if she be not held liable as executrix then a decree might be passed against her in her personal capacity.

Amongst the issues that were framed the one that requires mention is issue No. 2 which was in these words:

"Has the plaintiff any cause of action as against defendants Nos. 2 and 3,"

The Subordinate Judge held that the debt was proved, and that the moneys were borrowed for paying Government revenue. He found that the plaintiff had called for the account books of the defendants to show that the moneys were entered therein as having been spent for that purpose, but that the defendants had withheld the same. He held that it had not been established

that the executor had authority to borrow money for the purposes of the estate. He held that in such circumstances the debts though they were for legal necessity did not bind the estate. He held that defendant No. 1 alone was liable and in her personal capacity and that the claim on two of the hand-notes was barred before the date on which the said defendant was impleaded in her personal capacity; and he therefore gave the plaintiff a decree as against the said defendant in respect of the other five hand-notes. He made a decree against defendant No. 1 only in these terms, and dismissed the suit as against the other defendants.

The plaintiff has then preferred this appeal. It is clear that if the decree is to be as againt defendant No 1 only and in her personal capacity only the plaintiff cannot get anything more than what she has got. But the plaintiff's contention in the appeal is that he should have a decree against defendants Nos. 2 and 3 as well—such a decree as would bind the estate,—so that he may enforce it as against the estate itself.

Defendant No. 1 has not appeared in the appeal. Defendant No. 3 is not interested in the estate any longer the estate having been taken over by defendant No. 2 some time in 1928. Defendant No. 2 is the only contesting respondent.

On behalf of defendant No. 2 some arguments have been advanced before us to show that the loans were taken and the promissory notes were executed by defendant No. 1 in her personal capacity and not as executrix. The promissory notes were sealed with her seal as executrix and though she signed her own name therein without describing herself as executrix we must hold that the loans were taken by her in that capacity. We also hold in agreement with the court below that the loans were incurred for payment of Government revenue; and from the withholding of the account books on the part of the defendants, we think it right to presume that the amounts were so spent.

The question whether the decree against the estate may be passed or not is one of considerable importance and one not altogether free from difficulty. A number of decisions have been cited before us on this question and we shall have to examine such of them, and also such other decisions as may have a bearing on the question.

The Subordinate Judge has referred to three cases as authorities for the view he took, and it would be convenient to refer to them first. The first case is that of *Ramanath Paul* v. *Kanai Lal Dey* (1). In that case the evidence was that the executors borrowed the money secured by a promissory note for the purposes of the estate, represented at the time when the loan was incurred that the money was required for the purposes of the estate and that as a matter of fact the money was utilized for such purposes. The contention was that the plaintiff had a right to a decree not merely against the executor personally, but also against the estate. Sale, J., overruled this contention observing thus:

"I think this contention goes a good deal further than is warranted by any of the decisions in this court. I know of no case in which it has been held that in the absence of any special power given by the will an executor can render the estate liable for moneys borrowed by him for the purposes of the estate. I am quite aware that under certain circumstances an executor in his capacity as manager has the power of pledging specific portions of the estate for purposes of necessity, but that power is quite distinct from the power now claimed which is obviously of a wider character. In England it is settled law as appears from the case of *Farhall* v. *Farhall* (2), that an executor has not the power of charging the estate in respect of loans contracted for the purposes of the estate. In the present case it is not suggested that there is any special power given to the executor to borrow, or to charge the estate for loans made to the executor for the benefit of the estate."

The second case is that of *Debendra Nath Biswas* v. *Radhika Charan Sen* (3). In that case one of the executors as such had borrowed money on a promissory note and a decree was asked against all the executors, the other executors contending that they were not liable. It was found that the promissory note was given for goods apparently supplied to the estate. Maclean, C. J., Geidt, J. concurring relying on *Farhall* v. *Farhall* (2) and *Labouchere* v. *Tupper* (4) held that it was only the executor who had executed the promissory note and taken the loan against whom a decree could be passed. The third case is that of *Sudhir Chandra Das* v. *Govinda Chandra Roy* (5). In that case Chitty and Beachcroft, JJ., held that an executor who borrows money in the course of the administration, for the purposes of the estate is personally liable for the payment of such debts, subject to his right of indemnity against the estate upon proof

(1) 7 C. W. N. 104.
(2) (1872) 7 Ch. 123; 41 L. J. Ch. 146; 25 L. T. 685; 20 W. R. 157.
(3) 31 C. 253; 8 C. W. N. 135.
(4) (1857) 11 Moor. P. C. 198; 5 W. R. 797; 14 E. R. 670; 117 R. R. 16 (P. C.).
(5) 41 Ind. Cas. 503; 45 C. 538; 21 C. W. N. 1043.

that the borrowing was in all respects proper and for the benefit of the estate. In that case the borrowing executors were repudiating their personal liability. *Farhall* v. *Farhall* (2), *Labouchere* v. *Tupper* (4) and the two Calcutta decisions already referred to were relied upon in that case.

In *Farhall* v. *Farhall* (2), James, L. J. expressed the opinion that neither authority nor principle was in favour of the view that an executor can by borrowing money enable the person who lent it to stand as a creditor to the estate even though the moneys were borrowed for the purposes of the estate; and Mellish, L. J. took it to be settled law that upon a contract of borrowing made by an executor after the death of the testator the executor is only liable personally and cannot be sued as executor so as to get execution against the assets of the testator. In *Farhall* v. *Farhall* (2), Bacon, V. C. was inclined to hold that *Ashby* v. *Ashby* (6) and other cases recognized the rule that the creditor may have a demand against the executor both *de bonis testatoris* and *de bonis proprius* and that there may be a right in the creditor to proceed against the goods of the testator by reason of transactions with the executors, but this view was overruled, and the remarks of Lord Tenterden, C. J., and Bayley, J., in *Ashby* v. *Ashby* (6), which spoke of a hardship that might arise, were explained as being confined to cases in which the matter arose out of a contract with or something done by the testator. Mellish, L J., in *Farhall* v. *Farhall* (2), quoted the following statement of the law from Williams on Executors, (Edn. 9, at page 6661):

"The more modern authorities have however, established that in several instances the executor may be sued as executor on a promise made by him as executor, and that a declaration founded on such a promise will charge the defendant no further than a declaration on a promise of the testator;"

and then observed:

"But if we look through the different cases which follow the statement, it will be found that in every one the consideration for the promise of the executor was a contract or transaction with the testator."

The learned Lord Justice, after referring to two other cases, *Dowse* v. *Coxe* (7) and *Powell* v. *Graham* (8), observed thus:

"That shows no doubt that a count for money paid for the use of the executor is a good count to charge him in his representative character, when the demand arises in consequence of a contract or transaction with the testator."

This principle was applied in our court in the case of *Satya Proasd Pal* v. *Moti Lal Pal* (9) where the executor had renewed *hatchittas* in the same terms as the testator had originally executed them. In *Labouchere* v. *Tupper* (4) the Privy Council held that an executor of a trader carrying on the trade after his death was personally liable for debts contracted in the trade, and the propriety of his conduct as between himself and the beneficiaries did not give the creditors the right to be treated as creditors of the testator or to give them a charge on the assets.

In the case of *In the matter of M. A. Shard* (10), Sale J, held that the mere fact that the trustee in carrying on the business of a trust rendered himself personally liable for the business debts would not of itself give the creditors a right to proceed against the trust property, but that the creditors would be at liberty to take such steps as they might be advised to proceed against the trust property in proceedings properly constituted (the beneficiaries were not parties to the proceedings in that case). Dealing with the facts of the case itself he observed thus:

"The mere fact that the suit is described in the cause title as one against the defendant personally, and also in his capacity as trustee would not enable the plaintiff to obtain a decree which could be enforced against the trust property. It is clear upon the authorities, to which I will refer later on, that before the plaintiffs could obtain a decree which they could execute against the trust property they would have to show, first that the trust property under the terms of the settlement was devoted to the purposes of the business of an hotel, and thus made liable to the debts and liabilities which would ordinarily be incurred in the regular course of business, and in the next place they would have to show that the circumstances were such that the defendant as trustee would be entitled to be indemnified by the trust property to the extent of the claim, and further that the plaintiffs as creditors of the hotel business, were entitled to stand in the shoes of the trustee in respect of the indemnity and to be recouped out of the trust estate."

The learned Judge referred to and relied upon three decisions The first one was *Strickland* v. *Symons* (11), in which Lord Selborne said:

"There is no principle or authority for saying that if a trustee makes himself personally liable for goods the creditor thereby obtains a lien on trust property. There is not the least authority for such an action as the present. It is an action for an equitable execution against the trust estate in respect of a judgment against the trustee. There is no

(6) (1827) 7 B. & C. 444; 1 Man. & Ry. 180; 6 L. J. K. B. 41; 31 R. R. 242.

(7) (1825) 3 Bing. 20; 10 Moore 272; 3 L. J. C. P. 127; 28 R. R. 565.

(8) (1817) 7 Taunt 580; 1 Moore 305; 18 R. R 593.

(9) 27 C. 683.

(10) 28 C. 574.

(11) (1884) 26 Ch. D. 245; 53 L. J. Ch. 582; 51 L. T. 406; 32 W. R. 889.

evidence of any security on any part of this estate. There was only an ordinary contract for goods supplied to a person who happened to be a trustee. . . . . It is, therefore, impossible to compare the case of *Ex parte, Garland* (12) and *In re Johnson* (13), and other cases where there has been an express direction by the testator to carry on a business and where he specially appropriated part of his property for that purpose. Those authorities proceed on this principle that where a particular part of a trust estate is specifically dedicated to a particular purpose and the trustee though personally liable for the debts which he contracts in the course of the business has a right to be paid out of the specific assets appropriated for that purpose, and the trade creditors are not to be disappointed of payment so far as the assets so appropriated are concerned. But the authorities tend to limit that doctrine rather than to extend it. The case of *Ex parte, Garland* (12) shows that the creditor can only have recourse to the particular part of the property of which there has been an express dedication; and the right cannot be extended beyond that either in bankruptcy or in administration. And that applies even to cases in which the trustee has done his duty in carrying on the business, and where he may be entitled to an indemnity for the expenses incurred by him. *In re German Mining Co.* (14) and *Labouchere* v. *Tupper* (4), are cases in which the distinction is laid down between the rights of trustees carrying on business to be indemnified for expenses *bona fide* incurred where there are no particular assets appropriated and the rights of creditors. Under such circumstances the creditors have no rights against the trust estate."

The second case was *In re Johnson, Sheerman* v. *Robinson* (13). In that case Jessel, M. R laid down that:

"Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose the rule is that though the executor or trustee is personally liable for debts incurred by him in carrying it on pursuant to the will he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further; and consequently the creditors of the trade are entitled to stand in the place of the executor and trustee and to claim the benefit of that right, so as to obtain payment of their debts; but the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade: in such a case the defaulting executor or trustee not being himself entitled to an indemnity except upon terms of making good his default the creditors are in no better position and are, therefore, not entitled to have their debts paid out of the specific assets unless the default is made good."

The third case is that of *Raybould* v. *Turner* (15), in which the beneficiaries being parties to the proceeding the creditors were allowed to claim the benefit of the trustee's right to an indemnity so as to enable them to obtain payment of their debts out of the trust estate. In that case Byrne, J., expressed himself thus:

"*Bennet* v. *Wyndham* (16) goes to show that if a trustee in the course of the ordinary management of the testator's estate, either by himself or his agent does some act whereby some third person is injured and that third person recovers damages against the trustee in an action, the trustee if he has acted with due diligence reasonably, is entitled to be indemnified out of the testator's estate When once the trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or assets, as the case may be, as an ordinary creditor of a business carried on by a trustee or executor has been allowed to do."

The case of *In the matter of M A. Shard* (10) was approved of in the case of *Bride* v. *Madden* (17) and it was held that the creditor who supplied goods to a trustee authorized to carry on business is entitled to the trustee's right of indemnity if the trustee has not through his default lost that right.

In *In re Ivans, Evans* v. *Evans* (18), Cotton, L. J. (Lindley, L. J., agreeing) observed thus:

"A trader dies and his personal representative carries on his business. Whether the representative carries it on with or without, a person with whom he contracts a debt has no remedy against the assets, though an executor, if he had carried on the business in accordance with his duty, has a right to be indemnified out of them. Here the widow of an intestate took out Letters of Administration and continued his business, thinking to it be for the benefit of herself and her child. She incurred debts for the purpose of the business and the persons who supplied her with goods claim first against her and then against the goods... .....The goods now in question were acquired for the purposes of the business and went into the business. The infant child of the intestate claims them as belonging to the estate, and in my opinion he has a right so to claim them subject to the right of the widow to be indemnified out of them against all claims in respect of them so far as she has not lost such right by being a debtor to the estate, and whether she has lost that right is a question depending on the result of the general account."

In *Dowse* v. *Gorton* (19), it was held that the creditor of the executor or trustee is entitled, in cases where any part of the estate is authorized to be applied for carrying out a business specified in the will, to the benefit of the indemnity which the executor or trustee is entitled to In that case Lord Herschell observed thus:—

"I think it is clear that where a business has

(12) (1804) 10 Ves. 110; 1 Smith 220; 7 R. R. 352.
(13) (1880) 15 Ch. D. 548; 49 L. J. Ch. 745; 43 L. T. 372; 29 W R. 168.
(14) (1853) 4 De G. M & G. 19; 18 Jur. 710; 2 W. R. 547; 23 L. T. (o. s.) 200; 102 R. R. 7.
(15) (1900) 1 Ch. 199; 69 L. J. Ch. 249; 82 L. T. 46;

(16) (1862) 4 De. G. F. & J. 259.
(17) 31 C. 1084; 9 C. W. N. 9.
(18) (1887) 34 Ch. D. 597; 56 L. T. 768; 35 W. R. 586.
(19) (1891) A. C. 190; 60 L. J. Ch. 745; 64 L. T. 809; 40 W. R. 17.

been carried on under such an authority as was conferred upon the executors by the will of this testator, they would be entitled to a general indemnity as against all persons claiming under the will."

In the case of *In re East London County and West Minister Banking Company* v. *East* (20), where certain creditors of a testator's estate protested against a business which the executors were carrying on ostensibly under a direction contained in the will, Swinfen Eady, L. J, said:

"There can be no question that apart from the creditors of the testator who were in a special position by reason of their having assented to or acquiesced in or associated themselves with the executor's carrying on of the testator's business or otherwise being in such a position as that business is to be deemed to have been carried on with their consent and for their benefit as was the case in the House of Lords in *Dowse* v. *Gorten* (19) every other creditor was entitled to say that as against him the executors could not justify the carrying on of the testator's business for the period of three years that they did Whatever right therefore the executors may have to an indemnity as between themselves and the beneficiaries, they had no such right as against the creditors."

From the cases cited above the proposition may be deduced that whatever differences there may be in the equity in favour of a creditor who has lent money to an executor, according as it is applied for a purpose sanctioned by the will or a purpose not expressly sanctioned by it, the highest right that such a creditor may claim against the estate on the finding that it has been enriched or benefited by the money is a right to be subrogated to the right of the executor to be indemnified out of the estate to the necessary extent and unless the right of the executor to the indemnity is established the creditor has none as against the estate. We are speaking here of simple cases of loans on promissory notes or *hatchittas* or other contracts, that is to say, cases where no charge has validly been created on the estate. There are a few other cases of the Indian Courts that may now be usefully cited in support of this proposition. In 2 Ind. Cas. 161 *Byramji Rustomji* v. *Heerabai* (21), the creditor was only subrogated to the right of the executor and was not allowed to attach the estate though he had lent the money to pay off a debt due by the testator, Scott, C. J., observing

"It is clear that on a claim for money lent to executors they are liable personally and a judgment cannot be directed against the assets of the testator."

(20) (1914) 111 L. T. 101; 58 S. J. 513.

(21) 2 Ind. Cas. 161; 11 Bom. L. R. 250.

In 38 Ind. Cas. 172 *Swaminatha Aiyar* v. *Srinivasa Aiyar* (22), a case, in which a trustee of a temple had not signed the promissory note in question as manager, it was held that where money is lent or goods sold to a trustee on his own personal security, though for purposes of the trust, the creditor cannot realize the debt out of the trust property, and that the fact that the money was utilized for the benefit of the trust will not entitle the creditor to a decree charging the amount due against the trust property. In 43 Ind. Cas. 760 *Ammalu Ammal* v. *Namagiri Ammal* (23), in which case an executrix borrowed money for paying for certain legacies due from the testator's estate and executed a promissory note to which she affixed her signature without adding any description of herself as executrix and without mentioning in the promissory note the purpose of the loan, while both the learned Judges held that the creditor could not proceed against the estate and that his only remedy was to be subrogated to the rights of the executrix against the estate, they differed on the question whether, in view of the frame of the plaint, an inquiry into the question of the indebtedness of the estate to the executrix or of its liability to indemnify her could not be ordered. In the case of 43 Ind. Cas. 865, *Chidambaram Pillai* v. *Veerappa Chettiar* (24), where an executor executed a promissory note describing himself as executor and it was sought to bind the estate in a suit based on it, it was held that the estate was not liable.

On behalf of the appellant it has been contended that the three decisions upon which the Court below has relied and other cases generally in which a similar view as regards the limited rights of the creditor has been taken, have overlooked the difference that exists between the powers of an executor under the law in India as compared to what they are in English Law. It has been argued that under the Indian Law the estate vests in the executor, and that he represents the estate for all purposes and is very much in the position of an owner and that for that and other reasons the principles of English Law on which the decisions aforesaid rest should not be held to apply to this country. We

(22) 38 Ind. Cas. 172; 2 M. L. T. 91; 5 L. W. 323; 32 M. L. J 259; (1917) M. W. N. 278.

(23) 43 Ind. Cas. 760; 22 M. L. T. 391; 33 M. L. J. 631; 6 L. W. 722; (1918) M. W. N. 110.

(24) 43 Ind. Cas. 865; (1917) M. W. N. 744; 22 M. L. T. 380; 6 L. W. 640.

think it is now too late to raise a contention of this character, even if it be conceded that that there is any substance in it. It is true that the estate vests in the executor, that he represents it for all purposes and is much in the position of an owner, but then all that is so simply to enable him to do the acts which the will authorizes him to do, and to exercise those powers and discharge those duties which the law vests in him. The powers of an executor are detailed in Chap. VI, and his duties in Chap. VII, Probate and Administration Act, 1881; there is nothing in the provisions contained in these two chapters authorizing him to borrow money for the purposes of the estate. It is not suggested that the will of defendant No. 1 gave her any such power. It is quite true that it is one of the primary duties of an executor to preserve the estate and to see that its Government revenue is paid, and should he have to find money for that purpose he is entitled to be indemnified to the fullest extent.

He may dispose of the estate if he finds it necessary to do so in order to effectuate the general purposes of the will and there can be no good reason why in the exercise of a sound discretion he may not raise money by partial sale or mortgage of the assets: see *Bazayet Hossain* v. *Dooli Chand* (25). But we cannot hold that if he takes a loan and pledges his credit only, even though as an executor, he can bind the estate for its repayment, unless it is shown that he has not lost his right to be indemnified out of the assets of the estate. The appellant has also argued that a decree against the estate would be justified on the footing of s. 70, Contract Act, or on some principle analogous to what is enunciated in that section. We are unable to agree in this contention. On behalf of the respondent our attention has been drawn to s. 29, Negotiable Instruments Act, and certain cases decided under that section. We do not consider it necessary to discuss those cases because that section, which deals with the question of the extent of the limits of the personal liability of the person signing the promissory note, in our opinion, has no real bearing on the question that we are considering, namely, the question of the liability of the estate or of its owner. The cases cited merely lay this down that executors are personally liable on promissory notes executed by them as such even though they may be acting for the benefit of the testator's estate in doing so, unless their liability is excluded in the manner provided in s 29 of the Act: see, *e. g.*, *K Subbarayudu* v. *K. Subbanna* (26).

In giving a resume of the cases which we have considered relevant to the question of the liability of defendant No. 2 or of the estate, we have omitted to refer to those cases in which creditors who lent moneys to guardians of infants or the managing members of joint families or heads of religious endowments have or have not been allowed to be subrogated to the indemnity which such guardians, managing members or heads of religious endowments may have against the respective estates. We do not refer to those cases because they obviously stand on a very different footing from the present case. Some argument has been addressed to us to hold the estate liable on the footing that defendant No. 1 contracted the loan as guardian of the infant, defendant No. 2, and reliance for this argument was placed upon a provision, which the will is alleged to contain, namely, that the properties should remain under the management of defendant No 1 until the adopted son (*i, e.*, defendant No 2) attained majority. This provision, by itself, in our opinion, would not constitute defendant No. 1 guardian of defendant No. 2. Moreover the case was not presented in the trial Court in that aspect and very different considerations, dependent on investigation into facts on different lines would have arisen if it had been so presented.

The above being the state of the authorities on the question indicated above, our conclusion is that in view of the fact that in the present case the executrix, defendant No. 1, had executed the promissory notes as such executrix and that the loans were taken for the benefit of the estate and there being a strong presumption arising out of the non-production by the defendants of the account books that had been called for on behalf of the plaintiff that the estate was really benefited by the loans and that the plaintiff, far from asking for a decree against the executrix only in her personal capacity, had in the plaint as originally filed impleaded all the necessary parties and had asked for a decree against all the defendants binding the estate, he should not be debarred from the remedy which the law allows him. It is quite true that it was not specifically

(25) 4 C. 402; 5 I. A. 211; 3 Sar. 853; 3 Ind. Jur. 121 (P. C.).

(26) 85 Ind. Cas 457; A. I. R. 1925 Mad. 371 affirmed on appeal 92 Ind. Cas. 805; A. I. R. 1926 Mad. 390.

pleaded in the plaint that he was entitled to be substituted to the indemnity which defendant No. 1 had against the estate; but that is only a formal defect seeing that the prayer for relief against all the defendants and against the estate was there. Defendant No. 2 understood quite well that it was the indemnity to which the plaintiff desired to be subrogated as is evident from the passages from the written statement quoted above

We accordingly feel no hesitation in ordering a further trial of the suit to determine the question whether defendant No. 1 has lost her right to the indemnity, or, in other words, to what extent, if any she is entitled to be indemnified out of the estate. Defendant No. 2, who pleaded that defendant No. 1 had lost that right, has given no proof of this allegation at all. In going into this question the Court below will have to take such evidence as the parties may choose to adduce and then to direct an investigation into the accounts to be held by a Commissioner appointed for the purpose, should that course be also necessary, due regard being had to the circumstance that defendant No. 1 has been discharged from her position as executrix apparently without any liability to the estate which is now in the hands of defendant No. 2. On the result of this further trial and investigation the court below will consider what should be the proper decree to be passed in the case.

In conclusion, we desire to observe that it would be very necessary for the court below to be astute enough to see that as a result of collusion between defendant No. 1 and defendant No 2, about which some complaint has been made before us, the plaintiff may not be placed in a position making it impossible for him to show that defendant No. 1's right to indemnify has not been lost. Necessary presumptions will have to be drawn if defendant No. 2 persists in the non-production of the books of accounts and other papers which have not been produced by defendant No. 3 or by himself so far. And the allegations that defendant No. 2 made in the several paragraphs of his written statements will be matters for him to substantiate

The result is that the appeal is allowed, and the decree passed by the Court below in so far as it has dismissed the suit against defendant No. 2 being set aside, the suit is remanded to the Court below to be tried further in accordance with the observations made and directions given above.

Costs of this appeal will abide the result of the remand.

A. *Case remanded.*

CALCUTTA HIGH COURT.

Civil Rule No. 313 of 1931.

June 26, 1931.

JACK, J.

NARAYAN CHANDRA BANERJEE—PETITIONER

versus

KAILASH CHANDRA AND OTHERS—OPPOSITE PARTIES

Bengal Tenancy Act (VIII of 1885), ss. 26 F, 26-J. —Sale of occupancy—Landlord's right to pre-empt—Exercise of right before payment of transfer fee and compensation, legality of—Simultaneous applications under ss. 26-F and 26 J, propriety of.

Under s. 26-J. cl. (3), Bengal Tenancy Act, the application under s. 26-J must first be made in order to make the provisions of s. 26-F applicable to a case to which the provisions of cl. (1) s. 26-J applies, but this does not mean that the landlord is not competent to exercise his right of purchase under s. 26-F until the balance of the landlord's transfer fee and compensation allowed have been paid.

Applications under ss. 26-J and 26-F can be made at the same time.

Civil Rule against an order of the Munsif, Second Court, Khulna, dated the 22nd December, 1930.

Mr. *Hemendra Chandra Sen*, for the Petitioner.

Mr. *Bijan Kumar Mukerji*, for the Opposite Parties.

Judgment.—This rule has been issued calling upon the opposite party to show cause why an order of the Munsif, Second Court at Khulna, under ss. 26 J and 26 F should not be set aside on the ground that an application under s. 26-F must follow an application under s 26-J and that the application under s. 26 F cannot be made until after the balance of the landlord's fees and compensation have been paid into Court as provided by s. 26-C read with s. 26-J.

The contention of the petitioner depends upon the interpretation of s. 26 J, cl. (3). That clause states:

"The provision of s. 26-F shall apply to the case of a transfer referred to in sub-s. (1) and the immediate landlord shall be competent to exercise his rights of purchase under that section within two months of the date of payment into Court of the balance of the landlord's transfer fee and the compensation allowed."

The petitioner is right in holding that the application under s. 26-J must first be

made in order to make the provisions of s. 26-F applicable to a case to which the provisions of cl. (1), s. 26 J. applies. But he is not right in urging that the landlord is not competent to exercise his rights of purchase under s. 26 F until the balance of the landlord's transfer fee and compensation allowed have been paid. Such an interpretation of the section would mean that if the balance of the landlord's transfer fee and compensation are not paid the landlord would not be competent to pre-empt under s. 26-F and that in any case he has got to wait until the tenant chooses to pay the balance of the landlord's transfer fee. The position of the landlord in such a case would be much worse than that of the landlord whose tenant makes a *bona fide* transfer. This cannot be the intention of the Legislature. Obviously, this portion of cl (3), s. 26-J is merely a provision fixing the time within which the landlord may apply to pre-empt. The provisions of limitation in s. 26-F would not apply in this case (no notices having been issued under s. 26 C or 26-E) thus making it necessary to provide a special period of limitation in the case in which an application is made by the landlord under s. 26 J. It has also been pointed out that this point was not at all raised in the court below. The judgment of the court below shows that application was made at the same time under ss. 26 and 26 F and there seems to be no reason why this should not be allowed. This being the only ground on which this Rule was granted this Rule is discharged with costs: hearing fee one gold *mohur*.

A. *Rule discharged.*

CALCUTTA HIGH COURT.

Criminal Miscellaneous Case No. 11 of 1931.

August 11, 1931.

C. C. GHOSE AND PEARSON, JJ.

AMULYA CHANDRA BHADURI—PETITIONER

versus

SATIS CHANDRA GIRI AND OTHERS—OPPOSITE PARTIES.

Contempt of Court—Pleadings—Duty of complainant to allege grounds specifically—Affidavits—Source of information not disclosed—Value of statements.

In proceedings for contempt the practice of the court is to enable the parties concerned to know what are the points they have got to answer and the practice has always been that the parties charged with contempt cannot be called upon to answer to anything which is not set out specifically in the grounds used before the court at the time when the Rule was issued. The fact that the grounds are matters of record and that a Rule has been issued is immaterial. [p. 902, col. 2.]

The court should not take any notice whatsoever of matters which are stated to be true to information but in respect of which the source of the information is not disclosed. [p. 902, col. 1.]

Messrs. *N. K. Basu, Girja Prosanna Sanyal* and *J. N. Sanyal*, for the Petitioner.

Messrs. *H. D. Bose, Asita Ranjan Ghose, S. K. Sen, Maity, B. K. Mukherjee, Naresh Chunder Sen Gupta, Ramani Mohun Chatterji, Haradhan Chatterji, Prokash Chunder Pakrashi, Paramananda Lahiri* and *Indu Prokash Chatterji, Charu Chunder Biswas* and *Arun Prasad Roy Choudhury*, for the Opposite Parties.

Judgment.—This is a Rule calling upon four persons named Satish Chandra Giri, Probhat Giri, Narendra Samanta and Gobordhone Kamle to show cause why they should not be committed for contempt. The circumstances under which the present Rule came to be issued, shortly stated, are as follows: It appears that some time in February 1930 the Receiver of the admittedly *debuttar* estate attached to the Tarakeswar temple made an application to the District Judge of Hooghly praying that proceedings in contempt might be taken against the above-named persons inasmuch as they had been attempting to impede and stultify the administration by the Receiver of the *debuttar* estate by resorting to improper and unlawful means and artifices, as they had been guilty of direct illegal obstructions offered to the officers in the discharge of their lawful duties, as they had used criminal force and criminal intimidation under the circumstances stated in the petition or report of the Receiver and as they had been guilty of offering insults and threats to the Receiver and the officers under him. The District Judge thereupon issued notices upon the persons concerned and called upon them to show cause why they should not be proceeded against in contempt.

A number of witnesses were examined before the District Judge on the side of the Receiver as also on the side of the persons concerned and a number of records from the Magisterial and other courts were admitted in evidence, and finally the District Judge came to the conclusion on 9th January 1931 after a prolonged inquiry that it has been established to his satisfaction that the persons concerned had been guilty of various acts of contempt. He thereupon referred the matter to this court for taking such proceedings against the said persons

as this court thought proper under the provisions of Act XII of 1926. The matter came before my learned brothers, Lort-Williams, J. and S. K Ghose, J., who were then presiding over the Criminal Bench and which Bench had been authorized by the learned Chief Justice to deal with and dispose of the reference made by the District Judge of Hooghly. The learned Judges came to the conclusion that a Rule had to be issued upon the persons concerned and that such Rule should be issued on the petition or report of the Receiver made to the District Judge and the affidavit in support thereof. They expressed the view that one of the parties to the litigation should have moved in the matter, but, inasmuch as that had not been done, they thought it expedient in the circumstances appearing before them to issue a Rule on the report or petition of the Receiver to the District Judge treating the same as if it was a petition to this court. That Rule has now come on for hearing before us.

We have examined such portions of the record as have been brought to our notice. It is quite clear that the only allegations which Satish Chandra Giri and the three other persons named above are called upon to answer are the allegations made in the petition or report of the Receiver to the District Judge which petition or report was treated as if it was a petition to this court and the affidavit in support thereof. Confining ourselves therefore to the grounds upon which the present Rule has been issued and which are the only grounds that the opposite Parties are called upon to answer, it is to be observed that the affidavit in support of the report or petition of the Receiver is singulalry lacking in precision.

So far as paras A and B are concerned, it is no doubt stated in the affidavit that the said paragraphs refer to matters of record and that the same are true to the knowledge of the deponent, namely, the Receiver; but, as regards paras. C and D, it may be stated at once that we cannot take any notice whatsoever of the matters mentioned in para. D because the affidavit says that the matters mentioned therein are true to the information of the deponent. The source of the information is not disclosed and, as is laid down in various cases, we are unable to take any notice whatsoever of matters which are stated to be true to information but in respect of which the source of the information is not disclosed. As regards para C, it is stated that the earlier portion of the paragraph is true to information. The remarks we have just made as regards para. D apply to the same, but we have not been able to make out what are the earlier paragraphs which are referred to nor has Mr. Basu who appears in support of the present Rule been able to enlighten us as to which portions of para. C are referred to in the affidavit in question. The result therefore is that the petitioner on whose petition the present Rule has been issued must be limited to grounds A and B.

As regards grounds A and B, it is true that certain matters of record have been referred to, but the position is that those matters of record have been set out in such a manner as to justify the conclusion that the opposite parties have not been able to know with any amount of precision the particular acts of contempt with which they are charged in the petition. In cases of this nature, as is well-known, the practice of the court is to enable the parties concerned to know what are the points they have got to answer in a charge of contempt and the practice has always been that the opposite parties, namely, the parties charged with contempt cannot be called upon to answer to anything which is not set out specifically in the grounds used before the court at the time when the Rule was issued. The relevant practice and procedure are set out in the Annual Practice and there is no doubt whatsoever that, in matters of this nature, the court has to proceed very carefully and cautiously. The liberty of the subject is concerned and it is not enough that, because a Rule has been issued therefore the Rule has got to be determined in only one particular manner without the court examining the grounds on which the Rule has been issued. We are of opinion that the grounds in this case are insufficient and in the circumstances the only course that is left open to us is to discharge the present Rule.

Nothing that we have said will prevent any of the parties to the litigation which is the subject-matter of an appeal to this court at the present moment to move and apply for suitable orders, should they be so advised

Mr. H. D. Bose on behalf of the *Mohunt* asked for costs. But in the circumstances we are of opinion that there should be no order for costs.

A. *Rule discharged.*

CALCUTTA HIGH COURT.

Criminal Reference No. 90 of 1931.

AND

Criminal Revision No. 583 of 1931.

August 12, 1931.

C. C. GHOSH, AG. C. J. AND PEARSON, J.

RAJENDAR KUMAR ROY—PETITIONER

versus

BAL GOVINDA TEWARI AND ANOTHER—OPPOSITE PARTIES.

Bengal Municipal Act (III of 1884), s. 202—Applicability to Howrah—Calcutta Municipal Act (III of 1899), s. 342, effect of.

Section 202, Bengal Municipal Act, was not repealed so far as Howrah was concerned when in 1904, the Government extended s. 342 of the then Calcutta Municipal Act, III of 1899, to Howrah, and consequently there is no foundation for the suggestion that by reason of the non-existence of s. 242 in the present Calcutta Municipal Act, s. 202 must be considered to have been revived. [p. 904, col. 2.]

What was done at the time when the latter section was extended to Howrah was to clothe the Municipality of Howrah with the summary or dictatorial powers which the Legislature thought fit to confer upon the Chairman of the Corporation of Calcutta in addition to the powers which the Municipality already had under s. 202, Bengal Municipal Act. [p, 904, col. 1.]

Criminal Reference made by the District Magistrate, Howrah.

Messrs. *Monmotho Nath Roy* and *Suryya Mukar Aich* for the Petitioner.

Messrs. *Haradhan Chatterjee* and *Apurbadhan Mukherjee* for the Opposite Parties.

Judgment.—*Reference No. 90.* This is a reference by the Distsict Magistrate of Howrah under the following circumstances: It appears that there is a person named Bal Govinda Tewary who has erected a tin shed in Pandit Ghat Road within the Municipality of Howrah and has thereby been guilty of an encroachment on the public road. The Municipality through their Sub-overseer R. K. Roy lodged a compliant under s. 202, Bengal Municipal Act, III (B. C.) of 1884, which runs as follows:

"The Commissioners may issue a notice requiring any person to remove any wall which he may have built, or any fence, rail, post or other obstruction or encroachment, which he may have erected in or on any road or open drain, sewer or aqueduct, after the date on which the District Municipal Improvement Act, 1864, or the District Towns Act, 1868, or the Bengal Municipal Act, 1876, as the case may be took effect in the Municipality; or, in case none of the said Acts was in force in the Municipality before the commencement of this Act, then after the date on which this Act may have been extended thereto; and if such person shall fail to comply with such requisition within eight days of the same, the Magistrate may on the application of the Commissioners, order that such obstruction or encroachment be removed; and thereupon the Commissioners may remove any such obstruction or encroachment; and the expenses thereby incurred shall be paid by the person who erected the same.

No person shall be entitled to compensation in respect of the removal of any wall, fence, rail, post or other obstruction under this section."

The Magistrate before whom the matter came, came to the conclusion that s. 202, Bengal Municipal Act, so far as Howrah was concerned, had been repealed when in 1904 the Local Government by a notification in the Caclutta Gazette extended s. 342 of the then Calcutta Municipal Act III (B. C.) of 1899 to Howarh. The Magistrate had his attention drawn to the fact that s. 342 of the then Caclutta Municipal Act was no longer existent—the present Calcutta Municipal Act, not containing that section. The question then arose as to whether having regard to the fact that s. 242, Calcutta Municipal Act III (B. C.) of 1899 was not incorporated in the present Calcutta Municipal Act and s. 300 of the present Calcutta Municipal Act was not extended to Howrah, s. 202, Bengal Municipal Act, which according to the Magistrate, had been repealed by the extension of s. 342, Calcutta Municipal Act III (B. C.) of 1899 was revived. The Magistrate came to the conclusion that s. 202, Bengal Municipal Act, had not been revived. The matter attracted the notice of the District Magistrate and he has made a reference to this court for the determination of the questions: (1) whether s 202, Bengal Municipal Act, so far as Howrah is concerned has been repealed; and (2) what is the present state of the law having regard to the fact that s. 342, Calcutta Municipal Act III (B. C.) of 1899, is non-existent so far as Howrah is concerned.

It will be seen from the language of s. 202, Bengal Municipal Act, that the Legislature gave power to the Commissioners of a Municipality to

"issue a notice requiring any person to remove any wall which he may have built, or any fence, rail, post or other obstruction or encroachment, which he may have erected in or on any road or open drain, sewer" etc . . . . "and if such person shall fail to comply with such requisition within eight days of the receipt of the same, the Magistrate may, on the application of the Commissioners, order that such obstruction or encroachment be removed; and thereupon the Commissioners may remove any such obstruction or encroachment; and the expenses thereby incurred shall be paid by the persons who erected the same."

Section 242, Calcutta Municipal Act, III (B. C.) of 1899, gave power to the Chairman of the Calcutta Corporation and, after the extension of the said section to Howrah, to the Commissioners of the Municipality of Howrah or the Executive of the Howrah Municipality to

"remove any wall, fence rail, post, platform or other obstruction, projection or encroachment (not being a fixture referred to in s. 341) which has been erected or set up and any materials or goods which have been deposited in a public street or in or over any drain or aqueduct in a public street, whether the offender be prosecuted or not.

The section goes on to say:

"When the Chairman removes any wall or other obstruction, projection or encroachment from land which forms part of a public street, no compensation shall be payable, but the General Committee shall be bound to provide proper means of access to and from the street if none exist already."

It will be seen from a comparison of the two sections, namely s. 202, Bengal Municipal Act, and s. 342, Calcutta Municipal Act, III (B. C.) of 1899 that what was done at the time when the latter section was extended to Howrah was to clothe the Municipality of Howrah with the summary or dictatorial powers which the Legislature thought fit to confer upon the Chairman of the Corporation of Calcutta in addition to the powers which the Municipality already had under s 202, Bengal Municipal Act. Doubtless, there were reasons which were sufficient to satisfy the Local Government that such additional powers, having regard to the state of things within the Municipality of Howrah, were necessary from the point of view of the conservancy in Howrah and for other considerations. But, because in addition to the powers conferred by s. 202, Bengal Municipal Act, additional summary powers having the same objective without recourse to a Magistrate were conferred upon the Municipality, it does not follow that s. 202, Bengal Municipal Act was repealed. It is said that the Howrah Municipal Manual issued by the Howrah Municipality suggests that s. 202 ceased to have any operation from and after 1904 when s. 342, Calcutta Municipal Act, 1899, was extended to Howrah We have looked into the Municipal Manual and beyond the suggestion made by somebody who was charged with the duty of compiling the Manual that one section corresponded with the other there is nothing whatever in the said book to suggest that s. 202 was repealed in 1904 and ceased to have any operation from and after that date.

It is said that s. 342, Calcutta Municipal Act, 1899, shows that when one of the provisions of the then Calcutta Municipal Act was extented to another Municipality the corresponding section in the Bengal Municipal Act must be taken to have been repealed and that its operation must have ceased. It all depends upon what you mean by the words "corresponding section." In our view, s. 342, of the then Calcutta Municipal Act, does not correspond to s. 202, Bengal Municipal Act. For the reasons which have already been advanced, one section prescribed the normal machinery and the other section gives the Executive of the Municipality summary powers which ordinarily would not be availed of if the normal machinery were found to be sufficient but which would only be availed of in cases where recourse to the normal procedure would involve delay or where obstruction might be anticipated from the party alleged to be guilty of encroachment. One section does not correspond to the other and there is no foundation for the suggestion that in 1904, s. 202 was repealed and consequently there is no foundation for the suggestion that by reason of the non existence of s. 342, Calcutta Municipal Act, 1899, so far as Howrah is concerned at the present moment s. 202 must be considered to have been revived. It is not a case of revival at all, there having been no case of repeal in the first instance.

For these reasons, we accept the reference made by the learned District Magistrate of Howrah and direct that the order of the trying Magistrate be set aside and the proceedings do continue against the person who was summoned as having been guilty of the encroachment referred to above.

Revision Case No. 583.

For the reasons given in our judgment in Reference No. 90 of 1931, we are of opinion that a sufficient case has been made out for our interference and we make this rule absolute.

A. *Rule made absolute.*

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Administration Suit—*Necessary parties—Legal representative.*

The only proper plaintiff to recover the assets of a deceased person is, in default of evidence to the contrary, the legal personal representative of the deceased and even if a beneficiary could sue in his own right making the legal personal representative a defendant, his only claim would be an order for transfer of the assets to the legal personal representative to which claim all defences available against the legal personal representative would be open to the defendants. In a case of this nature the addition of the legal personal representative is not the mere curing of some technical defect not affecting the substance of the dispute between the original parties to the action but the matter goes to the substance of the plaintiff's claim. TUAN MAN *v.* CHE SOM P. C. 632

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———*Essentials—Independent trespassers—Tacking of possession—Cases under Arts. 142 and 144—Difference between—Onus of proof of possession within twelve years*

By the expression "falls into possession" is meant the time when reversioner or a remainderman becomes entitled to the actual possession of the estate.

Unless there is a break in the continuity of possession the true owner would be barred by 12 years' adverse possession even if that continuous adverse possession be of two or more trespassers who did not claim under one another.

Where the plaintiff alleges his possession over immovable property and dispossession by the defendant and where it is found that the possession of the plaintiff was discontinued when defendant entered into possession not as a tenant of the plaintiff but in his own rights, the article of limitation applicable to such a suit is Art. 142 and not Art. 144, Sch. 1, Limitation Act.

In cases falling under Art. 142, the claimant must prove his possession within 12 years next preceding the date of the institution of the suit and in cases of that nature an enquiry into the question of adverse possession is irrelevant.

In cases falling under Art. 144 where the defence is one of title acquired by adverse possession for more than 12 years, it is not necessary for the plaintiff to prove his possession within 12 years from the commencement of the suit MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* 642

———*essentials of.*

To prove title to land by adverse possession for the statutory period, it is not sufficient that some acts of possession have been done; the possession required must be adequate, in continuity, in publicity and in extent to show that it is possession adverse to the competitors; the possession must be actual, physical, exclusive, hostile and continued during the time necessary to create a bar under the Statute of Limitations. SITLA BAKSH SINGH *v.* SARABJIT SINGH *Oudh* 700

———*Landlord and tenant—Entry in village papers as* bila tasfia *tenants and twelve years' possession—Possession, whether adverse.*

Where a person is in possession as a tenant, the mere fact that he is entered as tenant *'bila tasfia'* in the village papers and has held land for over twelve years, cannot make his possession adverse to the rightful owner. SITLA BAKSH SINGH *v.* SARABJIT SINGH *Oudh* 700

———*Long possession of share proved—Absence of evidence to identify such share—Effect—Burden of proof of identity of land.*

Where in a suit by the plaintiff who was the recorded proprietor of a 12-annas share in a *mauza* for ejectment of the defendants who were entered as *mokararridars* in respect of four annas comprised within the said twelve annas on the ground that the entry was wrong and the defendants were mere trespassers, the defendants were found to have been in possession of some interest in the *mauza* for a long time but there was nothing to identify the land of which they had been in possession for so long with the four annas in dispute:

Held, that it could not be presumed that the defendants were in possession of the shares in dispute and the failure of the defendants to identify their interest with the four annas share in dispute was of itself sufficient ground for rejecting the plea of limitation and adverse possession raised by them. SHAMA KANT LAL *v.* RAMDHAN PURI P. C. 625

Affidavits. *See* CONTEMPT OF COURT 901

Agra Pre-emption Act (XI of 1922), s. 19. *See* PRE-EMPTION 402

Agra Tenancy Act (II of 1901), s. 165—*Suit for profits—Co-sharers collecting profits themselves—Lambardar's right to prescribed dues—Liability for negligence—Interest prior to suit.*

The duties of *lambardar* are not confined to the realization of rents and distribution of the profits. Therefore, in a suit for profits he is entitled to his prescribed dues eventhough the co-sharers were making collections directly

Where the co-sharers are allowed by arrangement to make their own collection, no question of the negligence of the *lambardar* arises if the total amount of rents is not collected.

In a suit for profits interest *pendente lite* is discretionary. But the plaintiff should ordinarily be allowed interest on excess collections, prior to the suit at 1 per cent. per mensem. GOBIND RAM *v.* JUGAL KISHORE *All.* 76

Agra Tenancy Act (III of 1926), s. 3 (6)—*Lease by mortgagee in possession—Redemption by mortgagor, whether terminates lease—Suit for ejectment of tenants in Civil Court—Maintainability.*

Where a mortgagee in possession who is authorised to let out the property to tenants, lets it out to tenants in the ordinary course of the *zemindari*, the tenants do not become trespassers on the redemption of the mortgage so as to entitle the mortgagor to sue them for ejectment through the Civil Court. BHUP SINGH *v.* SHEO SHANKER *All.* 281 (*b*)

———**s. 4 (d)**—Sir-*holder—Co-sharer recorded in possession of land as* khud kasht *in year previous to passing of Act—Co-sharer to be recorded as* sir-*holder—Manner of obtaining possession whether material.*

The parties were co-sharers in a certain *zemindari*. Certain plots of land were entered in the name of a certain person who was the *pujari* of the plaintiff-respondent. This *Pujari* was dismissed from service and he surrendered these holdings to the defendants-appellants who had their own names entered in the revenue papers as *khud kasht* holders in 1924:

Agra Tenancy Act, 1926—concld.

Held, that when the new Agra Tenancy Act came into force on September, 1926, they became *sir* holders being co-sharers who were recorded as being in possession of these plots as *khud kasht* in the year previous to the passing of the Act.

Held, further, that there is nothing in the new Act which enables a Court to go back to the manner in which possession was obtained and the plaintiff was not entitled to recover joint possession. RAM LOCHAN NAIK *v.* SRI THAKURJI ASTHAPAT. *All.* **157**

———s. 87. *See* CIVIL PROCEDURE CODE, 1908, O. XXXII, R. 3 **375**

———ss. 99, 121—*Cause of action before Act III of 1926—Suit after Act—S. 99, whether applies—Jurisdiction of Civil Court.*

Held, by the Full Bench (*Sulaiman, Actg. C. J. and Bajpai, J. dubitante*).—Section 99 of the Agra Tenancy Act of 1926 does not apply to a suit in respect of which the cause of action, *i. e*; the wrongful ejectment or the wrongful resistance to possession arose before the said Act came into force, and the jurisdiction of the Civil Court to entertain such a suit is not barred under s. 230, of the said Act.

There is nothing in s. 99 which either curtails the period of limitation or fixes the *forum*.

Where a suit is "of the nature of a suit under s 99" even though it may not strictly come under that section, the jurisdiction of the Civil Court is barred.

The fear of a curtailment of the period of limitation or of the taking away of any vested right does not apply to a declaratory suit under s. 121, as no period of limitation is fixed for such a suit. Such a suit is clearly cognizable by the Revenue Court only, even though the denial of title takes place before the Act came into force.

Per *Mukerji, J.*—Where a suit is against a land-holder or a person who pretends to be a land-holder having a right to eject the plaintiff, or where the suit is against a person holding a derivative title from such land-holder or person claiming as above, the suit should be governed by s. 99. "Claiming through" cannot mean raising a plea by way of defence or making a false claim without the shadow of title. RAM KARAN SINGH *v.* RAM DAS SINGH. *All.* **145**

———s. 197 (b)—*Grove of ex-proprietary tenant, whether can be sold in execution.*

Under the Agra Tenancy Act, 1926, a grove planted by an ex-proprietary tenant on his tenancy land can be sold in execution of a decree unless the tenant shows that it is for some reason exempt from the provisions of s. 197 of the Act. NANAK SAHI *v.* NASIR-UD-DIN. *All.* **576**

Allahabad High Court General Rules, Chap. I, r. 1—*Costs—Pleader's fees—Fees not actually paid—Mere execution of promissory note—Fees, whether taxable.*

Rule 1 of Chap. I of the General Rules of the Allahabad High Court relating to Pleader's fees contemplates the actual payment and not a mere promise to pay even though such promise is evidenced by a promissory note, bond or other instrument, and, therefore, if payment of fees is not actually made to the Pleader, it could not be taxed as part of the costs incurred by the party who is alleged to have made payment. The legal aspect of the matter is not altered by the fact that the Judge had permitted payment by means of a promissory note.

Allahabad High Court General Rules—concld.

When the judgment awards costs to a party it implies the costs deemed to be such according to the rules. BHAGWANT SINGH *v.* BHAO SINGH. *All* **817**

Appellate Court—*Remand for impleading new party—Indicating order which trial Judge should make—Propriety.*

A Court of Appeal while sending a case to the trial Judge for the purpose of having a necessary party brought before the Court should not proceed, before the new party has been joined or heard and without considering what defences may be available against him, to indicate the order which the trial Judge should make when he tries the case in the presence of proper parties. TUAN MAN *v.* CHE SOM **P. C. 632**

Approver—*Corroboration—Nature of evidence required—Corroboration as against some, effect of.*

Evidence in corroboration of an accomplice's evidence must be independent testimony which affects the accused by connecting or tending to connect him with the crime It must be evidence which implicates him, that is, which forms in some material particular not only the evidence that the crime has been committed but also that he personally committed it. The corroboration need not be direct evidence that the accused committed the crime; it is sufficient if it is merely circumstantial evidence of his connection with the crime.

Where there is one witness of bad character (an accomplice) giving evidence against two prisoners, a confirmation of his testimony with regard to one, is no confirmation of his testimony as to the other. If, therefore, there is a corroboration applicable to one prisoner, it may be taken as against him; but unless it exists with regard to both it would be unjust to give it a general effect. KHAIRATI RAM *v.* EMPEROR *Sind.* **753**

Arbitration—*Agreement to abide by decision of majority, meaning of—All arbitrators not taking part in proceedings—Validity of award—Duty of party to protest—Taking chance of favourable decision—Estoppel—Revision against awards—Maintainability—Civil Procedure Code (Act V of 1908, s. 115.*

An agreement to abide by the majority of a certain number of arbitrators does not mean that the arbitration may be conducted by a majority or by less than the full number of arbitrators.

But if some of the arbitrators are absent, it is the duty of the parties to object at that time and not to allow the proceedings to go on with less than the full number of arbitrators.

If a party having a clear knowledge of the circumstances on which he might have founded an objection to the arbitrators proceeding to make their award, submits to the arbitration going on and allows the arbitrators to deal with the case as it stood before them, taking his chance of the decision being more or less favourable to himself, it is too late for him, after the award has been made, and on the application to file the award, to insist on this objection to the filing of the award.

Revision is generally objectionable in cases of awards and a Court should not interfere unless it finds not only an illegality committed but some substantial harm resulting from that illegality. LAKSHMAMMA *v.* GOOLE APPADU *Mad.* **207**

Arbitration Act (IX of 1899).

———s. 14—*Objection to award for want of valid reference—Objections disallowed—Fresh suit to set aside award, competency of.*

A party in his objection to an award under s. 14, Arbitration Act can make an objection which challenges the *factum* of the reference so far as he is concerned and which goes to the root of the jurisdiction of the arbitration and it is within the jurisdiction of the court to hear this objection.

A suit is also competent, but if the party elects to file objections under s. 14 and his objections are heard and disallowed, it is not open to him to have the matter inquired into again in a separate suit. ROCHANBAI *v.* MOTUMAL *Sind* **806**

Arms Act (XI of 1878), ss. 19, 20—*Keeping* chhavi *blade in one's house—Nature of offence—Essentials of offence under s. 20.*

An essential ingredient of s. 20 of the Arms Act, is that the man doing any act mentioned in cls. (*a*), (*c*), (*d*), or (*f*), of s. 19, should do it in such a manner as to indicate an intention that such act may not be known to any public servant. Merely keeping of a *chhavi* blade in one's own house and possessing a stick that would fit into it, cannot be regarded as falling within the purview of s. 20. The case would fall more appropriately under the definition of s. 19 (*f*). IDA *v.* EMPEROR *Lah.* **724** (*a*)

Attachment before judgment. *See* HINDU LAW **778**

Award. *See* CIVIL PROCEDURE CODE, 1908, s. 115 **568**

Bar Councils Act (XXXVIII of 1926). *See* GOVERNMENT OF INDIA ACT, 1915 Ch. (5 & 6 Geo. V, CH 61) **793**

Benami *purchase—Presumption regarding* benami.

Though there is no presumption of advancement in *benami* transactions in India, very little evidence of intention would be sufficient to turn the scale. Where certain property is purchased by the father in the name of his minor daughter and the deed at the time of her marriage is produced for the inspection of her father-in-law and it is represented to him that the property belongs to the girl, it must be said that there is sufficient evidence to establish an intention on the part of the father to make a gift of the property to her daughter. MOHAMMAD SADIQ *v.* FAKR JAHAN **P. C. 385**

———*—Transaction—Proof—Source of purchase money.*

Where once it is established that the source of a sale transaction flowed from the husband and that the transaction stood in the name of the wife, it follows that the transaction is a *benami* one and the wife was a mere *benamidar*. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

———*transactions—Property standing in wife's name—Presumption—Onus of proof of* benami *nature.*

There is no presumption that when a document stands in the name of a woman, the property conveyed by it must be deemed to belong to her husband. The onus is clearly upon the person alleging the transaction to be *benami* to show that the apparent state of things is not the real state of things. HARI RAM *v* KUNDAN LAL *Lah.* **270** (*a*)

Bengal Alluvion and Diluvion Regulation (XI of 1825), ss. 2, 3, 4, *scope of—Alluvion and diluvion—River separating land from one estate and joining to another—Land identifiable—Property in such land*—Dhardhura, *custom of—Essentials.*

Bengal Alluvion and Diluvion Regulation—concld.

to in s. 2, Bengal Alluvion and Diluvion Regulation, and a river by a sudden change of its course separates a considerable piece of land from one estate and joins it to another estate without destroying its identity and preventing its recognition, such land on being clearly recognized remains the property of its original owner. Where the evidence falls very far short of proving a clear and definite usage immemorially established that the main channel of the river dividing two villages shall be the constant boundary line between them, whatever changes may take place in the course of the river so as to bring the case within the purview of s. 2, Bengal Alluvion and Diluvion Regulation, the case falls within the purview of ss. 3 and 4 of that Regulation.

Where a large area is taken away from one village to another, the party claiming accretion must satisfy the Court by clear and definite evidence not only that there is a general custom of *Dhardhura*, but also that such custom contemplates such far-reaching consequences as the transfer of a very large tract of recognizable land from one village to another as a result of a sudden change in the course of the river. SHEO RAM *v.* PASHUPATH PARTAB SINGH *Oudh* **213**

Bengal General Clauses Act (I of 1899), s. 26. *See* CALCUTTA MUNICIPAL ACT, 1923, s 391 **465**

Bengal Land Registration Act, (VII of 1876), s. 68 *See* BENGAL LAND REVENUE SALES ACT, 1859, s 9 **479**

Bengal Land Revenue Sales Act (XI of 1859), ss 2, 3, 13———*Sale for arrears, when justified—'Arrears', meaning of—Sale of share in respect of which separate account is kept—Necessary conditions—Sale before last date—Validity.*

Before liability to sale under the Bengal Revenue Sales Act attaches there must be : (1) the whole or a portion of a *kist* or instalment unpaid; (2) the conversion of such unpaid amount into an arrear on the first of the following month, and (3) the passing of the latest date of payment of such arrear, as fixed under s. 3 and the official notice of the Board of Revenue.

In order to justify the sale of a share in an estate in respect of which a separate account is kept, the estate must have become liable to sale for arrears of revenue, and an arrear of revenue must be due from that share according to the separate account.

By notice in the Calcutta Gazette, the date for payment of instalments of revenue and the latest dates for payment of arrears were fixed as 28th June, 28th September, 12th January, and 28th March. The Collectorate account for the third *kist* of 12th January, 1924, showed a credit balance of seven annas four pies on the general account of *Touzi* No. 10, and a debit balance of Rs 35-2 in the separate account of No. 10-6, to the satisfaction of which the Collector appropriated sufficient of the money deposited with him in terms of s. 15 of the Act. In the accounts for the fourth *kist* of 28th March, the general account of *Touzi* No 10 showed an unpaid balance of six annas five pies, but the separate account of share No. 10-6 showed that the sum of Rs. 20-13, being the current demand of revenue in respect of the fourth *kist*, had been paid on 27th March, 1924. On the 26th June, share No. 10-6 was sold for arrears :

Held, that inasmuch as the only arrear of the revenue of the estate which could be said to justify the sale was the unpaid balance of six annas five pies

Bengal Land Revenue Sales Act—concld.

balance could not be considered an arrear until the first of the following month, *i. e.*, 1st April, 1924, the latest day of payment was accordingly 28th June, 1924, two days after the sale took place—and the estate could "not become liable to sale for arrears of revenue" until after 28th June, 1924 and, therefore, the sale of share No. 10-6, was invalid on this ground alone. KRISHNA CHANDRA *v.* PABNA DHANA BHANDAR CO. LTD. P. C 410

——ss. 2, 3, 20—*Arrears due on 12th January—Sale on 28th March—Validity of sale.*

Where arrears for which a sale under the Bengal Land Revenue Sales Act took place were payable on the 12th January, 1924, and the estate was sold on the 28th March, which was the next date fixed for payment of arrears :

Held, that the sale was not invalid. RADHA GOBINDA DEB *v.* GIRIJA PRASANNA MOOKHERJEE *Cal.* 129

——s. 3. *See* BENGAL LAND REVENUE ACT, 1859, 2 410

——s. 9—*Bengal Land Revenue Act (VII of 1876), s 68—Contract Act (IX of 1872), s. 69—Transfer of tenure—Name of transferee not registered—Person paying arrears, whether entitled to recover from transferor.*

Where a tenure has been transferred by a registered proprietor, eventhough the transferee's name is not registered, a person who deposits arrears of revenue accruing after the date of transfer cannot recover the same under s. 9 of the Act XI of 1859 or under s 69, Contract Act, from the transferor, he can recover it only from the transferee.

Under s. 68 of the Land Registration Act, a transferee becomes liable for the discharge of any duties and obligations which are by any law imposed upon the proprietors of the estate, from the date on which he should have applied for registration. ASHUTOSH GANGOPADHYA *v.* SAROJINI SAHA *Cal.* 479

——s. 13. *See* BENGAL LAND REVENUE ACT, 1859, s. 2 410

——s. 20. *See* BENGAL REVENUE SALES ACT, 1895, s. 2 129

Bengal Land Revenue Sales Act (VII of 1868), s. 1—*Amalgamation of* malguzari *and* thanadari *lands—Single sale for arrears of revenue and* thanadari *dues—Validity—Want of time to complete sale—Adjournment, legality of—Signing order of adjournment in club, legality of.*

Where *thanadari* lands have been amalgamated with the *malguzari* lands of the *mehal* so as to form one estate as defined in s. 1, Act VII of 1868 and the demands on the two heads have been amalgamated to form a total demand for the estate, one sale can be held for the arrears of revenue for *malguzari* lands and on account of dues for *thanadari* lands.

The Collector has jurisdiction under s. 20 of the Bengal Land Revenue Sales Act, 1859, to adjourn a sale to the next day after selling some of the items if he cannot complete the sale of all the items before 5 P. M

The fact that the order for adjournment was signed by the Collector at a club and not at his office cannot affect his jurisdiction or the validity of the sale.

Non-service of a notice under s. 7 of the Act, which is meant to forbid *raiyats* and under-tenants to pay rent to the defaulting proprietor, has no bearing on the question of, and cannot affect, the price fetched at the sale. RADHA GOBINDA DEB *v.* GIRIJA PRASANNA MOOKERJEE *Cal.* 129

Bengal Municipal Act (III of 1884), s. 202—*Applicability to Howrah—Calcutta Municipal Act III of 1899), s. 342, effect of.*

Section 202, Bengal Municipal Act, was not repealed so far as Howrah was concerned when in 1904, the Government extended s 342 of the then Calcutta Municipal Act, III of 1899, to Howrah, and consequently, there is no foundation for the suggestion that by reason of the non-existence of s 242 in the present Calcutta Municipal Act, s. 202, must be considered to have been revived.

What was done at the time when the latter section was extended to Howrah was to clothe the Municipality of Howrah with the summary or dictatorial powers which the Legislature thought fit to confer upon the Chairman of the Corporation of Calcutta in addition to the powers which the Municipality already had under s. 202, Bengal Municipal Act. RAJENDRA KUMAR ROY *v.* BAL GOVINDA *Cal.* 903

——s. 261—*Assessment of license-fee—Suit for declaration of illegality of assessment—Jurisdiction of Civil Court.*

A suit for declaration that a certain sum of money which has been assessed as license-fee by a Municipality in respect of a yard or depot for trade is not legally recoverable from the plaintiff inasmuch as the entire area in respect of which the fee was levied was not used as a yard or depôt for trade and as such the levy was *ultra vires*, can be entertained by a Civil Court, JESRAJ *v.* NATORE MUNICIPALITY *Cal.* 542

Bengal Tenancy Act (VIII of 1885)

——ss. 26-C, 26-E, 26-F—*Sale of occupancy—Pre-emption—Right of landlord to whom notice was not given—Exercise of right within reasonable time.*

Section 26-F, Bengal Tenancy Act, gives the right of pre-emption not only to those landlords on whom notices have been issued but also to those on whom notices have not been issued under s. 26-C and 26-E, but who are landlords of the occupancy holding. In the case of the latter, the right is to be exercised within a reasonable time of the knowledge of the sale. SURYA KUMAR MITRA *v.* NOABALI *Cal.* 871

——ss. 26-C, 26-F, 174—*Rent sale—Landlord consenting to setting aside after transfer—Application to pre-empt—Sustainability—Slight discrepancies in description, effect of.*

Where the landlord obtained a rent decree and purchased the holding and subsequently the defaulting tenant conveyed the holding and certain other lands to a third party and the tenant and the transferee deposited the decree amount under s. 174, Bengal Tenancy Act, and the landlord withdrew the amount and the sale was set aside:

Held, that the landlord was not precluded from claiming pre-emption under s. 26-F by reason of his agreeing to have the rent sale set aside, eventhough he had received notice of transfer under s. 26-C before the sale was set aside.

Slight discrepancies regarding the description of property in the application for pre-emption under s. 26-F as compared with the notice under s. 26-C cannot invalidate the application. DABIRUDDIN *v* KRISHTO CHANDRA *Cal.* 470

——ss 26F, 26-J—*Sale of occupancy—Landlord's right to pre-empt—Exercise of right before payment of transfer fee and compensation, legality of—Simultaneous applications under ss. 26-F and 26 J, propriety of.*

Under s. 26-J cl. (3), Bengal Tenancy Act, the application under s. 26-J must first be made in order to make the provisions of s. 26-F applicable to a case to which the provisions of cl. (1) s. 26-J

applies, but this does not mean that the landlord is not competent to exercise his right of purchase under s. 26-F until the balance of the landlord's transfer fee and compensation allowed have been paid.

Applications under ss. 26-J and 26-F can be made at the same time. NARAYAN CHANDRA *v.* KALLASH CHANDRA. *Cal.* 900

——s. 26-F (4) (a)—*Pre-emption—Person purchasing share during pre-emption proceedings, whether can join as co-applicant—Division of shares—Principles—Unequal division—Error in exercising jurisdiction—Revision.*

Under s. 26-F, cl. (4) (*a*), Bengal Tenancy Act, a person who was not a co-sharer landlord at the time when the original application for pre-emption was made is entitled to make a purchase and, therefore to join as a co-applicant if he becomes a co-sharer at any time within two months of the service of notice under s. 26-C.

In the ordinary course co-sharer landlords applying to pre-empt should be entitled to pre-empt to the extent of equal shares, but in any case a co-sharer landlord should have a share corresponding to his interest in the superior right compared with the interest of the opposite party.

If the ordinary rule of equal shares is to be departed from, it must be done on some basis or principle.

An unequal distribution without sufficient reason amounts to an irregularity in the exercise of jurisdiction justifying revision. KHOSAL CHANDRA DAS *v.* UPENDRA NATH. *Cal.* 544

——s. 107 (1)—*Issue of area decided under s. 106—Decision to the contrary in rent suit—Validity* —Res judicata—*Civil Procedure Code (Act V of 1908), s. 11.*

Under the provisions of s. 107 (1) of the Bengal Tenancy Act, read with s 11 of the Civil Procedure Code, a Court trying a rent suit has no jurisdiction to decide an issue between the parties which has already been finally and definitely decided by a decision under s. 106 of the said Act.

So while the decree in a rent suit ought to be regarded as a valid decree so far as the liability of the parties during the years then in suit is concerned, a decision therein that *bhaoli* rent is payable only in respect of certain areas cannot be treated as *res judicata* to determine the areas for which such rent shall be payable in subsequent years, where such decision is at variance with an earlier decision under s. 106 of the Act. BANKEY BIHARI LAL *v.* RAM ANUGRAH *Pat* 297

——s. 109—*Whether retrospective—Applicability to pending suits—Interpretation of Statutes—Retrospective effect—Right of suit, whether vested right.*

Section 109, Bengal Tenancy Act, does not relate to a mere matter of procedure but confers a substantive right and the amendment introduced to the said section by Act IV of 1928, has no restrospective operation. The amended section is not therefore applicable to suits instituted before the amendment came into force GOSTA BEHARI *v.* NAWAB OF MURSHIDABAD. *Cal.* 606

——s. 167—*Service of notice—Onus of proof—Certificate in Collector's order sheet, effect of.*

A certificate in the order sheet of the Collector in a proceeding under s. 167 of the Bengal Tenancy Act, that a notice has been properly served is *prima facie* evidence that such a notice has been served, though it is not conclusive and it is open to the opposite party to challenge it and show that the notice was not served in time. PARMESHWAR SAHU *v.* NAND KISHORE LAL. *Pat.* 442

——s. 174. *See* BENGAL TENANCY ACT, 1885, s. 26 (*c*) (*f*). 470

——s. 184. *See* BENGAL TENANCY ACT, 1885, SCH. III, ART. 3. 601

——Sch. III, Art 3, s. 184—*Suit for ejectment—Plea of special limitation—Onus of proof—Lease—Construction*—Raiyati *holding—Burden of proof*—Bhag chashis, *status of.*

Where the plea of special limitation under the Bengal Tenancy Act has been on the record from a comparatively early stage and the matter has been investigated, the Appellate Court should not set aside the question merely on the ground that it was not pleaded so early as it ought to have been.

A lease of 99 *bighas* of land was given to a *Brahman* pensioner; the *patta* was both *mourasi* and *mokarrari*; the landlord took a *salami* of one thousand rupees; no rent was payable for the first year and for some years rent was payable on an increasing scale; about 20 *bighas* were cultivated by the tenants themselves and about 75 *bighas* were cultivated by *bhagchashis.* The lease provided as follows: 'You go on enjoying and possessing the said land by dwelling on the same, by cultivating it, by planting trees etc., by cutting them down, by excavating tanks, by erecting *pucca* buildings etc, generation after generation with power to transfer by gift, sale etc.':

Held, that the lease was not a *rayati* lease.

In a suit by the plaintiffs for possession of land on the allegation that they are lessees and that they had been dispossessed by the defendant's landlords, the burden of making out the plea of special limitation is on the defendant.

A *bhag chashi* is a person somewhere between a hired servant and a partner in those cases, at all events, where he has not been given an interest in the land so as to make him a tenant. RAM CHARAN *v.* MADAN MOHAN. *Cal.* 601

Benefit Society. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s 92 201

Bhag Chashis, Status of. *See* BENGAL TENANCY ACT, 1885, SCH. III, ART. 3 601

Bombay District Police Act (IV of 1890), s. 80 (3)—*Prosecution of Police Officer—Limitation—Applicability of rule of limitation to Crown prosecutions—'Act', whether includes omissions—'Under colour of duty', meaning of.*

Section 80 (3), Bombay District Police Act, refers to all prosecutions, and covers a prosecution instituted by the Crown

The word 'act' in s 80 (3) should be taken as including omissions also.

Where a Police Officer is dealing with a complaint in his capacity as such his procedure would be under the colour of his duty and authority though he had made up his mind from the beginning to hold no real investigation.

The act for which protection is given by s. 80 (3) must be an act which appears to be done in the lawful discharge of a duty or in the lawful exercise of an authority conferred by the Bombay District Police Act or other law for the time being in force. This would not include acts which are obviously offences and in no manner reconcilable with the duties or functions of a Magistrate or Police Officer such a

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bribery or extortion. EMPEROR *v.* ABDULLAKHAN *Sind* 513

Bombay Pleaders Act (XVII of 1920), s. 20 (1) (a)—*Fees of two Pleaders, taxation of.*

Under s. 20 (*a*), Bombay Pleaders Act, where a party has engaged two Pleaders, he is entitled to have the fees of both the Pleaders taxed in the bill of costs even though one of the two Pleaders is a junior hand. DATTATRAYA PANDURANG GASAVI *v.* LAKSHMAN MAHADEO PAHEKAR *Bom.* 161

Bombay Prevention of Gambling Act (IV of 1887), ss. 40 (a), 7—*Keeping common gaming house—Search by Police—Finding of slips of paper with names of horses and sums of money—Presumption—How presumption rebutted*—Panchnama—*Evidentiary value—Criminal Procedure Code (Act V of 1898), s. 103 (1), (2).*

The accused, a medical practitioner, was charged ith keeping a common gaming house and thereby committing an offence under s. 4 (*a*) of the Bombay Prevention of Gambling Act. He was convicted on the evidence that on a Police raid of his dispensary, some slips of paper with names of horses with sums of money marked against some of them were found. The Police could not find betting books of any sort:

Held, (*i*) that if a presumption arose from the evidence under s. 7 of the Act that the house or room was used as a common gaming house, then that presumption was rebutted by the fact that nothing was found in the house to suggest that it was being used as a common gaming house;

(*ii*) that the documents found in the house were perfectly consistent with the persons who were there, that is the accused, being merely engaged in making private bets for their own entertainment and the total absence of any books relating to book-making showed that no business of a common gaming house was being conducted.

Putting in *panchnamas* signed by *panchas* as part of the evidence of a Police Officer is worthless except to corroborate the evidence of the officer that *panchas* were employed and to show that the provisions of s. 103 (1) and (2) of the Criminal Procedure Code have been complied with. RUSTAM CURSETJI LAM *v.* EMPEROR *Bom.* 868

Bombay Revenue Jurisdiction Act (X of 1876), s 11—*Scope and object of—'Fact', meaning of—Order by City Survey Officer whether an act—Civil suit, when lies*

Section 11, Bombay Revenue Jurisdiction Act, is applicable to an order or decision of a City Survey Officer. The word 'act' in s. 11 of the Act is wide enough to cover a judicial or a *quasi*-judicial act i.e; the passing of an order or decision by a Revenue Officer.

Section 11 requires that all appeals allowed by law must be availed of before a civil suit can be filed for the object of the section is to protect the Government from being exposed to law suits out of the orders of its subordinate officers before its superior officers have been afforded the opportunity of considering and it may be, of disallowing the executive orders of its subordinate officials.

Where an order by a City Survey Officer has been confirmed on appeal to the Collector, a civil suit is competent for no further appeal to Commissioner is necessary to be filed in such cases. SECRETARY OF STATE FOR INDIA *v.* HUSSENABU *Bom.* 189

Bona fides, whether question of fact. *See* CIVIL PROCEDURE CODE, 1908, s. 100 710

Buddhist Law—*Adoption*—Keittima *child, definition of—Essentials of adoption—Proof.*

A *keittima* child is a child adopted publicly with the intention that the child shall inherit. The existence of natural children is no bar to such an adoption. No formal ceremony is necessary to constitute adoption, but the adoption must be a matter of publicity and notoriety. It can either be proved by direct evidence of the taking as a *keittima* child on a specified occasion, or it may be inferred from a course of conduct inconsistent with any other supposition.

U PO LEIN *v.* MA HNIN HLAING P. C. 393

Burden of proof. *See* CONTRACT ACT, 1872, s. 107 158

———*Civil case—Proof of crime—Quantum of evidence necessary.*

Barlee, J.—In a civil suit the onus of proof of the commission of a crime is not so heavy as in a prosecution for that crime. BAI MANI *v* USAFALI BHUDAR *Bom.* 173 (*b*)

Calcutta High Court (Original Side) Rules, Chap. XXXVI, rr. 32, 71 to 73—*Taxation of costs—Power to allow more than maximum prescribed—Written consent, whether necessary—Procedure for revision—Application to Court before taxation is completed, propriety of.*

Under Chap. XXXVI, r. 32, of the Calcutta High Court Original Side Rules, the Taxing Officer has power to allow fees in excess of the maximum on production of a written consent of the client and just as the Taxing Officer has jurisdiction to allow fees in excess when a written consent is produced, the Court has jurisdiction to allow fees in excess where consent is proved although it is not proved in every instance by a consent in writing

Although as a rule the proper procedure to apply for a revision of taxation is to wait till the completion of the taxation and then apply for a review under rr 71 to 73 of Chap. XXXVI, where the discretion is not vested in the Taxing Officer at all, there is no objection, whatever, and it is more convenient to approach the Court at a stage before the taxation is finally concluded. RAMJASH *v* ORR, DIGNAM & Co. *Cal.* 539

Calcutta Municipal Act (III of 1899), s. 342 *See* BENGAL MUNICIPAL ACT, 1884, s 202 903

Calcutta Municipal Act (III of 1923), ss. 175, 179, 386 and 387—*Area not excluded under s. 387—Refusal of license under s. 386—Legality—Grant of license under ss. 175, 179, effect of.*

Under s. 386, Calcutta Municipal Act, the Corporation has absolute power to refuse a license to any particular premises within a particular area even though the Corporation has not excluded generally that area under s 387.

The granting of a license under the taxing sections such as s 175 and s 179 does not preclude the Corporation from refusing to grant a further license under s. 386. CORPORATION OF CALCUTTA *v.* SUMERIA BEWA *Cal.* 638

———s 331. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 69, 70 135

———ss. 391, 498 (2)—*Lease of theatre—Lessee's liability to take out license—Power of Corporation to charge fees—Sentence of imprisonment in default of fine, legality of—Penal Code (Act XLV of 1860), s. 64—Bengal General Clauses Act (I of 1899), s. 26.*

Where a theatre has been leased by its owner, the lessee is the person who 'keeps it open' and who is, therefore, liable to take out a license under s. 391, Calcutta Municipal Act.

Calcutta Municipal Act—concld.

Under s. 498 (2) of the said Act, the Corporation may charge a fee for such license, though s. 391 is silent about fees.

Where a person is convicted under s. 391, it is open to the Court to impose a sentence of imprisonment in default of payment of fine under the provisions of s. 64, Penal Code, and s. 26, Bengal General Clauses Act. U. K. MITRA *v.* CORPORATION OF CALCUTTA *Cal.* **465**

——— **s. 498 (2).** *See* CALCUTTA MUNICIPAL ACT, 1923, s. 391 **465**

Cantonments Act (II of 1924), s. 118—*Gaming—'Public place', meaning of.*

A verandah of a private house accessible to a public street is not a public place within the meaning of s. 118 of the Cantonments Act and the mere fact that it is open to the road, and can be entered by the public is not sufficient for holding it to be a public place. JAGNA *v.* EMPEROR *Lah.* **720**

——— **ss. 184, 185, 207**—*Construction of building before New Act—Notice to alter after Act—Non-compliance—Prosecution under new Act—Competency of—Limitation.*

Under the Cantonments Act of 1924, erecting or re-erecting a building without the permission of the Cantonment authority and failure to comply with a notice to alter or demolish a building are separate offences; and therefore non-compliance with a notice given after the enactment of 1924, is punishable under the Act of 1924, eventhough the building in respect of which such notice was given was erected before 1924.

Further, prosecution for such disobedience may be launched within 6 months of such disobedience. PARMA NAND *v.* EMPEROR. *Lah.* **713**

Cattle Trespass Act (I of 1871), s. 24. *See* CRIMINAL PROCEDURE CODE, 1898, ss 413, 414 **248**

Central Provinces—*Inferior proprietor—Rights over village waste and forest produce—Burden of proof—Absence of entry in* wajib-ul-arz—*Inference.*

There is no presumption that the inferior proprietors of a district in the Central Provinces possess the same rights and privileges which are possessed by the inferior proprietors of the other districts of the Province.

Therefore, where the inferior proprietors of a *mauza* claim right in respect of the village waste and forest produce, they can only succeed if they show either that they acquired their rights by custom or those rights were granted to them when the sub-settlement of the *mauza* was made with them or their predecessors.

Further, where there is no proof of the existence of these rights before a particular settlement, he absence of any entry in the *wajib-ul-arz* prepared during the settlement cannot be interpreted as a reservation of any such right. LAL INDRA SHAH *v.* SHEOSHANKAR **P. C. 628**

C. P. Land Revenue Act (XVIII of 1881), s 69—*Dispute as to ownership of* sir-*land—Order under s. 69, finality of—Omission to set up finality of order*—Res judicata.

Section 69, C. P. Land Revenue Act, relates to disputes as to whether or not land admittedly belonging to a particular proprietor is *sir* land or not *sir* land. It has no application to disputes as to whether a particular person is the proprietor of such land and the special rule of limitation laid down in s. 69 (4) of the said Act has, therefore, no application to a case where the dispute was of the latter kind.

Where in a suit for determination of the question of title in which the plaintiff claimed both the proprietary and cultivating rights, the defendant denied the plaintiff's title only to the cultivating rights in spite of the fact that an year prior to the institution of the suit the Settlement Officer had recorded his field as his *sir*:

Held, that the defendant might and ought to have set up his proprietary rights and he was barred by the rule of *res judicata* from setting up such right in a subsequent suit. GULAB CHAND *v.* HARBHAGAT. *Nag.* **884**

C. P Land Revenue Act (II of 1917), s. 203, *scope of*—Abadi—*Erection of substantial building—Right to transfer site.*

Section 203 of the C. P. Land Revenue Act is not confined to the rights of agricultural house-holders only; their rights and liabilities are determined by the first three sub-clauses, and house-holders in general are governed by the remaining sub-clauses. Clause 5 is governed by the general sub-s. (8).

A license to occupy a village site cannot carry with it a right to transfer the site with permission to occupy unless such permission is proved and the fact that the licensee has built a substantial building on the site would not preclude the *malguzar* from ejecting a person to whom the licensee has transferred the site. MADHORAO GADRE *v.* RAMLAL. *Nag.* **882**

C. P Tenancy Act (XI of 1898), ss 41, 46—*Absolute occupancy holding—Son's right, nature of—Alienation by father—Son's right to challenge on ground of legal necessity.*

Under the old C. P. Tenancy Act, sons obtained by birth no vested interest in an absolute occupancy holding for it did not recognise succession by right of survivorship Therefore, an alienation by a Hindu occupancy tenant effected before the new Act came into force could not be challenged by his son on the score of want of legal necessity. SHANKER RAO *v.* DAULAT *Nag.* **235**

C. P. Tenancy Act (I of 1920), ss. 5, 11—*Absolute occupancy holding—Son's interest.*

Under the new Act sons of an occupancy tenant take an interest by birth where the law of the parties recognises succession by survivorship. SHANKER RAO *v.* DAULAT. *Nag.* **235**

——— **s 6 (5)**—*Mortgage of absolute occupancy—Pre-emption by* malguzar—*Suit to enforce mortgage—Liability of pre empted property.*

Under s. 6 (5) of the C. P. Tenancy Act, 1920, when the proprietor exercises his right of pre-emption and deposits the amount which has been fixed by the Revenue Officer as the value of the land free from incumbrances, the mortgage-debt becomes a charge on the purchase-money in exoneration of the lien. And in a suit brought on the basis of the mortgage, such pre-empted land must be excluded when the mortgaged property is brought to sale. IRSHEDALI *v.* DASHRATH *Nag.* **876**

Certiorari, writ of *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 45 (5). **319**

Civil and Criminal *proceedings on same matter—Procedure.*

Where a civil suit and a criminal complaint raise the same issues between the same parties, the judgment of neither Court is binding on the other and each must decide the case on the evidence before it. The risk of conflict is one that is inherent in the division of causes into criminal and civil. PANDMANABHANI *v.* GOLUSU APPALANARASAYYA. *Mad.* **348**

Civil Procedure Code (Act XIV of 1882), s. 470 —*U. P. Court of Wards Act (III of 1899), s. 48—Court of Ward—Power to file interpleader suit—Person, meaning of.*

Under s. 470 of the Civil Procedure Code of 1882 a person whose only interest in the property was that of a mere stake-holder and who was ready to render it to the rightful owner, was entitled to bring an interpleader suit to enable the Civil Courts to decide upon the rights of the rival claimants to the same property. The Court of Wards being a trustee for the rightful owner and thus a stake-holder can file such a suit and the mere fact that no such capacity to sue or to be sued has been conferred upon the Court of Wards under s 48 of the old Court of Wards Act does not in any way oust the jurisdiction of the Civil Court to take proceedings under s. 470, upon a plaint filed by the Court of Wards. The word "person" in s 470 is wide enough to cover a corporate body like Court of Wards. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

Civil Procedure Code (Act V of 1908), s. 2 (h). *See* PROBATE PROCEEDINGS **543**

——— **ss. 2 (2), 47** *-Order accepting or refusing security bond—Appeal, competency of.*

An order accepting or refusing to accept a security bond is not appealable either as a 'decree' under s. 2 (2), or under the provisions of s. 47, Civil Procedure Code. SRI KISHAN DAS *v* SAT NARAIN *Lah.* **792**

——— **s. 11.** *See* BENGAL TENANCY ACT, 1885, s. s 107 (1) **297**

———**s. 11**—*Decree on award*—Res judicata—*Competency of Court.*

If a decree passed by a Court cannot operate as *res judicata* owing to incompetency of that Court to try the subsequent suit, the fact that the decree was based upon an award cannot render the matters decided in that decree or the award itself *res judicata.* PURNIMA DEBYA *v.* NAND LAL OJHA *Pat.* **577**

———**s. 11**—*Jurisdiction of Court—Prior adjudication by Munsif—Same property claimed along with others in later suit—Valuation of suit—Competency of former Court to try subsequent suit—Tests*

The plaintiff sued in the Court of the Subordinate Judge to recover one-half of certain lands by inheritance from *U* and the other by inheritance from *S* and also by adverse possession. The suit was valued at Rs 2,000. It appeared that as regards the claim against *S* there had been a prior adjudication by the Munsif regarding two of the plots which were valued at more than Rs. 50 :

Held, (*i*) that to decide whether the Munsif was entitled to try the later suit, only the value of that half which was claimed under the same cause of action, namely inheritance from *S*, had to be considered;

(*ii*) that from the value of this one-half, *viz.*, Rs. 1,050, the value of the two plots (which exceeded Rs. 50) must be deducted and the suit would therefore, came within the jurisdiction of the Munsif and was barred by *res judicata.* PRIYANATH *v.* KALICHARAN *Cal.* **604**

———**s. 11**—*Points not raised in pleadings but in issues—Decision, whether* res judicata.

Where a point is not properly raised by the plaint, but both parties have without protest chosen to join issue upon that point, the decision on the point would operate as *res judicata* between the parties. KRISHNA CHENDRA *v.* CHALLA RAMANNA **P. C. 412**

Civil Procedure Code—contd.

———**s. 11**—*Prior decision in scheme suit, whether operates as* res judicata

Where the Division Bench decided the nature of an institution in a suit under s. 92, Civil Procedure Code, and in a subsequent proceeding under the Sikh Gurdwaras Act the Tribunal had to decide the question as to whether the institution was a Sikh Gurdwara according to the statutory definition to be found in the Sikh Gurdwaras Act, 1925, with which definition the Court was not concerned in the previous suit:

Held, that the previous decision did not operate as *res judicata.* SHROMANI GURDWARA PRABANDHAK COMMITTEE *v.* NAND KAUR *Lah.* **31**

———**s. 11**—Res judicata—*Co-defendants.*

In a suit for possession by *A* against *B*, *C* and *D* the first Court held that the suit was barred by adverse possession against *B* but decreed the suit against *C* and *D*. On appeal by *C* and *D*, however, the entire suit was thrown out on the ground that *A* had no title In a subsequent suit between *B* and *C*:

Held, that the adjudication by the first Court in favour of *B* in the earlier suit did not operate as *res judicata* as against *C*. DILAWAR HUSAIN *v* SUBHAN KHAN *Oudh* **241**

——— **s. 11** - Res judicata—*Litigating under same title—Mortgagee suing in two different capacities.*

A mortgagee suing in two cases under different capacities cannot be said to be litigating under the same title and, therefore, does not attract the application of s. 11, Civil Procedure Code.

The point of *res judicata* being a question of law may be taken for the first time in appeal where it does not necessitate the taking of further evidence. DATTATRAYA PANDURANG GOSAVI *v.* LAKSHMAN MAHADEV PAHEKAR *Bom.* **161**

——— **s. 11**—Res judicata—*The question not before Court in previous suit—Effect on subsequent suit.*

Where the question in issue between the parties in the subsequent suit was not before the Court and was not decided in the previous suit between the parties, there is no bar of *res judicata* in the subsequent suit. SHANKAR YESU *v.* H H. KHEM SAWANT *Bom.* **801**

———**ss. 11, 13, 44**—*Foreign judgment—Non-resident foreigner—Validity—Execution in British India—Objection for want of jurisdiction—Maintainability—Scope of s. 44—Submission, what constitutes—Part payment and asking for time, whether operate as submission,* res judicata *or estoppel.*

A decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has in no way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it, and it must be regarded as a mere nullity by the Courts of every nation, except in the country of the forum by which it was pronounced.

Where a decree passed by a Court in a Native State against a British subject who did not reside in that State, is sought to be executed in British India, it is open to the defendant to object to its execution on the ground that the decree, being one against an absent foreigner who had not submitted to the jurisdiction of the Court, is a nullity.

Section 44, Civil Procedure Code, merely lays down the method of procedure for the execution of decrees passed by Courts in certain Native States as to which there is a Notification by the Governor-General-in-Council. There is nothing in the section

Civil Procedure Code—contd.

which compels the British Indian Court to execute a decree transferred to it by a Native State Court even if it is satisfied that the decree was passed without jurisdiction.

The submission to the jurisdiction must be to the foreign Court itself and probably before the judgment is pronounced; for if there was no such submission, the judgment is a nullity. But appearance in the British Court may amount to waiver independently of this rule.

Where such a decree was sought to be executed in British India and the moveable properties of the debtor were attached and the latter paid a certain sum of money and took time:

Held, (*i*) that the mere fact that the amount was deposited in part payment of the decree or that time was taken for the payment of the balance would not amount to an adjudication of the rights of the parties by the Court so as to operate as *res judicata* against the judgment-debtor in all subsequent proceedings, even though they arise out of a fresh transfer of the execution and relate to an entirely different set of properties; (*ii*), that the judgment-debtor was not estopped as the decree-holder had not in any way been prejudiced by any representation of the judgment-debtor. SHEO TAHAL RAM *v.* BINAEK SHUKUL *All.* **353**

———s 21—*Jurisdiction—Trial of case by Court not having local jurisdiction—Interference in appeal.*

Where a case has been decided by a Court having no territorial jurisdiction, its decision will not be set aside on that score unless it is shown that a failure of justice has resulted from the trial of the case at the wrong place. NIHAL CHAND *v.* DAL SINGH *Lah.* **17**

———s 24. *See* PROVINCIAL SMALL CAUSE COURTS ACT, 1887, s. 35 **357**

———s. 24—*Transfer of case—Application for transfer—Notice to opposite party, necessity of—Court competent to try suit, meaning of.*

It is open to a District Judge to proceed *suo motu* and transfer a case from one Court to another Court of competent jurisdiction. But where he is moved for transfer by a party to the suit, he is bound to issue notice to the other party and to hear him if he desires to be heard. Failure to do so, if not without jurisdiction, is at least a material irregularity.

A Court would not be competent to try and dispose of a suit if it does not possess both pecuniary and territorial jurisdiction to entertain it RAM DAS *v* HABIB ULLAH *All.* **384**

———s 34—*Interest subsequent to date of suit—Power to award though not claimed in plaint*

Having regard to the terms of s 34, Civil Procedure Code, the Court has power to award interest after suit whether claimed specifically in the plaint or not TULSHIRAM *v.* AMBARSINGH HARJI *Bom.* **186**

———s. 35, Sch. II, para. 3 (2)—*Reference to arbitration—Costs incurred prior thereto—Omission of arbitrators to award such costs—Court, if can award*

Where the question relating to costs incurred in the litigation prior to a reference to arbitration was also referred to the arbitrators but the arbitrators left the question undecided and the Court did not remit the award on the ground that it had omitted to award costs:

Held, that as the Court was precluded from going into that matter by virtue of the provisions contained in para. 3 of Sch. II, Civil Procedure Code, it no longer had any discretion to award costs.

Held, further, that as soon as the dispute as regards costs of litigation was referred to arbitration, the Court became *functus officio*, so far as this matter was concerned and could not decide this question. HIRA *v* GAYA *All.* **789**

———s 39, O. XXI, r. 46—*Attachment of debt—Jurisdiction of Court—Conditions—Want of jurisdiction—Validity of sale—Procedure—Debt, location of—Insurance policy, attachment of.*

The invalidity or absence of attachment would not invalidate a sale inasmuch as an order of attachment is only a prohibitory order issued on the judgment-debtor and the public in order to protect the decree-holder.

But if a property cannot be attached being outside the jurisdiction of a Court it can neither be sold by that Court

It is not competent in execution of a decree for money to attach at the instance of the decree-holder a debt payable to the judgment-debtor outside the jurisdiction by a person not resident within the jurisdiction of that Court.

The proper procedure in such cases is to transfer the decree for execution to the Court which has jurisdiction to attach the debt.

It makes no difference so far as the consideration of the present question is concerned as to where the money is payable.

The location of a debt is where the debtor resides. HARI DAS *v.* NATIONAL INSURANCE CO. *Cal.* **533**

———s 47.

See CIVIL PROCEDURE CODE, 1908, s 2 (2) **792**
See PROVINCIAL INSOLVENCY ACT, 1920, s. 20 **593**

———s. 47, O. XXI, r. 95—*Suit by auction-purchaser within twelve years, maintainability of.*

The decree-holder auction-purchaser can bring a suit for recovery of possession of the property purchased at the auction sale within twelve years of the sale as provided in Art. 138, Limitation Act. Such a suit is not barred by s. 47, Civil Procedure Code. TRIBENI PRASAD SINGH *v.* RAMASRAY PRASAD CHAUDHURI *Pat.* **49**

———s. 47, O. XLI, r. 1—*Scheme—Creation of Board of Control with right to call upon trustees for collections—Board's right to execute scheme—'Decree-holder', meaning of—Appointment of Receiver, propriety of—Order XLI, r. 1, scope of.*

Where a scheme framed by the Court for the management of a temple constitutes a Board of Control and confers upon the Board the right of calling upon the trustees to remit the collections, the Board though created by the scheme itself, may be regarded as a decree-holder competent to execute the provisions of the scheme. A decree holder need not be a party to the decree. It is enough if the decree confers upon him some right enforceable under the decree.

The proviso to O XLI, r. 1, Civil Procedure Code, refers to a case where the person in possession is a third party and the parties to the suit have no present right to disturb him. Where the dispute is between parties to the suit, if it is just and convenient for the purpose of enforcing or carrying out the directions in the decree, a Receiver can be appointed even where the party in possession is not liable to be removed VYTHILINGAM PANDARASANNADHI *v.* THIAGARAJASWAMI *Mad.* **771**

——ss. 47, 144—*Restitution of property—Decree-holder selling property of judgment-debtor in his possession and under charge of decree—Over-payment and satisfaction of decree—Recovery of sum over-paid.*

The plaintiff obtained a money decree against the defendant. The decree created a charge on certain bales of cotton in the possession of the plaintiff and which belonged to the defendant. The plaintiff alleged to have sold the said bales for Rs. 143-2-6. The first Court found the value of the bales to be Rs. 1,820. On appeal the lower Appellate Court declared the value of bales to be Rs. 5,511-10-0. The decree was for a sum of Rs. 4,413-7-9. The defendant prayed that the plaintiff should deduct the decretal amount from the value of the bales and claimed to recover the balance under s 144, Civil Procedure Code:

Held, that s. 144, Civil Procedure Code, on a liberal construction applied to the case.

Held, further, that the question of over payment like this and satisfaction of a decree is a matter to be decided in an application in execution and not by a separate suit. LAKSHMINARAYAN *v.* LADURAM *Bom* **486**

——ss. 47, 145, O XXXVIII, r. 7 - *Attachment before judgment—Properties delivered to* sapurdar *—Suit by defendant against* sapurdar *for rent of premises—Maintainability.*

Where certain moveable properties belonging to the defendant were attached before judgment and they were handed over to a *sapurdar* and as the *sapurdar* did not remove the goods from the defendant's premises the latter brought a suit against the *sapurdar* to recover a certain sum of money by way of rent of the premises and damages and for a permanent injunction against the *sapurdar* restraining him from using the premises:

Held, that inasmuch as the cost, if any, incurred in storing the property attached would be a legitimate charge on the properties or the proceeds of their sale when they were delivered eventually to the party who succeeded in the suit, the question was one between the parties to the suit and the suit was not maintainable under s. 47, Civil Procedure Code. KUNDAN LAL *v.* SOHAN LAL *Lah.* **368**

—— s. 47, 151—*Court-sale—Judgmen'-debtor leasing premises after sale—Power of executing Court to issue prohibitory order to judgment-debtor and tenant.*

Where, subsequent to a Court-sale but before the confirmation of the sale, the judgment-debtor leases the premises sold, the Court has inherent power under s. 151, Civil Procedure Code, to issue a prohibitory order to the tenant and the judgment-debtor restraining them from paying the rent and receiving the rent, respectively. ABDUL GHANI *v* SIMLA BANKING & INDUSTRIAL CO. LTD., SIMLA *Lah.* **4**

——s. 60—*'Cooking vessels', 'artisan', 'tool', meanings of—*Gagra, *whether cooking vessel—Soap maker, whether artisan—Interpretation of s 60.*

Section 60, Civil Procedure Code, ought to receive a liberal interpretation The expression "cooking vessels" in the said section does not mean only vessels in which food is actually cooked but includes vessels necessary for cooking operations, such as, a *thali* and a *gagra*

One who practises the art of soap making should be considered to be an artisan within the meaning of that word in s. 60, cl. (*b*), and the paraphernalia of such a person for the soap factory should be considered as tools of an artisan within the meaning of s. 60 and are, therefore, not liable to attachment and sale in execution of a decree. BINDNSHARI *v.* BANSHI LAL. *All.* **280**

——s. 60 (c), O. XXI, r. 54—*'Agriculturist', meaning of—Exemption when available—Proclamation of order—Proclamation not by beat of drum but only by loud voice, legality of*

There is sufficient compliance with the provisions of O. XXI, r. 54, C. P. C, where owing to resistance offered on behalf of the judgment-debtor and holding out of threat to use force if the order is proclaimed by beat of drum, the process server does not make the proclamation by beat of drum and proclaims the order in a loud voice at the place adjacent to the property in dispute.

The term 'agriculturist' is used in s. 60 (c), Civil Procedure Code, to denote a person making his living by tilling the soil, in other words, whose sole means of livelihood is gained by cultivating land and does not necessarily mean a person who works with his hands. It includes a small holder of the land who tills the soil but not a large landed proprietor even though his sole income is derived from land

The property of the agriculturist to be exempt under s. 60 (c) must be shown to have been occupied by him as such for purposes of agriculture, that is, in order to enable the owner or occupier to cultivate the land. SUKHRAJ KUER *v.* HARNAM SINGH *Oudh* **335**

——s. 66 *construction of—Agreement of sale from vendee of* benamidar, *validity of.*

Section 66, Civil Procedure Code, has to be construed strictly and applies to a suit in which the cause of action is given by the *benami* purchase and not to a suit which is based on a contract which is separate from the transfer. ALLIBHAI MAHOMED *v.* DADA ALLI ISAP *Bom.* **509**

——s. 66—*Sale in execution—Suit to enforce agreement to sell against purchaser—Maintainability.*

A suit against a purchaser in Court auction to enforce an alleged agreement entered into by him before the confirmation of the sale to convey to the plaintiff a share in the property purchased is barred under s. 66, Civil Procedure Code.

Obiter.—An agreement subsequent to the purchase is not affected by the section. HARAN CHANDRA *v.* RAM KUMAR *Cal.* **538**

——s. 80—*'For any act purporting to be done', meaning of—Act merely contemplated or threatened—Notice, necessity of.*

The words 'in respect of any act purporting to be done by such public officer in his official capacity' in s 80, Civil Procedure Code, refer to a past act and not to any action merely contemplated or threatened.

Where the suit was confined to obtaining payment of a share in respect of future collections and not in respect of the monies, if any, collected in the past by the Receiver:

Held, that s. 80 did not apply, and the suit was not bad for want of notice to the Receiver. KRISHNASWAMI *v.* SYED AHMED *Mad.* **777**

——s 80—*Notice under—Plea of want of notice, if can be raised by third party.*

A third party is not entitled to raise the plea of want of notice under s. 80, Civil Procedure Code.

RUP LAL AGARWAL *v.* DHANSAR COAL CO. *Pat.* **445**

——s 92—*Res judicata. See* CIVIL PROCEDURE CODE, 1908, s. 11 **31**

C vil Procedure Code—contd.

——s. 92—*'Trust and trustees,' meaning of—'Public', meaning of—Trust not admitted—Application of section—Necessary parties in suit under section—Suit for removal of trustees, maintainability of.*

The words 'trust' and 'trustees' in s. 92, Civil Procedure Code, have been used in their ordinary sense and not in any technical sense as used in English Law or in the technical sense in which the word *wakf* is used in Muhammadan Law. Section 92 contemplates that there is a property burdened with obligations for purposes of a charitable or religious nature It will apply in all cases whether *wakf* or not where there is a clear indication that there is an obligation annexed to the property in favour of religious or charitable objects of a public nature.

The word 'public' in s. 92, Civil Procedure Code, means a section of the public and it is beyond dispute that provisions of maintenance of *khankah* and for distribution of alms and charities etc. are objects of a public nature within the meaning of the section.

In a suit under s 92, Civil Procedure Code, only the trustee is a necessary party.

Section 92, Civil Procedure Code, applies even when the trust is not admitted and the very existence of the trust is in dispute.

Where there is a breach of trust a suit for declaration that there is a trust and for the preparation of a scheme or removal of the trustees is maintainable only under s. 92, Civil Procedure Code. SHAH MUHAMMAD *v.* ABI SAGHIR *Pat.* **417**

—— ss. 92, 93—*Suit under s. 92 with sanction of Legal Remembrancer—Sanction of Local Government not obtained—Maintainability of suit—Scope of s. 93*

Section 93, Civil Procedure Code, provides for two distinct matters, the appointment of an officer to exercise the powers conferred by ss. 91 and 92 on the Advocate-General, and the 'previous sanction' of the Local Government to the exercise of such powers. In each case both the appointment and the previous sanction of the Local Government to the exercise of the powers are necessary before the provisions of s. 93 can be utilised.

A suit under s. 92 brought with the consent of the Legal Remembrancer but without the previous sanction of the Local Government as required by s. 93, is not maintainable. PREM NARAIN *v* RAM CHARAN **P. C. 461**

——s. 100. *See* CONTRACT ACT, 1872, s. 251 **260**

——s 100—*Finding of 'default', whether finding of fact—Post Office Act (VI of 1898), s 6—'Default', meaning of.*

A finding of negligence or a finding that there was or was not default is not necessarily in all cases a finding of fact, if the finding has not been approached from the proper legal standpoint.

The word 'default' is used in s. 6, Post Office Act, in the sense of failure in duty, care, etc., as the cause of some untoward event.

Where an insured cover containing promissory notes was lost and in a suit against the Post Master the only fact proved against him was that in the list of insured articles sent to the sorter in the ordinary course of his duties he did not mention the missing article and the District Judge found that the defendant was not guilty of default:

Held, the finding of the District Judge was one of fact. FIRM RIKHAI LAL-BINDESHRI PRASAD *v.* BANARSI SINGH *All* **569**

——s. 100—*Finding of fact—Interference—Question, as to whether presumption is rebutted, whether question of law.*

The question whether a presumption is rebutted or not is a question of fact to be determined according to the circumstances of each case.

It is open to the lower Court to appreciate the evidence in the best manner according to its discretion, and where evidence has been properly admitted on both sides, even if its conclusion on a question of fact is erroneous, it cannot be interfered with in second appeal. GURUSAMI THEVAN *v* GANAPATHI CHETTI *Mad.* **783**

—— s 100—*Finding of fact—Usage.*

Where there is evidence legally sufficient to support a finding as to the existence of an usage, the High Court cannot set aside that finding on the ground that the quantum of evidence is meagre and scanty. But where the usage has not been pleaded with precision and the evidence adduced is vague and inconsistent a finding may be over-set by the High Court on the ground that it was not justified by the pleadings and was not supported by evidence of a relevant character. SITA PRASAD *v.* RARJIT SINGH *All* **158**

——s. 100—*Question whether the conduct of a party was* bona fide—*Whether question of fact—Second appeal—Interference.*

Though the question whether the conduct of a person was *bona fide* is usually one of fact, the High Court can interfere in second appeal if there is no evidence to support the finding. GHASI *v.* MANGA *Lah* **710**

——s. 100—*Second appeal—Concurrent findings that transfers not fictitious—Interference.*

Concurrent findings of fact by the Courts below that certain transfers are not colourable and fictitious, are not open to challenge in second appeal. UMA SHANKAR SINGH *v.* SUKHRAJ KUNWAR *Oudh* **247**

——s. 100—*Second appeal—Effect of construction of words in document—Question as to—Question of fact.*

The question as to the effect of the construction of the words in a document which is neither a document of title nor the foundation of the plaintiff's claim is one of fact and not of law HARI KISHAN *v.* FIRM SHANKAR DAS-SHIB LAL *Lah.* **727**

——s 100—*Second appeal—Limitation, question of, not raised in lower Appellate Court, effect of.*

A point of limitation may be re-opened in second appeal even if it was not urged in the lower Appellate Court where the facts on which it rests are not in dispute. RAM CHARRITTER MISIR *v.* SURAJ TELI *All* **71**

—— ss 104 (h), 151—*Order directing arrest or detention in civil prison—Appeal—Order for production of lady for medical examination—Non-compliance—Arrest, legality of—Inherent powers of Court—Medical examination without consent—Assault.*

Under s. 104 (h), Civil Procedure Code, an appeal lies from an order directing the arrest or detention in the civil prison of any person otherwise than in execution of a decree.

An internal medical examination of a lady, if not voluntarily submitted to by her, would amount to assault and battery.

A Subordinate Judge directed defendants Nos. 1 to 3 to produce defendant No. 4 in Court for internal

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medical examination without ascertaining whether defendant No 4 who was a *pardanashin* lady was willing to submit to such examination, and, on their failure to do so, directed the arrest of all the defendants and got them produced in Court under the supposed inherent powers of the Court and not professing to act on the assumption that they were in contempt :

Held, that the order was entirely *ultra vires* and illegal. PADARATH TEWARI *v.* DULHIN TAPESHA KUERI *All.* **367**

——— **s. 109**—*Letters Patent (Bombay High Court), cl. 39—Privy Council leave to appeal to—High Court decree in pursuance of directions from Privy Council—Application for leave of appeal, whether competent.*

Where the High Court in pursuance of the directions given by the Privy Council takes account between the parties and passes a decree on the basis of those accounts, an application for leave to appeal against such decree is not competent either under s. 109, Civil Procedure Code, or cl. 39 of the Letters Patent of the Bombay High Court as the decree cannot be said to have been passed on appeal to the High Court.

Clause 39 of the Letters Patent first refers to a final judgment, decree or order made on appeal *i. e.* made on appeal on the Original Side or under the Civil Procedure Code, or appeals from the *mofussil* and the latter part of cl. 39 refers to a final judgment, decree or order of the High Court in the exercise of its original jurisdiction made by individual Judges of the High Court or by a Division Bench from which an appeal does not lie to the High Court under cl. 15 of the Letters Patent. BAI MANGU *v.* BHARATKHAND COTTON MILLS *Bom.* **183**

——— **s. 115.** *See* ARBITRATION **207**

——— **s. 115**—*Order setting aside award—Revision—'Case decided'.*

An order setting aside an arbitration award is not a case decided within the meaning of s. 115, Civil Procedure Code, and, therefore no revision lies from such an order. RISAL SINGH *v.* FAQIRA SINGH *All.* **568**

——— **s. 115**—*Revision—Error of law—Remand*

The fact that a decision is incorrect is no ground for revision under s. 115, Civil Procedure Code, where no question of jurisdiction is involved GAGDAMBA PRASAD v. RAM DULARAY *Oudh* **251**

——— **s. 115, O XXIII, r. 1**—*Order allowing plaintiff to withdraw suit—Revision, competency of.*

Where a plaintiff is allowed to withdraw the suit with liberty to bring a fresh one, if the Court has given a considered decision that there is a formal defect in the plaint and that if the plaintiff is not permitted to withdraw the suit with permission to bring a new suit he will be denied justice, the order allowing withdrawal cannot be challenged in revision. under s. 115, Civil Procedure Code. ISHAR DAS *v.* AYA RAM *Lah.* **1**

——— **s. 144.** *See* CIVIL PROCEDURE CODE, 1908, s. 47 **486**

——— **s. 145**—*Surety's liability for costs, nature of—Extension of liability to decree of Appellate Court—Permission to withdraw security, effect of.*

A suit dismissed on default was restored on the condition of the plaintiff furnishing security for Rs. 1,000 for costs of the suit. The surety deposited Rs. 1,000 as security. The suit being decreed the security was withdrawn. On appeal the suit was dismissed and the defendant applied to the trial Court for an order directing the surety to bring into Court his costs of the suit. The surety resisted the application on three grounds, namely (1) that he had undertaken no personal liability, (2) that his liability came to an end with the decree of the first Court and did not extend to the decree passed in appeal and (3) that the order permitting him to withdraw the money operated as *res judicata*:

Held, that the surety was personally liable and the bare fact that he deposited Rs. 1,000 did not exclude his personal liability.

Held, further, that liability of the surety did not cease with the decree of the trial Court but extended to decree passed in appeal.

Held, also, that the order permitting withdrawal of the money did not operate as *res judicata*. KARUPPAN CHETTIAR *v.* SUBRAMANIAM CHETTIAR *Mad.* **318**

——— **s 151.**

See CIVIL PROCEDURE CODE, 1908, s. 47 **4**

See CIVIL PROCEDURE CODE, 1908, s. 104 (*h*) **367**

——— **s. 151**—*Inherent powers of Court—Striking off defence on failure to pay* batta.

In a suit the plaintiff applied for the appointment of a Receiver in respect of some standing crops. The Court however directed one of the defendants to furnish security of Rs. 100 and take away the crops. He furnished a security bond and the Court ordered the testing of the sufficiency of the bond by issuing a warrant to an *amin* to investigate the matter For this issue of process *batta* had to be paid by the defendant which he did not. Court then ordered him to pay cash into Court and warned him that in case of default his defence would be struck off. The defendant failed to comply with this order with the result that the Court struck off his defence:

Held, that though there was no provision in the Code of Civil Procedure for striking off the defence under the circumstances mentioned above, it was competent to the Court to do so under its inherent powers under s. 151, Civil Procedure Code. DASARI VENKATACHARYULU *v.* MANCHALA YESOBE *Mad.* **42**

——— **s. 151**—*Inherent powers, when to be exercised.*

A court cannot make use of the special use of the provisions of s 151, Civil Procedure Code, where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it or has not complied with the conditions laid down by the Code. SATIA NAND *v.* JHANGI RAM *Lah.* **735** (*b*)

——— **s. 151, O. IX, r. 13, O. XXI, r. 90**—*Application to set aside sale—Dismissal for default—Inherent power to restore—O. IX, whether applies.*

Order IX, Civil Procedure Code, is not applicable to the dismissal of an application under O. XXI, r. 90, but there is an inherent jurisdiction in the Court to restore such an application if good cause is made out. FIRM DWARKA DAS-BABU RAM *v.* VAISH FLOUR MILL *All.* **283**

——— **s. 151, O. XLI, r. 5**—*Appeal from preliminary decree—Power to stay execution of final decree—Inherent powers of Court.*

The Appellate Court has ample power under s. 151, Civil Procedure Code, to order stay of execution of a final decree in a mortgage suit during the pendency of an appeal from the preliminary decree. JANKI DASS *v.* SHEO PRASAD *All.* **75**

——— **ss. 151, 152, O. XX, r. 3**—*Judgment—Absence of clerical error or omission—Alteration without review—Legality—Inherent powers.*

When there is no clerical or arithmetical mistake or any error arising from any accidental slip or omission,

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a judgment cannot be altered or added to, except by way of review. Section 151, Civil Procedure Code, cannot override the distinct provision of O. XX, r. 3. SECRETARY CHHOTI BAZAR BANK *v.* BAQRIDI *Oudh* **253**

——— **s. 152**—*Suit for sale on mortgage—Preliminary decree—Wrong survey number entered in mortgage-deed, plaint and decree—Mistake common to both parties—Suit for rectification of decree—Maintainability of—Proper procedure—Specific Relief Act (I of 1877), s. 31.*

A preliminary decree was passed in a suit for sale on a mortgage. Subsequently the mortgagee found out that by a mistake a wrong survey number had been entered in the mortgage deed and the mistake was repeated in the plaint as also in the preliminary decree. The mortgagee sued for rectification of the deed of mortgage and also of the plaint and the preliminary decree in respect of the mistaken survey number It appeared that as a matter of fact there had been a common mistake on the point by both parties:

Held, (*i*) that to attack by a 2nd suit the decree in a previous suit between the same parties would offend against the principle of *res judicata* which admits of exception only in cases where the previous decree was a compromise decree or a decree obtained by fraud of the other party and that consequently rectification of the mortgage-decree could not be granted.

(*ii*) that in proper cases the Court could grant rectification of a mortgage-deed which has ripened into a decree and that the limits after which rectification of an instrument should not be made are (*a*) the limit stated in s 31, Specific Relief Act, when 3rd parties have acquired rights in good faith and for value and (*b*) where a decree has been obtained on an unrectified instrument and that decree has been executed and money or property concerned has been recovered.

(*iii*) that after getting their mortgage-deed rectified and then amending their plaint the decree-holder then could apply for review or amendment of the preliminary decree under s. 152, Civil Procedure Code.

Per *Ananthakrishna Ayyar, J.*—The circumstance that a decree has been passed on a mortgage is not by itself a legal bar to such rectification being granted when otherwise a case for rectification is made out. UPADRASTA LATCHAYYA *v.* GUDAPARTI SEETHAMMA *Mad.* **850**

———**O. I, r. 3**—*Misjoinder of causes of action—Contract of sale by one partner—Dissolution of partnership—Suit for specific performance against vendee and for indemnity against contracting partner.*

The plaintiffs and defendant No. 2 were partners in a firm of which the latter was the managing partner. He agreed on behalf of the firm to sell certain land belonging to the firm to defendant No. 1 and entered the transaction in the books of the firm as being a contract to sell the land for Rs. 9,000. The actual agreement for sale was for Rs. 5,000. Subsequently the partnership dissolved and the terms of dissolution were embodied in a deed and the effect of dissolution was that the plaintiffs took over the whole of the partnership assets, the accounts were to be taken as correct, and if it was found that any entry was wrong, the partner in default was to make good the loss to the plaintiffs. The plaintiffs sued for specific performance of the agreement of sale, stating in the plaint that if the sale price was Rs 9,000 the defendant No 1 was bound to pay Rs 9,000 and purchase the land. If on the other hand the price fixed was Rs 5,000 then they claimed against defendant No. 1 specific performance on that basis and as against defendant No. 2 the balance of Rs. 4,000 under the contract of indemnity contained in the deed of dissolution. The Sub-Judge dismissed the suit on ground of misjoinder of causes of action:

Held, that there was no misjoinder of causes of action as there was a common question of fact, namely what were the terms of the contract of sale

Order I, r. 3, Civil Procedure Code, applies to joinder of causes of action as well as to joinder of parties BHAGVAN GOKULJI *v.* BALKU BABAJI *Bom.* **497**

———**O I, r 8**—*Representative suit—Defect in frame of suit—Omission to raise objection—Objection in appeal, competency of.*

Where in a representative suit the question whether the plaintiff was entitled to institute the suit because he had not obtained the permission of the Court was not raised and the suit was allowed to proceed:

Held, that the frame of the suit could not be objected to in appeal and that, in any case, the defect was cured by s. 99, Civil Procedure Code. DILAWAR HUSAIN *v* SUBHAN KHAN *Oudh* **241**

———**O. I, r 8**—*Suit against representative defendants, when competent—Debt incurred by managers of community—Suit against managers—Permission for defendants to be sued as representatives*

As a general rule a suit against representative defendants cannot be brought upon a debt, as it is not possible to proceed against the common property unless all those who possess an interest in the property are actually made parties to the suit. But this rule does not apply to a case in which managers or trustees or some other persons whom the plaintiff alleges have power to bind the property of the association or community are before the Court. Thus, where a promissory-note is executed by five persons and the holder of the note sues them alleging that they are managers appointed by their community with powers of borrowing and dealing with common property and that the common property is bound by the debt, an order under O I, r. 8 permitting the defendants to be sued as representative of the community is competent. ANDIAPPAN AMBALAM *v* SUBBAYYA AMBALAM *Mad.* **315**

———**O III, r. 4**—*Pleader—Authority to refer—Document in writing, necessity of—'Act', meaning of—Referring pending suit to arbitration amounts to 'acting' and not merely 'pleading'.*

Under O. III, r. 4 (1) of the Civil Procedure Code, as amended in 1926 a pleader cannot act for any person unless he has been authorised for the purpose by a document in writing

Where a *vakalatnama* authorised the Pleader to refer the dispute to arbitration and also gave authority to the Pleader to engage another Pleader who would have authority to exercise all the powers which had been given to the former and a Pleader who had been engaged by the original Pleader applied to the court for referring the dispute to arbitrators and the court accordingly referred the case:

Held, that the reference was illegal inasmuch as the Pleader who had signed the application for reference was not appointed in writing as required

by O. III, r. 4, Civil Procedure Code. AMIR SHAH *v.* ABDUL AZIZ *Lah.* 712

——— O. V, r. 17—*Substituted service—Duty to allow sufficient time to appear*

Even in the case of substituted service duly effected under O. V, r. 17, Civil Procedure Code, sufficient time must be allowed from the date of the affixation of the process on the door of the defendant's house and the date of the hearing of the case. One day is obviously inadequate in the absence of speacial circumstances. GANGA RAM *v.* OFFICIAL RECEIVER DELHI *Lah.* 258

——— O. V, r. 20—*'Duly served,' meaning of—Substituted service, defendant's right to challenge propriety of—Limitation—Limitation Act (IX of 1908), Sch I, Art 164*

The rule that substituted service is to be taken to be as effectual as personal service only means that the court hearing the case may proceed with the suit as if the summons had been personally served on the defendant. Therefore, when an order for substituted service is made by a court on the representation of plaintiff, it is open to the defendant when he makes an application for setting aside *ex parte* decree to challenge the propriety of the order and to show that the method employed was not calculated to effect the purpose, namely of informing the defendant of the institution of the suit. If the court having regard to all the circumstances of the case comes to the conclusion that there was no due service, limitation would be computed from the date of applicant's knowledge of the decree. RAM BHAROSE *v* GANGA SINGH *All* 609

——— O. VI, r. 17. *See* CIVIL PROCEDURE CODE, 1908, s. 100 710

——— O. IX, r 13. *See* CIVIL PROCEDURE CODE, 1908, s. 151 283

——— O. XIII, rr. 1, 2. *See* EVIDENCE 290

——— O. XX, r. 3. *See* CIVIL PROCEDURE CODE, 1908, s. 151 253

——— O. XX, r. 4 (1)—*Judgment of Court of Small Causes—Contents*

Under O. XX, r. 4, Civil Procedure Code, a Judge in a small cause suit may reduce his remarks to a minimum and they need not contain more than the points for determination and the decision thereon but this minimum must be intelligible, and must enable the High Court in revision to satisfy itself that the decree or order was according to law without the necessity of perusing the whole record. BADLU *v.* RAM DAS *Oudh* 701

——— O. XXI. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 68 267

——— O. XXI, r. 2, applicability of. *See* CIVIL PROCEDURE CODE, 1908, O. XXXIV, RR. 4, 5 732

——— O. XXI, r. 16. *See* CIVIL PROCEDURE CODE, 1908, s. 39 533

——— O. XXI, r. 54. *See* CIVIL PROCEDURE CODE, 1908, s. 60 (c) 335

——— O. XXI, r. 66. *See* LIMITATION ACT, 1908, s. 19 624

——— O. XXI, r. 66 (2) (e)—*Proclamation of sale—Duty of Court to ascertain value and state it.*

If the Court does not consider that the value of the property should be mentioned in the proclamation, on account of the peculiar nature of the property, it may not do it. But if on the other hand it considers that the value is a material piece of information for an intending purchaser it should be put "as fairly and accurately as possible." Except in exceptional cases where it is not possible to ascertain the value or where it may be found that in the circumstances of the case the value need not be ascertained, the Court is bound to put a fair and accurate value in the proclamation. The enquiry by Court should be a summary one and need not be elaborate.

Where the decree-holder stated that the value of the property (3 *bighas* of land with a bungalow) was Rs. 2,000 and the judgment-debtor stated it was worth Rs. 40,000:

Held, that the case was one in which the Court should hold an enquiry and state its own valuation. PASHUPATI NATH *v.* BANK OF BEHAR *Cal.* 468

——— O. XXI, r. 66 (2) (e)—*Sale proclamation—Matters to be stated—Pending litigation.*

The fact that the property to be sold is the subject-matter of a pending litigation is a thing material for a purchaser to know and can, therefore, be mentioned in the proclamation for sale. VENKATARAGHAVAMMA *v.* BYRISETTY SINGARAYYA SETTY *Mad.* 47

——— O. XXI, r. 89—*Court sale—Adjustment out of Court—Application to set aside sale without depositing 5 per cent. for auction-purchaser—Maintainability—Power to set aside sale.*

Where after a court sale has been held the decree-holder and the judgment-debtor made an application under O. XXI, r. 89, Civil Procedure Code, for setting aside the sale without depositing 5 per cent. of the purchase-money for payment to the auction-purchaser the court has no power to refuse to confirm the sale either under that rule or under the inherent powers of the court. SATIA NAND *v.* JHANGI RAM *Lah.* 735 (*b*)

——— O. XXI, r. 89—*Deposit under protest—Validity—Attachment by decree-holder's creditor, effect of.*

When a deposit is made under O. XXI, r. 89, Civil Procedure Code, it must be made, in the ordinary way, for payment to the decree-holder voluntarily and unconditionally.

Where a judgment-debtor in depositing the amount under O. XXI, r. 89 stated that the amount calculated by the Court Officer was in excess of the real amount due and besides this, execution costs and interest were also claimed in excess and prayed that permission should not be granted to the decree-holder to withdraw pending the hearing of the objections:

Held, that the deposit was bad

Where in such a case the deposit has been attached by a creditor of the decree-holder and has been ordered to be paid to him, the effect of this fact must be considered. NURJAHAN KHATUN *v.* ASIA KHATUN *Cal.* 478

——— O. XXI, r. 90. *See* CIVIL PROCEDURE CODE, 1908, s. 157 283

——— O. XXIII, r. 1. *See* CIVIL PROCEDURE CODE, 1908, s. 115 1

——— O. XXIII, r. 1 (2)—*Application to withdraw from suit with liberty to bring fresh suit—Allowing application without giving leave for fresh suit—Legality—Proper procedure.*

An application under O. XXIII, r. 1 (2), Civil Procedure Code, for permission to withdraw from the suit with liberty to institute a fresh suit on the same subject-matter must be treated as an indivisible whole, and if the applicant is not allowed liberty to institute a fresh suit, his pending suit should not be dismissed, but the application

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should be refused altogether and the suit should be retained on the file. MARUDACHALA *v.* CHINNA MUTHU *Mad.* **316**

———O XXXII, r. 1. *See* CIVIL PROCEDURE CODE 1908, s. 100 **710**

———O XXXII, r. 1, O. VI, r. 17—*Suit by major a minor—Application for amendment—Amendment when to be allowed*

Where a suit is instituted by a next friend for a person described as a minor who is really a major and an application is subsequently made for permitting the real plaintiff to continue the suit as a major what the Court has to see is whether at the time the wrong recital was entered in the plaint those responsible for it were acting *bona fide* or not, that is to say, whether they themselves were mistaken and if there was no mistake and at best gross carelessness permission should not be granted. GHASI *v.* MANGA *Lah.* **710**

———O. XXXII, r. 3—*Agra Tenancy Act (III of 1926), s. 81—Proceedings in Revenue Court against minor—Appointment of guardian, necessity of—Omission to appoint—Validity of proceedings.*

Order XXXII, r. 3, Civil Procedure Code, applies to proceedings in Revenue Courts and it is incumbent upon a party taking proceedings against a minor under s. 81, Agra Tenancy Act, to formally make an application for appointment of a guardian for the minor. But failure to do so is only an irregularity, and the minor who is not properly represented cannot have the decree or order set aside unless he shows that he was really prejudiced by that decree or order. MADHO SINGH *v.* KESHAB DEO *All* **375**

———O. XXXII, rr. 3, 11—*Guardian—Neglect to protect minor's interests—Removal—Duty of Court—Right to retire—'Interest adverse to minor', meaning of.*

A guardian appointed by the Court has no absolute right to remove himself from the litigation and force the hands of the Court at his own sweet will

But if the interests of a minor are in the hands of a person who has neglected to protect those interests it is the duty of the Court to remove him from the guardianship, if he had already been appointed, or to decline to appoint him guardian, if there was no formal order for his appointment.

"Claiming an interest adverse to that of the minor" does not mean that the minor and guardian were fighting or were actually on inimical terms. The expression is an expression of law, and it means that the interest of the minor cannot be safe in the hands of the guardian. RAM KISHAN *v.* RADHEY LAL *All.* **562**

———O. XXXII, r. 7. *See* MUTATION **254**

———O XXXII, r. 7—*Minor—Compromise without sanction—Validity.*

Where a case in which a minor party is interested is compromised without the sanction of the Court the decree is a nullity so far as the minor is concerned. MUDAKATH MATHA *v.* CHALORA ILLATH *Mad.* **350**

———O. XXXIV, r. 1. *See* TRANSFER OF PROPERTY ACT, 1882, s. 91 (*f*) **840**

———O. XXXIV, r. 1—*Mortgage suit—Parties—Persons claiming paramount title.*

A person who sets up a title paramount to that of the mortgagor and mortgagee should not be joined as a party to a suit to enforce the mortgage as he is neither interested in the mortgage-security nor in the right of redemption. MESSRS. BRIJ LAL & SONS *v.* PUNJAB AND KASHMIR BANK, LTD., RAWALPINDI

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———O. XXXIV, rr. 4, 5—*Mortgage suit—Adjustment after peliminary decree—Power to pass final decree—Proceedings for decree absolute, whether execution proceedings—O. XXI, r 2, applicability of.*

Proceedings to get a decree absolute for sale are not proceedings by way of execution of the preliminary decree but are proceedings in the suit to obtain a final decree for sale which is the only decree capable of execution. Order II, r 2, Civil Procedure Code which provides for certifying a payment made out of Court is not, therefore, applicable to proceedings for a final decree and if money is not paid in the manner directed by the preliminary decree the Court is bound to pass a final decree for sale, notwithstanding an adjustment out of Court DURGA DEVI *v.* NAND LAL *Lah.* **732**

———O. XXXIV, r. 6—*Application for personal decree—Sale, whether condition precedent*

Where a decree for sale becomes inoperative on the mortgagor being declared not to have been the owner of the mortgage property, O. XXXIV, r. 6, Civil Procedure Code, can have no application. ZIA-UDDIN AHMAD KHAN *v* AKBAR ALI *All.* **829**

———O. XXXVIII, r. 7. *See* CIVIL PROCEDURE CODE, 1908, ss 47, 145 **268**

———O. XXXVIII, rr. 7, 8—*Garnishee proceedings—Attachment of debt—Investigation into its existence—Procedure.*

When a Court has attached a debt either before judgment or in execution of a decree it is not open to the Court to determine whether the debt is actually due or not. After attachment only two courses are open to it, either to sell the debt or to appoint a Receiver for its realisation. ALWAR AIYANGAR *v.* SUBRAMANIA DIKSHATHAR *Mad.* **337** (*a*)

———O. XXXIX, rr. 1, 2. *See* INJUNCTION **346** (*b*)

———O. XLI, r. 1. *See* CIVIL PROCEDURE CODE, 1908, s 47 **771**

———O. XLI, r 2—*New point in appeal.*

It will be unfair to allow the appellants in a case to spring a surprise on the opponent by allowing them to raise a contention not raised either in the lower Court or in the grounds of appeal. GIRDHARI LAL *v.* JUGAL KISHORE *Lah.* **733**

———O XLI, r. 5. *See* CIVIL PROCEDURE CODE, 1908, s. 151 **75**

———O. XLI, r. 5—*Mortgage suit—Appeal against preliminary decree—Stay of proceedings in lower Court.*

Where an appeal has been preferred against a preliminary decree in a mortgage suit, the Appellate Court has power to stay further proceedings in the lower court and it is a general rule to do so where no loss would be caused to the decree-holder by the stay of proceedings. DIWAN CHAND *v.* NANAK CHAND *Lah.* **729** (*a*)

———O XLI, r. 10 (2)—*Appeal—Security for costs—Failure to give security—Dismissal—Power to restore—Limitation—Limitation Act (IX of 1908), Sch I, Art. 168, applicability of—Insolvency, whether extends time.*

Order XLI, r. 10 (2), Civil Procedure Code, is of a mandatory character and if security is not furnished within the time allowed the Court is bound to reject the appeal.

An application for restoration of an appeal dismissed under O XLI, r. 10 (2) is governed by Art. 168 of the Limitation Act.

Insolvency is not a disability under the Limi-

whom an *ex parte* order is passed is not a sufficient ground for extending the time for making an application to set aside the order. G. SIBUR *v.* MYTHILI AMMAL *Mad.* **45**

———O. XLI, rr. 11, 31—*Appeal—Summary dismissal—Judgment, contents of—Compliance with r. 31, necessity of.*

In a judgment delivered on hearing an appeal under O. XLI, r. 11 of the Civil Procedure Code, by a Court subordinate to the High Court, compliance with the provision of r. 31, O XLI, is necessary.

The question whether in a particular case there has been a substantial compliance with the provisions of r. 31 is a different one depending on the nature of the judgment delivered in each case. A non-compliance with the strict provisions of this rule may not vitiate the judgment and make it wholly void, and the irregularity may be ignored if there has been a substantial compliance with it and the second Appellate Court is in a position to ascertain the findings of the lower Appellate Court. DURGA THATHERA *v.* NARAIN THATHERA *All.* **274 F. B.**

———O. XLI, r. 23—*Direction that party should pay costs within certain period after receipt of order by trial Court—Trial Court, whether bound to give notice to party.*

Where a case is remanded with a direction for re-trial on condition that the plaintiff pays the costs of the previous suit within a certain number of days of the receipt of the order of remand by the trial Court, the trial Court is not bound to serve the plaintiff with notice of the receipt of the record by it. It is the duty of the plaintiff to take necessary steps to find out when the record was received by the trial Court. JAGDAMBA PRASAD *v.* RAM DULARAY *Oudh* **251**

———O. XLI, r. 23, O. XLIII, r. 1—*Suit not disposed of on preliminary issue—Remand by Appellate Court, legality of—Appeal from order of remand, competency of—Remand under inherent power—Power to order refund of court-fee*

No order of remand can be made under O. XLI, r. 23, Civil Procedure Code, unless the trial Court has disposed of the whole suit upon a preliminary point; and if an order of remand is not one passed under O. XLI, r. 23, Civil Procedure Code, it is not appealable.

A Court remanding a case under s. 151, Civil Procedure Code, is competent to order a refund of court-fee paid on the memorandum of appeal. GAINDO *v.* RADHA MOHAN *Lah.* **559**

———O. XLI, r. 27—*Additional evidence in appeal—Refusal to admit—Second appeal, competency of.*

Where a lower Appellate Court refuses to admit a certain material document as additional evidence in an appeal under O. XLI, r. 27, Civil Procedure Code, the High Court cannot interfere in second appeal. BUTA SINGH *v.* BALWANT SINGH *Lah.* **788**

———O. XLI, r. 27—*Appeal, additional evidence—Remand.*

Where a party had a free hand in summoning of witnesses in the Court of first instance, the case cannot be remanded in appeal for giving him a further opportunity to produce evidence simply because his Counsel in appeal considers the evidence of certain witnesses to be essential. NIHAL CHAND *v.* DAL SINGH *Lah.* **17**

———O. XLI, r. 31. *See* CIVIL PROCEDURE CODE, 1908, O XLIII, R 11 **274**

———O. XLIII, r. 1. *See* CIVIL PROCEDURE CODE, 1908, O. XLI, R 23 **559**

———O. XLV, r. 7 (1)—*Time for giving security, extension of—Power of High Court.*

The Chief Court has no jurisdiction to extend the time fixed for giving security under cl. (*b*) of sub-r. (1) of r. 7, O. XLV, Civil Procedure Code. HUKUM CHAND *v* RADHA KISSEN-MOTI LAL *Oudh* **336**

——— Sch II, para. 3 (2). *See* CIVIL PROCEDURE CODE, 1908, s. 35 **789**

——— ——— para. 15 (1) (c), para. 16 (2)—*Decree in terms of award—Objection as to validity of reference—Appeal, competency of—Intention of Legislature.*

No appeal is competent against a decree which is in accordance with an award even when the validity of the reference itself is impugned.

The intention of the Legislature is to give finality to the decision of the trial Court on all objections to the award, and to restrict the appeal to the solitary case in which the decree is at variance, or not in accordance with the award, and, even, then to confine its scope to that part of the decree which differs from the award. FIRM RALA RAM-WALAITI RAM *v.* FIRM BANSI LAL-JAGGAN NATH *Lah.* **11**

Commission, agent. *See* LIMITATION ACT, 1908, SCH. I, ART 65 **481**

———*Application for commission at late stage—Discretion of Court.*

When a party elects to go to trial without the evidence of a particular witness who at the time was ill, the Court will be justified in refusing to issue a commission for examining him when the application for that purpose is made at the end of the trial. PRAMATHA CHANDRA KAR *v.* BHAGWAN DAS-MADAN LAL *Cal.* **529**

———*for examination of witnesses—Unnecessary protraction, an abuse to be checked.*

Unnecessary protraction of examination of witnesses on commission which enormously increases the costs of litigation without any corresponding benefit to the parties should be checked and it is within the powers of the High Courts to direct an enquiry with a view to disciplinary action in flagrant cases which come under their notice at the hearing of appeals. RAJKUMAR SEN CHOWDHURY *v.* RAM SUNDAR SHAHA **P. C 102**

Companies Act (VII of 1913), s. 4 (2). *See* TRADE UNION **84**

———s. 152—*Arbitration Act (IX of 1899), ss. 2, 3—Arbitration between Companies—Applicability of Arbitration Act.*

Section 152, Companies Act, is not restricted by s. 2 of the Arbitration Act, which limits the application of the latter Act to cases where the subject-matter could be the subject of a suit in a Presidency Town.

Arbitrations between companies in Bihar and Orissa under s. 152, Companies Act, are, therefore, governed by the Arbitration Act and not by Sch. II, of the Civil Procedure Code. RUPLAL AGARWALA *v.* DHANSAR COAL CO. *Pat.* **445**

———ss. 153, 202—*Appeal—Persons entitled to appeal—Scheme for restarting, consideration of.*

A creditor, contributory or a liquidator only has a right of appeal under s. 202, Companies Act. A person who has no present interest but only expects to be appointed secretary or agent of the company if it restarted under a scheme under s. 153 of the Act has no right of appeal.

In considering a scheme the wishes of the creditors and the contributories have to be consulted and

not the wishes of any person who may have propounded a scheme. MOTILAL KANJI & Co. *v.* NATVARLAL *Bom* 491

——ss 162 (vi), 174, 176—*Winding-up of solvent company—Grounds for winding-up—'Just and equitable rule', application of—Appeal in name of company against winding-up order—Wishes of contributories, weight of—Duty of Official Liquidator—Court's power to remove Official Liquidator.*

The fact that a Managing Director has a preponderating voice in the company by reason of his owning or controlling a large number of shares or that the dividends have not been paid regularly is by itself no reason for winding-up a company.

To justify a winding-up order on the 'just and equitable rule it is necessary to prove a lack of confidence in the conduct and management of the company's affairs by the Directors.

An order for winding up a company even if not justified may be maintained on the ground of lapse of time and intervening events.

An *ultra vires* transaction on the part of Directors is of itself not sufficient reason for a winding-up order since other remedies are available to aggrieved share-holders.

Where the Directors of a company intend to appeal against a winding-up order they should prefer the appeal in the company's name even though an Official Liquidator has in the meanwhile been appointed by the Court. If the majority of the contributories concur in the filing of such appeal the appeal is in truth that of the contributories.

In the winding up of a solvent company the Court as well as the Official Liquidator should have particular regard to the wishes of the contributories in all matters affecting them as a class.

An Official Liquidator must maintain a position of complete impartiality between all persons involved in the winding-up Where this is not done the Judge in charge of the winding-up may remove such Liquidator and appoint in his place a person from whom an attitude of unqualified detachment can be expected. RIPON RREss & SUGAR MILL Co., LTD. *v.* GOPAL CHETTI P. C. 114

——s. 202. *See* COMPANIES ACT, 1913, s. 153 491

Company—*Directors, appointment of—Poll, demand of—Poll not taken—Original meeting, continuance of—Suit by share-holders for declaration that appointment of Directors is invalid, competency of.*

The Directorate of a Life Insurance Company was composed of two policy-holders' Directors elected by the policy-holders and of a certain number of share-holders' Directors. The Ordinary General Meeting for the election of share-holders' Directors was fixed for the 13th October, 1930. The Articles of Association had contained a provision that the number of share-holders' Directors should be six and that two should retire in rotation their places being filled by election at the meeting. But the number had been by amendment of the articles reduced to five and it was provided as a special case, that at the General Meeting of 1930 the six Directors should vacate office and that no more than five should be elected in place of them. At the meeting held on 13th October, 1930, votes were taken by show of hands and five persons were declared elected. A poll was then demanded and the Chairman then directed that it should be held at the Company's Office on 20th October, and appointed the manager of the Company Returning Officer for the purpose of taking it. On October 16th the two policy-holders' Directors appointed two other persons thus bringing the Directors up to four. On the 20th October the Returning Officer did not appear and no other arrangement being made for holding the poll, the share holders who had assembled dispersed. No other attempt was made to take a poll and the four persons at that time claiming to be Directors after a couple of days co-opted 3 more Directors, thus bringing their number up to the maximum. Four of the share-holders filed a suit praying *inter alia* that these appointments might be declared invalid and that the Court should direct a poll to be taken to elect the five share-holders' Directors :

Held, that the taking of a poll was a mere enlargement of the meeting at which it was demanded and the original meeting continued until the poll had been taken.

Held, further, that so long as the meeting continued the five Directors' posts remained vacant and neither the provision for the automatic re-election of the old Directors on failure of their posts being filled up in the meeting, nor the provision enabling Directors to appoint any duly qualified person as Director could come into operation.

Held, also, that as the five persons were installed as Directors in contravention of the articles the mode of constituting them was *ultra vires* the Board of Directors and the suit by some of the share-holders who had been deprived of their fundamental privilege of choosing their own management was competent.

Held, also, that plaintiffs were entitled to maintain the suit even though the share-holders under the articles could by special meeting remove the Directors from the office by three-fourths majority. SRINIVASAN *v.* WATRAP S SUBRAMNIA AYYAR *Mad.* 193

Compromise. *See* MUTATION 254

——by Counsel. *See* COUNSEL AND CLIENT 535

——decree. *See* REGISTRATION ACT, 1908, s. 17 (2) 54

Contempt of Court—*Essence of offence.*

The essence of the offence of contempt of Court is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings must go on, even where the proceedings do not involve trial by Jury and no one would imagine that the mind of the Magistrates or Judges charged with the case would or could not be induced thereby to swerve from the straight course. SATHAPPA CHETTIAR *v.* RAMACHANDRA NAIDU *Mad.* 311

——*Judicial proceedings—Publication of disputed Will in newspaper—Contempt.*

Where during the pendency of a suit in which the genuineness of a Will was seriously disputed, the editor of a newspaper published a certified copy of the Will as a paid advertisement, and the object of the publication was to make the public believe that it was genuine :

Held, that the editor was guilty of contempt of Court. GURU CHARAN PRASHAD *v.* VISHNU PARARKAR *All.* 282

——— *Pleadings—Duty of complainant to allege grounds specifically — Affidavits—Source of information not disclosed—Value of statements.*

In proceedings for contempt the practice of the court is to enable the parties concerned to know what are the points they have got to answer and the practice has always been that the parties charged with contempt cannot be called upon to answer to anything which is not set out specifically in the grounds used

before the court at the time when the Rule was issued. The fact that the grounds are matters of record and that a Rule has been issued is immaterial.

The court should not take any notice whatsoever of matters which are stated to be true to information but in respect of which the source of the information is not disclosed. AMULYA CHANDRA *v.* SATIS CHANDRA *Cal* 901

Contract—*Consideration—Third party's right to question.*

In the case of a sale of property the question of payment and non payment of the consideration is a matter between the vendor and the vendee *inter se*; it cannot be raised by a third party. TRIBENI PRASAD SINGH *v.* RAMASRAY PRASAD *Pat.* 49

———*Deposit in connection with illegal contract—Suit for recovery.*

A deposit made in respect of an illegal contract can be recovered by a suit provided the plaintiff has not to rely on such contract in support of his claim. LILADHAR *v.* SUNDERLAL *Nag.* 875

Contract Act (IX of 1872), s 11—*Unsoundness of mind—Mere loss of memory distinguished—Medical evidence, value of.*

Loss of memory does not usually reach such a stage during the lifetime of the individual so as to unfit him for the management of his own affairs.

The fact that the medical history of a case was derived from an unreliable informant is an important factor which detracts from the weight of medical evidence. RAJKUMAR SEN *v.* RAM SUNDAR SHAHA P. C 102

——— s. 16 *See* UNDUE INFLUENCE 525

——— s. 23. *See* SALE 49

——— ss. 23, 25—*Consideration—Promise to pay debt of his deceased brother.*

One G. M. died issueless and was succeeded by N. C, his brother and S. his widow. The deceased owed some money to the plaintiff N C. after going into the accounts of the deceased with the plaintiff struck a balance containing a stipulation to pay interest. Plaintiff sued N. C. for recovery of his debt and the latter pleaded want of consideration:

Held, that the burden of proving absence of consideration lay on N. C. which he had failed to discharge.

Held, further, that the plaintiff by accepting the signature of N. C. and his undertaking to pay the amount due on the accounts discharged G. M's estate from liability and that was a sufficient consideration to sustain an action against N. C. NIHAL CHAND *v.* DAL SINGH *Lah* 17

——— s. 65. *See* VENDOR AND PURCHASER 108

——— s. 69. *See* BENGAL LAND REVENUE SALES ACT, 1859, s. 9 479

——— s 69—*'A person who is interested', meaning of—Payment made in respect of certain estate—Estate going to opposite party in litigation—Right of payer to be recouped—Lien on estate.*

The words 'a person who is interested' in s. 69, Contract Act, do not mean that the person who makes the payment must prove that he had such an interest as would stand the test of a judicial trial. All that is necessary for a person making a payment to recover it is that he should really believe and honestly believe that he must make the payment in his own interest.

When a proprietor in good faith pending litigation makes the necessary payments for the preservation of the estate in dispute and the estate is afterwards adjudged to his opponent he should be recouped what he has so paid by the person who ultimately benefits by the payment, if he has failed through no fault of his own to reimburse himself out of the rents.

A person who makes a payment on account of another in respect of an immoveable property does not acquire a lien or charge on the property so saved, by way of a salvage lien MUNNI BIBI *v.* TIRLOKI NATH *All* 66

——— s. 74—*Mortgage—Stipulation for payment of compound interest on entire mortgage amount though possession of part was given—Enforceability—Power to grant relief—Usurious Loans Act (X of 1918), s 3.*

Where under the terms of a usufructuary mortgage the mortgagee was put in possession of about three-fourths of the mortgaged properties and the mortgagor agreed that till the date of giving possession of the remaining properties interest on the entire mortgage amount at a certain rate with compound interest would be paid to the mortgagee:

Held, that the clause for payment of simple and compound interest on the entire sum advanced was on the face of it unconscionable and that under s. 3 of the Usurious Loans Act the Court had ample jurisdiction to decline to enforce the contract as to interest and to grant only such relief as was just and equitable. JAWAYA *v* MULRAJ *Lah.* 556

——— s 107—*Re-sale—Necessity of notice—Trade usage—Sale without notice—Burden of proof—Pleadings—Illegal re-sale—Measure of damages.*

It is open to a party to plead a trade usage in conflict with the provisions of the Indian Contract Act, but if a party relies on a trade usage its incidents and details ought to be indicated with clearness and precision and where there is an issue between the parties as to the existence of such an usage the onus of proof lies upon the party propounding the same.

Even if a re-sale is illegal for want of notice, if a breach of contract on the part of the buyer is established, the seller can claim damages on the basis of the difference between contract price and the market price on the date of the breach. SITAL PRASAD *v.* RANJIT SINGH *All.* 158

——— s. 202—*"Interest in goods, meaning of—Agent for sale of goods entitled to retain price as remuneration, interest of.*

An agent for sale of goods who is entitled to retain part of the sale-proceeds in lieu of his remuneration is not a person who has an interest in the goods within the meaning of s. 202, Contract Act. DALCHAND *v.* HAZARIMAL *Nag.* 878

——— s. 202—*Interest, meaning of—Junior member of* tarwad, *interest of, in* tarwad *property—Malabar Law.*

A junior member of a Malabar *tarwad* who has been given a power-of-attorney by the *karnavan* to collect rents of the *tarwad* property being entitled to be maintained out of such property, has an interest in the property within the meaning of s. 202, Contract Act. CHATHU KUTTI NAIR *v.* KUNDAN APPA *Mad.* 776

——— s. 251—*Partnership — Adjustment of firm debt towards private debt of partner, whether binding on firm—Absence of prejudice—Court holding adjustment illegal—Interference in second appeal—Civil Procedure Code (Act V of 1908), s. 100.*

Where a partner in the plaintiff-firm owes a

certain sum to the defendant-firm and gets his liability cancelled by cancelling the debt due by the defendant-firm to his firm, such adjustment does not necessarily amount to a fraud and in the absence of proof of fraud or prejudice it is binding on the plaintiff-firm.

In such a case the Court errs in law if it holds that such a mere act of adjustment, in the absence of proof of fraud or prejudice to the plaintiff-firm, is prejudicial to the plaintiff-firm and it is open to the High Court to interfere in second appeal. DIWAN CHAND-PARMA NAND *v.* RAM DAS-UTTAM CHAND *Lah.* **260**

——— **s. 264**—*Partnership—Secret dissolution—Liability of retiring partners—Absence of notice that they were partners, effect of.*

If a firm is dissolved and no notice is given, people who continue to trade with the firm under the firm's name are not affected by the secret dissolution Their right to sue the retiring partner upon post-dissolution transactions does not depend on whether they knew that he was a partner prior to the dissolution. PRAMATHA CHANDRA KAR *v.* BHAGWANDAS MADANLAL *Cal.* **529**

Co-owners—Redemption. *See* LIMITATION ACT, 1908, SCH. I, ART. 144 **264**

Co-sharer. *See* SPECIFIC RELIEF ACT, 1877, SS. 14, 15, 16 **405**

Costs.

See CALCUTTA HIGH COURT RULES (ORIGINAL SIDE) RULES CHAP. 46, RR. 32, 71 TO 73 **539**

See CIVIL PROCEDURE CODE, 1908, S. 145 **318**

See DIVORCE ACT, 1869, S. 10 **262**

See LAND ACQUISITION ACT, 1894, S. 27 (2) **173** (*a*)

——— Pleader's fee. *See* ALLAHABAD HIGH COURT GENERAL RULES CHAP. I, R. 1 **817**

Co-tenants—*Partition between subordinate interest holders—Maintainability—Defendant holding fractional interest of landlord, effect of.*

The sole basis upon which a claim to partition is founded is the joint possession of the parties. Hence a suit for partition can be brought by a person holding a subordinate interest in land against others holding a similar interest though a partition at the instance of a subordinate interest holder among persons holding other subordinate interest will not be binding upon the superior interest holder and will enure till the interest of the party seeking partition lasts.

The fact that one of the defendants happens to be a fractional landlord of the *jote* does not make any difference.

Quære:—Whether a person interested in a portion of a property can claim a partition of that property. MATILAL *v.* KAMAKSHYA *Cal.* **594**

Counsel and Client—*Compromise by Counsel—Party present in Court not objecting—Validity of compromise—Allegation of misunderstanding of Counsel, effect of.*

If a Counsel gives his consent to a decree on a misunderstanding, that may be good reason for the Court refusing to enforce the agreement Where, however, the Counsel himself does not complain of having acted on a misunderstanding the Court cannot presume that he had acted on a misunderstanding. If the client is negligent in giving instructions and if the Counsel's exercise of judgment is not very sound the agreement arrived at cannot be impeached on those grounds.

When the case was opened the Counsel for defendant in view of certain documents mentioned to the attorney that the defendant should consent to a decree and he also consulted the person who was standing behind his back, but it appeared that the Counsel was under the impression that the person consulted was a relative of the party and not the party himself The decree that was passed on the basis of the Counsel's representation was sought to be impugned on the ground that the Counsel did not have the requisite authority:

Held, that the party present having in fact been consulted, the agreement was binding on him.

Per *Rankin, C J.*—If the party present in Court was not properly and adequately consulted then his duty was to refuse, when his Counsel was proposing to consent to a decree, to allow that to happen and if necessary to give notice to the other side and the Court that he was withdrawing the authority which the Counsel had on his behalf. If any right is to accrue to the client from the fact of his being in Court he must at least make his presence known to the Counsel in order that the Counsel may act accordingly and it cannot be supposed that because he keeps quiet and does not even instruct his Counsel as to who the client is or take any steps to inform the Counsel of his presence, the Counsel has got to carry on upon the footing that he has no authority to deal with the case as circumstances may require. GHASIRAM *v.* HARIBUX *Cal.* **535**

Court Fee. *See* CIVIL PROCEDURE CODE, 1908, O. XLI, R. 23 **559**

Court fees Act (VII of 1870), ss. 7 (xi) (cc), 12—*Suit for possession against tenant holding over—Valuation—Decision as to class to which suit belongs—Appeal, competency of.*

Section 12, Court Fees Act, applies merely to the valuation of the property for the purpose of calculating the Court-fee when there is no question as to the schedule of the Act with reference to which the valuation is to be made, and it does not apply to cases in which it is contended that the property has been wrongly valued and that the relief has been improperly estimated by putting it under a wrong article of the schedule in the Act. Therefore, an appeal lies against a decision as to the class to which a suit belongs although it does not lie against a decision as to the valuation of the suit in that class.

Per *Patkar, J.*—At any rate, the Court can interfere in such cases under s. 115, Civil Procedure Code, or s. 5 of Regulation II of 1827, if no appeal lies

Under s. 7, cl. (*xi*) (*cc*), Court Fees Act, one year's rent is the proper valuation of a suit for recovery of immoveable property from a tenant, including a tenant holding over after the determination of the tenancy. BALKRISHNA *v.* RAMKRISHNA *Bom.* **176**

——— **Sch. I, Art. 1**—*Decree directing mesne profits to be settled in execution—Application for final decree—Mesne profits disallowed—Appeal—Court fee payable*

Where a suit for recovery of possession was decreed and in respect of mesne profits the Court ordered that "the amount will be settled in the execution department" and an application for final decree was made but the same was disallowed on the ground that the judgment did not direct payment of mesne profits and the plaintiff thereupon preferred an appeal:

Held, that the appeal was not against an order i

Court Fees Act—concld.

execution but from an order amounting to a decree and the appellant should pay *ad valorem* Court-fee on the amount of mesne profits which had been claimed by him and disallowed COLLECTOR OF ETAWAH *v.* BINDRABAN *All* **77**

——— **Sch. I, Art 1**—*Partition suit, appeal from—Appeal attacking money relief—Court-fee payable—Giving up part of claim to avoid further payment of Court-fee*

Where in an appeal from a partition suit all that the appellant claims is that he should not have been held liable to pay certain sum to the respondent by the trial Court, he is bound to pay *ad valorem* Court-fee on such sum

A party may give up a part of his claim so that the Court-fee already paid may suffice. JAI DAYAL *v.* NARAIN DAS *Lah.* **270** (*b*)

——— **Sch II, Art. 11 (a)**. *See* INCOME TAX ACT, 1922, s. 61 **302**

——— ——— **Art. 17 (vi)**—*Suit for partition—Plaintiff in possession—Court-fee—Prayer for unnecessary relief in trial Court—Right to confine to proper relief in appeal*

If a person is out of possession on his own allegation he cannot sue for partition without suing for possession also and he would have to pay court-fee on the market value of his share. But where the plaintiff sues for partition on the footing that he is in actual possession it is unnecessary for him to pay court-fee upon a claim for recovery of possession. He need not do so even if the defendants deny his title.

Where the plaintiff had claimed unnecessary relief such as declaration of title and injunction in a partition suit, is it open to him on appeal to confine his relief to the proper reliefs and to pay court-fee on such relief alone. *In re* NANDA LAL *Cal.* **600**

——— **Art. 17 (iii), Sch. I, Art. 1**—*Declaration as to priority—Appeal for cancelling declaration- Court-fee payable.*

Where a suit for recovery of a certain sum of money from a company and debenture-holders of that company and for a declaration that the amount is recoverable in priority to the debentures was decreed and the debenture holders appealed to modify the decision of the Trial Court by refusing the declaration as to priority :

Held, that Art. 17 (*iii*) of the Court Fees Act, did not apply and the court-fee as payable *ad valorem* under Sch. I, Art. 1 of the Court Fees Act on the decretal amount or on the value of their debentures whichever was less. A. U. JOHN *v.* SURAJ BHAN *All.* **837**

Courts—*Function of.*

Dictum : 'Courts of Justice have not only to do justice but should also inspire confidence in the public mind as to their fairness'. PADARATH TEWARI *v.* DULHIN TAPESHA KUERI *All.* **367**

——— *Loss of security bond—Liability of Secretary of State.*

Where the security bond executed by the guardian of the property of a minor and deposited in the Judicial Commissioner's Office was lost due to the negligence of the office and a suit was brought by the minor after attaining majority against the Secretary of State for damages caused owing to the negligence of defendant's servants :

Held, that though the plaintiff had sustained loss as he was prevented from taking action against the surety, the fact relied on only constituted *damnum sine injuria*

Held, further, that as no appreciable benefit accrued to the Revenue of the Government by the taking of the surety bond and the transaction was not one out of which profit could be derived, the transaction was not such in which the old East India Company might have been sued and plaintiff had no cause of action against the Secretary of State. RADHA KISHEN *v.* SECRETARY OF STATE *Sind* **517**

Criminal Procedure Code (Act V of 1898), ss. 4 (l) m—*'Criminal proceeding', meaning of.*

The expression 'criminal proceeding' includes investigation by a Police Officer of an alleged cognizable offence. EMPEROR *v.* JOHRI *All.* **277**

——— **ss 5, 239 (a)**—*Offences under Factories Act, whether offences of the same kind.*

Offences under ss. 41 (*h*) and s. 41 (*j*) of the Factories Act are offences of the same kind within the meaning of s 239 (c), Criminal Procedure Code, and so persons jointly and severally liable for offences under the said clauses may be tried together for two offences committed by them. J. AGARWALA *v.* EMPEROR *Pat.* **289**

——— **ss. 69, 70**—*Summons—Mode of service—Conviction without proper service of summons—Legality.*

A conviction under s. 391, Calcutta Municipal Act, cannot be upheld where the summons has not been properly served on the accused.

A summons is not properly served where it is left with the *durwan* without any attempt being made to find out the accused. MON MOHAN PANDE *v.* CORPORATION OF CALCUTTA *Cal.* **135**

——— **s. 103 (1) (2)**. *See* BOMBAY PREVENTION OF GAMBLING ACT, 1887, s 40 (A) **868**

——— **ss 103, 165**—*Penal Code (Act XLV of 1860), ss 52, 99, 352—Search by Police Officer—Inhabitants of the locality not called Legality of search—Omission to comply with s. 165 (1) (5)—Resistance to search—Conviction under s. 352—Legality of.*

Where a Police Officer, in view of the attitude of the men who had assembled on the scene did not serve upon them or upon any other person of the *basti* a notice under s. 103, Criminal Procedure Code, asking them to witness the search but asked two other respectable persons who had come with him from another village to act as search witnesses:

Held, that the failure of the Police Officer in the circumstances to secure search witnesses from the locality was no more than an irregularity and did not by itself entitle the accused to resist the search. In s. 103 the emphasis is on 'respectable' not on 'locality'

Where a Police Officer did not comply with the requirements of s. 165, Criminal Procedure Code, in the matter of making a record and sending a copy to the Magistrate and there was no ground for holding that there was anything to prevent him from complying with the requirements in question and the accused pushed the Police Officer back to prevent him from making the search:

Held, that the Police Officer was not acting in good faith within the meaning of s. 52, Penal Code, and the accused were not guilty of an offence under s. 352, Penal Code.

Per *Macpherson, J.*—Failure on the part of a Police

Criminal Procedure Code—contd.

Officer to comply with s. 165 (5) is not a ground for holding that the search was made without due care and attention:

Quære:—Whether failure to comply with s. 165 (1) would give room for such a finding. GOPI MAHTO *v.* EMPEROR *Pat.* **60**

——— **s. 107**—*Jurisdiction to take proceedings—'Person within jurisdiction,' meaning of.*

For initiating proceedings against a person under s. 107, Criminal Procedure Code, it is not necessary that that person should reside within the jurisdiction of the Magistrate; it is enough if he is within the local limits of the Magistrate's jurisdiction. But a person who resides outside the jurisdiction cannot be held to be a person within the jurisdiction merely because he is present in Court in obedience to a summons issued by the Magistrate under s. 112. HAMID HASAN *v.* EMPEROR *All.* **72**

——— **ss. 109, 121**—*Forfeiture of bond—Sureties, time for proceeding against—Person found in suspicious circumstances—Forfeiture of bond.*

Where a surety bond has been forfeited on account of any act of the accused person within the period for which the sureties had bound themselves, they would be liable whether the proceedings were started against them before or after the expiry of the period.

The mere fact that a person bound down under s. 109, Criminal Procedure Code, is again found in suspicious circumstances without any means of livelihood or is unable to give a satisfactory explanation of himself which may justify fresh proceedings against him under s. 109, Criminal Procedure Code, would not result in the forfeiture of first bond because that does not amount to the commission of or attempt to commit, or abetment of an offence punishable with imprisonment. EMPEROR *v.* BAHADUR SINGH *All.* **373**

——— **s. 110**, *orders under—Revision—Interference.*

Though in cases under s. 110, Criminal Procedure Code, the Court of the Judicial Commissioner, Sind, does not sit as a Court of Appeal, nevertheless when there appears anything unsatisfactory or unusual in the proceedings of the lower Court, that court will look into the record to satisfy itself that an order under s. 110 has been properly passed. KHAIRATI RAM *v.* EMPEROR *Sind* **753**

——— **ss. 117, 118**—*Security for keeping peace—Nature of surety required—Direction to produce 'surety in moveable property', legality of.*

In making an order under s 117, Criminal Procedure Code, calling upon a person to give security for keeping the peace there should be no restriction in the order itself that the accused should produce sureties in moveable property. So far as the order goes the Magistrate should follow the words of s. 117 and the bond executed by the sureties should be in the form given in the schedule.

Obiter—If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may, by way of precaution, accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties. EMPEROR *v.* HARIHAR KALWAR *All.* **65**

——— **s. 121.** *See* CRIMINAL PROCEDURE CODE, 1898, s. 109 **109**

——— **s. 133**—*'Public' and 'community,' meanings of—Trade injurious to neighbours but not to community in general—Jurisdiction to make order under s. 133.*

Though the words 'community' and 'public' are used indiscriminately in s. 133, Criminal Procedure Code, there is no reason for making a distinction between the public and the community and for holding that a man may carry on a trade or occupation that is injurious to the health or physical comfort of his neighbours or of the public without becoming liable under s. 133 merely on the ground that there may be some part of the community which is not affected. RAGHUNANDAN PRASAD *v.* EMPEROR *All.* **621**

——— **s. 139-A**—*Proceedings for removal of public nuisance—Question of title involved—Reliable evidence adduced—Duty to stay proceedings.*

Where in a proceeding for removal of a dwelling house from the land in dispute, it appeared that a question of title was involved and there was reliable evidence to support the title of the person against whom the proceedings were instituted

Held, that the proceedings should be stayed under s. 139-A, Criminal Procedure Code, until the matter of the existence of the right in question was decided by a competent Civil Court. SOHAN LAL *v.* DISTRICT BOARD, LUCKNOW *Oudh* **839** (*b*)

——— **s. 145**—*Breach of peace—Fear of 'imminent' breach of peace, whether necessary.*

Section 145, Criminal Procedure Code, requires that there must be a present dispute, and that there must be a likelihood of the breach of the peace Under the section there must be a present fear, that it is probable that there will be a breach of the peace owing to the dispute, unless proceedings are taken under the section. But it does not require that there should be a fear of an 'imminent' or 'immediate' breach of the peace. HARI CHARAN DE *v.* SHERALI-TALUKDAR *Cal.* **475**

——— **s. 162**—*Statement of accused before Police—Admissibility in evidence.*

Where the accused were tried for offences under ss. 399 and 402 of the Penal Code, and the Deputy Superintendent of Police gave evidence as to the explanations offered by the accused soon after their arrest as to the circumstances which brought them to the place where they were arrested, which differed from those given by the accused in the Sessions Court:

Held, per *Milne, J. C.*, that the evidence was admissible as showing that the conduct of the accused was not that of innocent persons.

Per *Mehta, A J C.*—"It is doubtful if in order to discredit the version of an accused person at the trial, the use of his statement before the Police, although it may be substantially of a non-incriminatory character otherwise, is not provided against in s. 162, Criminal Procedure Code." CHUTO *v.* EMPEROR *Sind* **523**

——— **ss 164, 533**—*Mode of recording confession—Necessity of observing prescribed rules—Omission to question accused and to record questions and answers, effect of*

It is not proper to record a confession in a Police Station or during the night. If the matter is urgent and the surroundings have to be accepted as unavoidable, exceptional care should be taken to observe very strictly the directions prescribed by the rules for recording confessions.

Failure of the Magistrate recording a confession to

question the accused in order to satisfy himself that the accused was making the confession voluntarily is a radical and fatal defect which cannot be cured by s. 533, Criminal Procedure Code.

The fact that the Magistrate was satisfied from observation that the accused was making the confession voluntarily does not dispense with the necessity of questioning the accused.

Provided the Magistrate satisfies himself by putting questions and hearing answers, that the prisoner before him is making a voluntary confession, it is unnecessary for him to record the questions and answers; it is sufficient if he complies with the letter of the law. RANBIR SINGH *v* EMPEROR *Lah.* **19**

——— **s. 165.** *See* CRIMINAL PROCEDURE CODE, 1898, s. 103 **60**

——— **s. 167 (3)**—*Detention in Police custody—Power to order, limits of.*

The policy of the Legislature as disclosed by the provisions of s 167, cl. (3), Criminal Procedure Code, is that detention in police custody should be allowed only in special cases and for such limited periods as the necessities of the case might require. Such remands are not to be granted without sufficient cause being shown for it. JAI SINGH *v.* EMPEROR *Oudh* **321**

——— **ss. 179, 188**—*S. 188, whether overrides s. 179.*

Since the amendment of the Criminal Procedure Code, s 188 overrides s. 179 in any case in which s. 188 is applicable. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* LUDUR CHANDRA DAS *Cal.* **137**

——— **s. 188.** *See* CRIMINAL PROCEDURE CODE, 1898, s. 179 **137**

——— **s. 190 (c).** *See* PREVENTION OF CRUELTY TO ANIMALS ACT, 1890, s. 6 **59**

——— **s. 195 (1) (b)**—*Offence committed not in Court but in relation to proceedings in Court—Jurisdiction to make complaint—Powers of Appellate Court—Jurisdiction of High Court apart from Criminal Procedure Code.*

Section 159 (1) (*b*), Criminal Procedure Code, does not apply merely to offences committed in "such Court" but applies also to offences "committed in relation to any proceeding in any Court."

An offence committed in relation to the proceeding in the trial Court is also committed in relation to the appeal from that Court.

The High Court had jurisdiction to order prosecution for offences committed in relation to a proceeding in a subordinate Court before the enactment of Act V of 1898 and s. 195 (1) (*b*) does not take away this jurisdiction of the High Court. KETKI KUNWAR *v.* SHEO NARAIN JAFA *All.* **376**

——— **ss. 195 (1) (b), 476, 537**—*Penal Code (Act XLV of 1860), ss 193, 467—Complaint of offence under s. 193—Conviction under s. 467—Absence of complaint by Court, effect of—Validity of conviction.*

Where it was alleged in a complaint that the accused fabricated a pro-note and induced *A* to file a suit against *B* and obtained a fraudulent decree with the object of getting the house of *B*, and the accused was convicted under ss. 467 and 109, Penal Code:

Held, that the complaint disclosed an offence under s. 193, Penal Code, of intentionally fabricating false evidence for the purpose of being used in a stage of judicial proceedings, and a Court confronted with such a complaint by private person and not preferred under s. 476, Criminal Procedure Code, had no jurisdiction to take cognizance of it and the conviction was, therefore, illegal.

Where a Court proceeds upon a complaint which is no legal complaint at all, the error cannot be corrected under s 537, Criminal Procedure Code, nor has s. 532 any relevancy to such a case. *In re* RAVANAPPA REDDI *Mad* **779**

——— **s 195 (1) (c)**—*Penal Code (Act XLV of 1860) s. 477-A—Prosecution under s 477-A—Necessity of sanction.*

The provisions of s. 477-A, Penal Code, are not covered by the provisions of s. 195 (1) (*c*), Criminal Procedure Code, consequently, no sanction is required for institution of a prosecution under s. 477-A with regard to a document produced in Court. JETHMAL *v.* EMPEROR *Sind* **766**

——— **ss. 195 (1) (c), 476**—*Forgery—Power to complain against witnesses.*

The Court has no power under s. 476, Criminal Procedure Code, to complain against witnesses for abetting forgery. Under that section the Court can complain of an offence referred to in s. 195 (1) (*c*), only if it is an offence alleged to have been committed by a party to the proceeding in the Court. SENGODA GOUNDAN *v.* VAYYAPURI GOUNDAN *Mad.* **48**

——— **ss 202, 204, 439**—*Order calling for charge-sheet, effect of—Enquiry under s. 202—Power to arrest without warrant, if affected—Quashing of criminal proceedings—Power of High Court.*

An order calling for a charge-sheet on a report under s. 202, Criminal Procedure Code, when the Police drew-up a First Information Report is an order under s. 204, Criminal Procedure Code, and in practice an order for issue of process.

If an enquiry under s. 202 is held by a Magistrate or a Police Officer his power to arrest without a warrant remains intact.

Ordinarily if a Magistrate has ordered an accused person to be tried, the trial must proceed. But when he High Court is satisfied that an accused is being prosecuted without there being any material before the Magistrate for his prosecution, it will interfere to stop patent injustice calling for a prompt redress [Significance and nature of charge-sheet discussed]. RAGHUNATH *v.* EMPEROR *Pat.* **342**

——— **s. 203**—*Statement on oath of complainant—Whether and when necessary—Complainant already examined under s. 200.*

A Magistrate is not bound to examine the complainant on oath under s. 203, Criminal Procedure Code, when he has already been examined on oath under s. 200, unless the Magistrate considers it desirable to do so. Where the witnesses examined on behalf of the complainant have said nothing which requires any further explanation from the complainant, he need not be examined again under s. 203. HASHIM MOOSA *v.* MRS G. BOOTH *Sind* **767**

——— **ss. 203, 476**—*Application to make complaint—Dismissal—Second application—Competency of.*

The dismissal of an application for making a complaint under s 476, Criminal Procedure Code, does not preclude the Magistrate from entertaining a second application for the same purpose. KALASTRI MUDALI *v.* EMPEROR *Mad* **313**

——— **ss. 204, 439.** *See* CRIMINAL PROCEDURE CODE, 1898, s. 202 **842**

——— s. 222 (2)—*Criminal misappropriation—Proof of specific sums misappropriated, whether necessary—Nature of proof required for conviction—Scope of the section.*

In a charge for criminal misappropriation it is not necessary for the prosecution to prove that the accused spent the items in any particular manner. The prosecution must stop when it is proved that the accused has received the money, has acknowledged the receipt and has failed to pay it to his master or show it in his master's accounts.

Under s. 222, cl. 2, Criminal Procedure Code, persons who showed a deficiency in the accounts with which they were entrusted could be convicted of criminal misappropriation even when it could not be shown that they had misappropriated any specific sum. SHIAM SUNDAR *v.* EMPEROR *Oudh* 810

——— ss. 231, 233, 234—*Penal Code (Act XLV of 1860), ss. 409, 477-A—Misjoinder—Joinder of two or more charges for breach of trust with two or more for falsification of accounts—Legality—Alteration of charge—Accused's right to re-examine witness—Refusal to allow re-examination—Validity of trial.*

Three offences of criminal breach of trust may be tried together and three offences for falsification of accounts may be tried together, but as an offence of criminal breach of trust is not of the same kind as an offence of falsification of accounts the trial of two or more charges of criminal breach of trust cannot legally be joined with two or more charges of falsification of accounts.

Where after the conclusion of the case and before delivery of judgment, the trying Magistrate made an alteration in the charge and though the accused asked for certain witnesses to be called for cross-examination, his prayer was rejected on the ground that the alteration was immaterial:

Held, that s. 231, Criminal Procedure Code, was mandatory and as the Magistrate had acted in violation of the terms of s. 231 the trial was illegal irrespective of the question whether the accused was prejudiced or not. GENDRA NATH SEN GUPTA *v.* EMPEROR *Cal.* 136 (*b*)

——— ss. 233, 234. *See* CRIMINAL PROCEDURE CODE, 1898, s. 231 136 (*b*)

——— ss 237, 238—*Charge under ss. 302 and 149, Penal Code—Conviction under s. 323—Legality—Absence of formal charge, effect of.*

Where some of the persons tried under s. 302 read with s. 149, Penal Code, are found not to be liable for murder and are acquitted in respect of the charge under s. 302 read with s 149, they can be convicted under s 323 for having caused hurt in the same transaction to the companion of the deceased, provided the commission of this offence is imputed to them and brought out by the evidence. The omission of a charge under s. 323 would not render such conviction illegal. JOGINDAR SINGH *v.* EMPEROR *Lah* 721

——— s. 239 (a) *See* CRIMINAL PROCEDURE CODE, 1898, s 5 289

——— ss. 239, 423 (2)——*Joint trial for kidnapping and concealing kidnapped woman—Legality.*

A joint trial for offences under ss 366 and 368, Penal Code, is not illegal where the whole chain of events beginning with kidnapping or abduction and ending with the discovery of the woman can fairly be regarded as forming one and the same transaction. EMPEROR *v.* ZAMAN *Oudh* 243

——— ss. 244, 256—*Warrant cases—Accused, whether entitled to cross-examine prosecution witnesses before charge.*

In the trial of a warrant case the accused has no absolute right of cross-examination of the prosecution witnesses before the framing of the charge, but Magistrates would generally be exercising a proper discretion if they permit some cross-examination at least, at that stage.

When a Magistrate has "to take all such evidence as may be produced in support of the prosecution" he has to record not only the examination-in-chief of the prosecution witnesses, but also their cross-examination and re-examination (if any), if no express provision is made for cross-examination. But when express provision for cross-examination is made, as in s. 256 or s. 208 (2), then the phrase mentioned cannot be construed as giving a separate and independent right of cross-examination LACHMI NARAIN *v.* EMPEROR *All.* 572

——— s. 245—*Acquittal without examining complainant or his witnesses, legality of.*

It is not open to a Magistrate to acquit an accused person under s. 245, Criminal Procedure Code, without examining the complainant and witnesses produced by him. EMPEROR *v.* VARADARAJULU NAIDU *Mad.* 314

——— s. 250 (3)—*Order directing compensation—Appeal—Power of Appellate Court to go into facts.*

There is nothing that debars the Court in an appeal from an order under s. 250, Criminal Procedure Code, directing a complainant to pay compensation, from going into all the facts of the case in order to determine whether the case is false and vexatious, even though in doing so it may have to come to a finding showing that the acquittal of the accused was wrong. SURENDRA NATH *v.* BASANTA CHANDRA *Cal.* 140

——— s. 256. *See* CRIMINAL PROCEDURE CODE, 1898, s. 244 572

——— s. 263—*Summary trial—Judgment—Contents—Reasons for conviction.*

When a Magistrate tries a case summarily he is not bound to record evidence but he is bound to record his reasons for the conviction and to state them in such a manner that a superior Court acting in revision may be in a position to judge whether there was sufficient material before the Magistrate to support the conviction. AHMAD JAN *v.* EMPEROR *Oudh* 641

——— ss. 306, 307—*Jury trial—Disagreement between Judge and Jury—Duty of Judge—English and Indian Law—Reference to High Court—Power to interfere where verdict is not perverse or manifestly wrong.*

In a trial by Jury the position of a Judge in India differs from that of a Judge in an English Court who is merely an instrument for passing a sentence or directing a release once a verdict is given. In India under the mandatory provisions of ss. 306 and 307, Criminal Procedure Code, the Judge must make up his mind whether he agrees or disagrees with the verdict and in the latter case form an opinion on the necessity for the ends of justice of submitting the case to the High Court.

Where a case has been referred under s. 307, Criminal Procedure Code, it is the duty of the High Court after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury to acquit or convict the accused. It is not necessary that the verdict shou

be perverse or clearly or manifestly wrong, EMPEROR *v.* C. BARWICK *Lah.* 5

——— **s. 307**—*Trial by Jury—Reference by Judge—Power of High Court to interfere, whether unlimited.*

On the assumption that a Sessions Judge will not make a reference under s 307, Criminal Procedure Code, unless he thinks that the verdict is manifestly wrong, the duty of the High Court in dealing with the reference is confined to considering whether the opinion of the Judge is supported by evidence.

Per Waller, J.—The observations in *Veerappa Goundan* v. *Emperor* (1) should not be construed in such a manner as to limit the discretion of the High Court in disposing of a reference under s. 307.

Per Pandalai, J.—There is nothing in *Veerappa Goundan* v *Emperor* (1) which does violence to the language of s. 307 nor anything which is either inconvenient or unsuitable to Indian conditions The discretion of the High Court in disposing of references is by no means unlimited: VENKATACHALA GOUNDAN *v* EMPEROR *Mad.* 33

——— **s. 370**—*Judyments of Presidency Magistrates—Contents.*

The records of Presidency Magistrates should be properly kept and the provisions of s. 370, Criminal Procedure Code, should be properly and strictly complied with. MONMOHAN PANDE *v.* CORPORATION OF CALCUTTA *Cal* 135

——— **s 370**—*Presidency Magistrates—Duty to keep records properly.*

Presidency Magistrates should see that the records are properly prepared and kept in compliance with the provisions of s. 370, Criminal Procedure Code. PROBODH CHANDRA GUHA *v.* CORPORATION OF CALCUTTA *Cal.* 136 (*a*)

——— **ss. 413, 414**—*Cattle Trespass Act (I of 1871), s. 24—Penal Code (Act XLV of 1860), s. 447—Conviction for criminal trespass and forcibly rescuing cattle—Combination of sentences—Order of conviction, whether appealable.*

Where a person was convicted under s. 447, Penal Code, and s 24, Cattle Trespass Act, and fined Rs 50 for the former offence and Rs. 20 for the latter, by a Magistrate in the exercise of summary powers:

Held, that there was a combination of two punishments of the nature referred to in s. 414, Criminal Procedure Code, and the order was appealable. KANDHAI *v.* EMPEROR *Oudh* 248

—— **s 415**—*'Therein,' meaning of.*

The word "therein" in s. 415, Criminal Procedure Code, refers to ss. 413 and 414, and s. 415 is intended to apply to cases in which two or more of the punishments mentioned in s. 413 or s. 414, have been combined. KANDHAI *v* EMPEROR *Oudh* 248

——— **s. 421**—*Jail appeal—Summary dismissal—Discretion unfettered.*

Under s 421, Criminal Procedure Code, a Judge receiving an appeal from the Jail has power to dismiss the appeal summarily on perusing the same if he considers there is no sufficient ground for interference. He is not bound to call for the records or to state the reasons and has an unfettered discretion. ALLAH BAKSH *v.* EMPEROR *All* 281 (*a*)

——— **s. 423**—*Criminal appeal—Private prosecutor, whether entitled to be heard.*

Under s. 423, Criminal Procedure Code, the only persons who have got a right to be heard in a criminal appeal are the appellant or his Pleader and

the Public Prosecutor if he appears and in certain cases, the accused if he appears. A private prosecutor has no right to be heard, though the Court may in its discretion hear him and an acquittal in appeal without hearing the complainant's Vakil is not bad in law. BEHARI MAJHI *v.* HARI MAJHI *Cal.* 474

——— **s 423 (2)**. *See* CRIMINAL PROCEDURE CODE, 1898, s. 239 243

——— **s. 436**—*Jurisdiction of High Court where application lies to Sessions Court*

Although the High Court will not ordinarily entertain applications for revision under s. 436, Criminal Procedure Code, when the Sessions Court has jurisdiction to entertain them, the High Court may entertain them in special cases. When the application is connected with another application which has been made and which can be entertained only by the High Court, it may be entertained. EMPEROR *v.* ABDUL KHAN *Sind* 513

——— **s. 436**—*Order directing Magistrate to frame charge—Legality of.*

Section 436, Criminal Procedure Code, only empowers a Sessions Judge to direct a further enquiry; it does not empower him to direct the Magistrate to frame a charge and to try the accused on that charge IBRAHIM *v.* GURAN DITTA MAL *Lah.* 705

——— **ss. 436, 437**—*Penal Code (Act XLV of 1860), s. 463—Forgery—Discharge of accused—Pendency of civil suit—Power to order further inquiry.*

Where a person accused of forgery is discharged and the Sessions Judge is moved under ss. 436 and 437, Criminal Procedure Code, the Judge, if he thinks further inquiry necessary, should proceed under the said section and if he does not, he should dismiss the application. He has full discretion in the matter and the circumstance that the accused has lodged a civil suit in respect of the same matter is irrelevant to the question whether the discharge of the accused should or should not be set aside.

Forgery is an offence of too grave a public importance to be made merely triable by Subordinate Magistrates. SUBRAMANYAM *v.* VEERARAGHAVULU *Mad* 780

——— **s 439**—*Accused not preferring appeal—Application for revision by third party—Power to interfere.*

The High Court has power to interfere in revision under s. 439, Criminal Procedure Code, with in order of conviction even though the accused has not preferred an appeal and the application for revision is made by a third party, *e. g*, the Bar Association. LILA WATI *v.* EMPEROR *Lah.* 717

——— **s. 439**—*Acquittal—No appeal by Government—Revision, competency of.*

It is open to the High Court to interfere with an order of acquittal in revision at the instance of a private complainant to the extent of setting aside the order of acquittal and directing re-trial. GIRDHARIJI SINGH *v.* JITENDRA MOHAN SINGH *Oudh* 249

——— **s. 439**—*Alteration of conviction—Conviction for minor offence—Power to alter for major offence.*

When the accused are charged under s. 325, Penal Code, but are convicted under a minor section, namely, s. 323 of the same Code, the Magistrate must be held to have acquitted them of the charge under s. 325 and the High Court in revision cannot alter the conviction into one under s. 325. EMPEROR *v.* EBRAHIM *Rang.* 836

Criminal Procedure Code—contd.

——— **s. 439**—*Enhancement of sentence—Principles.*

The principles upon which the High Court habitually acts as a court of revision in relation to the enhancement of sentences, where the law allows a discretion to the Court whose sentence is impugned, are that it should not interfere if the sentence passed involves substantial punishment, and should interfere if the sentence is manifestly inadequate. The Court is, in particular, slow to interfere where interference would involve the imprisonment of persons already discharged from Jail, though this circumstance is no insuperable obstacle. The Court also frequently declines to interfere in order to enhance a sentence, on the mere ground that it would itself have passed a heavier sentence, contenting itself with pointing out that the sentence is so far light that a heavier sentence would, have been maintained. BHOLA NATH *v.* EMPEROR *Lah.* **729** (*b*)

——— **ss. 439, 497 (5)**—*Bail—Power of High Court to cancel—Grounds for releasing on bail.*

The High Court has jurisdiction to consider whether or not the order of a Subordinate Court passed under s. 497, Criminal Procedure Code, should or should not be maintained and also whether under the provisions of sub-s. 5 of s 497, an accused person should be allowed to continue at large.

Where a person is accused on a charge of a serious nature such as an attempt to murder, bail should not be allowed for the reason that the injured person was not well enough to attend the identification parade. EMPEROR *v.* PRITAM SINGH *Lah.* **769**

——— **s. 476**. *See* CRIMINAL PROCEDURE CODE, 1898, s. 195 (1), (*c*) **48**

——— **s. 476**. *See* CRIMINAL PROCEDURE CODE, 1898, s 203 **313**

——— **ss. 476, 537**. *See* CRIMINAL PROCEDURE CODE, 1898, ss 195 (1) (*b*) **779**

——— **s. 494**—*Permission to withdraw complaint—Omission to record reasons—Legality.*

In granting permission to withdraw a prosecution under s. 494, Criminal Procedure Code, the Court is not bound to record any reasons for granting any such permission. LAKSHMI NARAIN *v.* MOHAMMAD HANIF *Lah.* **714**

——— **s. 497 (5)**. *See* CRIMINAL PROCEDURE CODE, 1898, s. 439 **709**

——— **s. 516-A**—*Penal Code (Act XLV of 1860), s. 338—Prosecution of motor driver under s. 338—Detention of car, legality of—'Used', meaning of.*

In a prosecution of a motor driver for an offence under s 338 Penal Code, it cannot be said that the car has been used by the accused for the commission of the offence within the meaning of s. 516-A, Criminal Procedure Code, and it is illegal for the Magistrate to detain the motor car pending conclusion of the trial. PHULA SINGH *v.* EMPEROR *Lah.* **724** (*b*)

——— **s. 517**—*Appeal against order for disposal of stolen property—Notice to opposite side, whether necessary.*

In an appeal against the order of a Magistrate for disposal of property regarding which an offence is committed, the Appellate Court should not reverse the order, without issuing notice to the party in whose favour the Magistrate has passed orders. JANKI DAS *v* EMPEROR *Lah.* **735** (*a*)

——— **s. 526**—*Magistrate handing over judicial record to person to be examined as witness—Impropriety—Ground for transfer.*

Criminal Procedure Code—concld.

It is highly improper for a Magistrate or his officials to allow the judicial record of a pending case to be removed from the Court and handed over to a person who is to be examined as a witness in the case.

An incident like this is such as to raise a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial and is a sufficient ground for transfer. BRAHMU DUTT *v.* EMPEROR *Lah* **9**

——— **s. 533**. *See* CRIMINAL PROCEDURE CODE, 1898, s 164 **19**

——— **s. 539-B**—*Local inspection—Omission to make memorandum—Validity of trial.*

Omission to make a memorandum of local inspection as provided by s 539 (B), Criminal Procedure Code, will not vitiate the whole proceedings unless it has occasioned a failure of justice. RAGHUNANDAN PRASAD *v.* EMPEROR *All.* **621**

——— **s. 539-B**—*Local inspection—Separate record of inspection, necessity of.*

A local inspection must be held sparingly and the danger of such an inspection is intensified when one or both of the parties are absent at the time of the local inspection. There is no compliance with the imperative provisions of s. 539-B, Criminal Procedure Code, where there is no separate record made by the Sessions Judge concerning the inspection he made of the locality and the facts that he found which would be helpful to him in appreciating the evidence given at the trial. WILAYAT HUSAIN *v.* EMPEROR *Oudh* **218**

——— **Sch. II**—*Penal Code (Act XLV of 1860), s. 124-A—Sedition case, trial of—Courts competent to try—Magistrate's discretion as to* forum *of trial—Consideration governing discretion—Interference with Magistrate's discretion by High Court—Accused, right of.*

Under the Criminal Procedure Code, Sch. II, an offence under s. 124-A, Penal Code, is triable by the Court of Session, Chief Presidency Magistrate, District Magistrate or a Magistrate of the first class specially empowered The Magistrate has a discretion to decide in what way the case shall be tried having regard to the alternatives given by the schedule. The Magistrate must have regard to the importance of the case and to the fact that the maximum penalty under the section is transportation for life. He must consider also whether if he sends the case to the Court of Session there will be Jury or assessors and in that connection he may consider which of the two tribunals his own or the Court of Session is the more satisfactory tribunal for deciding the case Though the Magistrate's discretion is subject to review by High Court, the High Court will not interfere with his discretion except on certain definite grounds.

The Legislature does not provide that in every case in which the trial at Sessions will enable the accused to have a Jury he is entitled to that privilege. HARI MORESHVAR JOSHI *v* EMPEROR *Bom.* **187**

Criminal trial—*Cross cases under ss. 326 and 302, Penal Code, close connection between—Commitment to Sessions Court of case under s. 326, propriety of—Procedure.*

It is no ground for committing to Sessions Court a case under s. 326, Penal Code, that it is closely connected with a counter case under s. 302, Penal Code, for the offence under s. 326 is triable and can be adequately punished by a Magistrate of the First Class

Criminal trial—concld.

or at any rate by one exercising enhanced powers under s. 30, Criminal Procedure Code. The object of avoiding a possible conflict of decisions can be achieved by awaiting the result of the Sessions trial under s 302. EMPEROR *v.* NATHU *Lah.* 272

——— *Gang cases—Duty of Police.*

Dictum :—There seems to be a fatal attraction about conspiracy and gang cases but it is difficult to prove them and speaking generally the Police would usually be well advised to proceed with the substantive cases and to leave the gang case alone. SURJAN SINGH *v.* EMPEROR *Lah* 27

——— *Investigation, delay in, effect of.*

It is not proper to abandon an investigation and resume it after some days, as a delay of this kind may cause serious prejudice to an accused person by giving time to the witnesses to bring their evidence to harmony, by making identification less certain and by interfering with the preparation of the defence. EMPEROR *v.* C. BARWICK *Lah.* 5

——— *Medical examination, necessity of*

The absence of an early medical examination in the case of crimes of violence must be regarded as a very unsatisfactory feature of the prosecution case. EMPEROR *v.* C. BARWICK *Lah.* 5

——— *—Misjoinder of charges—Charges under ss. 302 and 201, Penal Code—Acquittal under s 302 and conviction under s. 201—Legality of conviction*

Where the accused are charged together and tried for offences under ss. 302 and 201, Penal Code, and the evidence being insufficient to sustain a conviction under s 302, are acquitted of the charge under that section but are convicted under s. 201, there is no misjoinder of charges and the conviction is legal SAWANTA *v* EMPEROR *All.* 376

——— *Procedure—Offence covered by special as well as general law—Law applicable.*

It is not a general rule of law that if an act is an offence under a special law providing penalties for such an act, the application of the general law would be repelled. It is possible that an act may be an offence both under special law as well as under general law both laws being applicable simultaneously. In such a case the offender may be prosecuted under either law though it would be more appropriate to prosecute the offender and to convict him under the special Act if the offence falls strictly within the purview of a section of the special Act and does not go beyond it. EMPEROR *v.* JIWA RAM 571

——— *Witnesses of defence.*

As lies on the prosecution to prove the case against the accused, if this has not been done it is not legitimate to draw any inference against the accused based on a criticism of the defence EMPEROR *v* C. BARWICK *Lah.* 5

Cross contract—Cause of Action, when arises. *See* LIMITATION ACT, 1908, SCH. I, ART. 65 481

Crown—*Liability for acts of servant.*

So far as torts committed by the servants of the Secretary of State in the conduct of undertakings which might be carried on by private persons are concerned, exemption from liability cannot be pleaded by the Secretary of State But the Secretary of State will not be liable for torts committed by Government servants while performing acts done in the exercise of powers which are usually termed sovereign. RADHA KISHEN *v.* SECRETARY OF STATE *Sind* 517

Crown Side Rules Chap. XXXVII, r. 2. *See* LETTERS PATENT (CAL.) CL. 24 598

Currimbhoy Ebrahim Baronetcy Act (IV of 1913). *See* INCOME TAX ACT, 1922, S. 3 488

Customary Law (Punjab—*Attachment, whether gives cause of action to reversioners for declaratory suit—Suit before sale — Findings, whether* res judicata — *Alienation of ancestral property for trade, validity of.*

Mere attachment does not amount to an infringement of the rights of the reversioners, and cannot furnish the latter with a cause of action for a suit for a declaration that the attachment shall not affect their reversionary rights. Therefore, the sons of the judgment-debtor cannot, before the sale bring a suit objecting to the attachment of the property and any finding in such a suit that there was no necessity would not operate as *res judicata.*

It cannot be laid down as a hard and fast rule that ancestral property can never be alienated by an agriculturist for the purpose of providing funds for trade or business. The decision in each case must depend upon in its own facts NATHA *v* GANESH SINGH *Lah* 265

——— *Succession*—Bhatti Rajputs *of Batala Tahsil —Mode of succession*—Chundawand *or* pagwand *—Change of custom—Evidence* — Riwaj-i-am— *Record of custom contrary to general custom— Evidentiary value—Onus of proof—Agreement to give up old custom—Validity—Successive records —Later record, whether abrogates earlier.*

Amongst the *Bhatti Rajputs* of Tahsil Batala the *chundawand* rule of succession has been followed from time immemorial and though at the attestation of the *riwaj-i-am* of the Tahsil in 1911-12, an attempt was made to make out that the *pagwand* rule should be followed in preference to the *chundawand*, no new custom of *pagwand* has arisen abrogating the older *chundawand* custom.

Where custom is the rule of law it is not open to the parties to agree that they would give up their old custom and follow a new one which they, for some reason, prefer; the parties have no power to legislate for themselves by mean of a *riwaj-i-am.*

Where a *wajib-ul-arz* contains merely a record of the wishes and opinions of the parties it could not be regarded as establishing any binding custom at variance with the personal law of the parties or an old established custom.

The parts of a *wajib ul-arz* referring to a custom are not provisions intended to be in force for a limited period only, but are statements that a certain custom existed and if the statements are correct there would be a natural presumption that the custom continued to exist and it would be for those alleging that a change had subsequently taken place to prove the allegation Though the production of a later Record of Rights containing entries opposed to the earlier ones would be some proof of such a change, there would merely be a balance of evidence on either side and it could not be said that the second record destroyed or abrogated he earlier one.

An entry in a *riwaj-i-am* is a strong piece of evidence in support of a custom even though it is against the general custom and the burden of proof of a custom contrary to the entry cannot be said to be light even in cases where the entry is against general custom. FAZAL-I-HUSSAIN *v.* TAFAZIL HUSSAIN *Lah.* 545

———*Widow—Unchastity—Forfeiture of rights— Custom—Entry in* riwaj-i-am, *value of*—Ahirs *of Rewari, Gurgaon District.*

Customary Law (Punjab)—concld.

The entry in the *riwaj-i-am* of the Gurgaon District provided that if a widow was unchaste or remarried she forfeited all right to her husband's estate :

Held, that the onus of rebutting the entry was upon the widow who disputed its correctness even though the entry was opposed to the general custom of the Punjab.

Held, further on the evidence that the onus was not discharged. BHAJNA *v.* BHEOLI *Lah.* **555**

Debt, location of. *See* CIVIL PROCEDURE CODE, 1908, s 39 **533**

Decree—*Amendment—Duty of Court*

The duty of preparing the decree in accordance with the judgment primarily rests with the court and not with the interested party. BHAGWANT SINGH *v.* BHAO SINGH *All.* **817**

———*Construction—Reference to judgment*

A Court cannot look at the judgment to interpret the decree, where the language of the decree is plain and unambiguous. It is only when the terms of a decree are ambiguous that it can be interpreted in the light of the judgment. RAM SAROOP *v.* JWALA PRASAD *Oudh* **252**

Deeds—*Execution—Registration — Presumption of regular and due presentation*

The fact that the Sub-Registrar accepted a document from the executant and duly registered it is *prima facie* proof that the executant was not in an intoxicated condition when he presented it for registration. KOTUMAL MOHANDAS *v.* DUR MAHOMED *Sind* **525**

Defamation—Absolute Privilege. *See* MALICIOUS PROSECUTION **369**

Dekkhan Agriculturists Relief Act (XVII of 1879), s 15-B—*Decree by Court to which Act does not apply—Execution by Court where Act applies—Power to grant instalments.*

Held, per *Baker, J.*, (*Nanavati, J*, dubitante) :—

When a decree has been passed by a Court where the Dekkhan Agriculturists' Relief Act does not apply, it is not open to the executing Court where the Dekkhan Agriculturists' Relief Act does apply, o grant instalments to the defendants assuming that they are agriculturists. RAMLAL *v.* RATAN LAL *Bom.* **504**

Dhardhura, custom of. *See* BENGAL ALLUVION AND DILUVION REGULATION ACT, 1825, s 2 **213**

Divorce Act (IV of 1869), s. 10—*Hindu marrying English wife in England—Subsequent marriage of Hindu wife in India—Petition by English wife for divorce—'Bigamy with adultery'—'Marriage with another woman with adultery'—Petition for divorce—Wife's right to costs.*

The respondent, a Hindu, married the petitioner, a Christian lady, by license at Manchester. After living with the respondent for some time in India the petitioner returned to England and the respondent married a Hindu lady in India by a Hindu form of marriage and had a son by her. The petitioner sued for dissolution of marriage :

Held, (1) that the petitioner's marriage with the respondent having been celebrated in England was a valid Christian marriage, despite the Indian domicile of the husband.

(2) that the respondent, however, being a Hindu was not precluded from marrying a second wife in India during the life time of the first and the petitioner was not entitled to divorce on the ground that the respondent had committed 'bigamy with adultery'.

Divorce Act—concld.

(3) that the petitioner was, however, entitled to a decree for dissolution of marriage on the ground of the respondent's 'marriage with another woman with adultery'.

Where the wife is the petitioner and is successful in her suit, her husband will, as a matter of course, be ordered to pay her costs. GLADYS SEINAPATTI *v.* SEINAPATTI *Lah.* **262**

———**ss. 14, 16**—*Petition by wife for divorce—Wife guilty of adultery—Granting of divorce—Adultery caused by husband's cruelty—Discretion of Court.*

In dealing with divorce cases where it is found that the woman has been guilty of adultery and that her adultery has resulted from the husband's conduct towards her, the court should make allowance in treating her case with leniency Where the husband deserted his wife without making any provision for her maintenance and the wife who was living in her father's house after her desertion by the husband cohabited with a person living as a guest in the father's house:

Held, that as the conduct of the husband in deserting his wife and making no provision for her, conduced greatly to the wife's adultery it was a fit case in which the court should exercise its discretion by granting to the wife a decree *nisi* under the provisions of s 14 of the Divorce Act. GLADYS BOURKE *v.* RICHARD EDMUND BOURKE *Sind* **764**

Documents—*Cumulative effect—Value of.*

Where each of the items of documentary evidence relied upon does not prove a fact in issue and has no evidentiary value in advancing a particular case, the cumulative effect of all the mass of such evidence would be of no evidentiary value. MOHAMMAD AZIM KHAN *v* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

Easements Act (V of 1882), ss. 60-B, 64—*Building of wall- Failure to protest—Implied license—Erection of work of permanent character—Power to revoke—Right to injunction.*

Where the defendant to whom a wall belonged knew that the plaintiff, an adjacent house owner, was constructing a wall above the defendant's wall and did not make any protest until it was built :

Held, that there was an implied grant of license by the defendant to the plaintiff that could not be revoked as the plaintiff had executed a work of a permanent character and incurred expenses in the execution and the defendant was not entitled to demolish the wall

Section 64 of the Easements Act, does not apply to case where the work is of a permanent character. MOHAMMAD ABDUL JAMIL *v* MANZOOR AHMAD *All.* **821**

English and Indian Law. *See* CRIMINAL PROCEDURE CODE, 1898, s 306 **5**

Escheat—*Basis of the right—Escheat and succession, distinction between—Succession Act (XXXIX of 1925), ss 214, 381, application of, to Crown—Recovery of debt by Secretary of State due to person dying heirless—Succession Certificate, necessity of.*

Where there is a vacant inheritance the property lapses to the Crown by the rule of escheat but the escheat to the Crown is not due to any rule of succession; it is a prerogative of the Crown. Upon the death of a person without leaving heirs his estate devolves upon the Crown under its general prerogative and not by reason of any rule of succession. Therefore, the provisions of ss. 214 and 381, Succession Act, are not applicable to the Crown where the property vests in the Crown by

Escheat—concld.

reason of escheat and it is not necessary for the Secretary of State to obtain a succession certificate for the realisation of the debt due to the person dying heirless. SECRETARY OF STATE FOR INDIA *v.* FIRM GIRDHARI LAL SHAMBHUNATH *All.* **565**

Estoppel. *See* HINDU LAW **290**

———*Nature of plea—Essential conditions.*

The plea of estoppel ordinarily rests on a question of fact, namely, whether the persons sought to be estopped intentionally caused or permitted another person to believe a thing to be true and to act upon such belief and in general the person pleading estoppel has to establish that in consequence of the representation or conduct of the person against whom estoppel is pleaded he was induced to act in a particular manner. SHEO TAHAL RAM *v.* BINAEK SHUKUL *All* **353**

Europeans. *See* LETTERS PATENT (CAL.) cls 24 **598**

Evidence—*Admission of loose* zemindari *papers at late stage—Civil Procedure Code (Act V of 1908), O. XIII, rr. 1, 2.*

Ordinary *zemindari* papers on loose-sheets can be fabricated at any time and such papers should not be admitted by the Court at a late stage of the case O. XIII, rr. 1, 2, Civil Procedure Code, is intended to provide for papers of this kind. BHEKDHARI SINGH *v.* SRI RAMCHANDERJI *Pat* **290**

———*Taking advantage of opponents' evidence which has been disbelieved—Propriety*

A litigant cannot be allowed to avail himself in support of his case, his opponent's evidence directed to a different story which has not been believed by the court. RAYMOND LINCOLN *v.* ALICE POUPINEL DE VALENCE **P. C. 451**

Evidence Act I of 1872)—*Evidence of retirement—Statements made at the time—Admissibility—Witnesses—Failure to examine at early stage.*

If a person is proving that he has retired from a firm he is entitled to show that immediately after the date of retirement he wrote to the Bank and informed them that he had severed his connection with the firm and could not continue to guarantee its account. If he does that, any statement by him made at the time as the reason for his refusing to continue to guarantee is admissible to explain his conduct. PRAMATHA CHANDRAKAR *v* BHAGWAN DAS MADAN LAL *Cal.* **529**

———**ss 11, 40, 42, 43**—*Judgments not* inter partes, *relevancy of.*

The Evidence Act itself does not draw a distinction between a judgment which is not *inter partes* and a judgment which is *inter partes*, except where the judgment is clearly *res judicata.*

A judgment other than a judgment referred to in ss. 40 to 42 may be admissible to prove that a right was asserted or denied under s. 13 of the Evidence Act or to explain or introduce facts in issue or to explain the history of the case. But unless a judgment is relevant under ss. 40 to 42 of the Evidence Act, it is not evidence at all so far as regards the matter which it decides. PURNIMA DEBYA *v.* NAND LAL OJHA *Pat.* **577**

———**s. 30**—*Retracted confession of co-accused—Admissibility and weight—Necessity of corroboration.*

The retracted confession of an accused person is admissible against a co-accused but is practically of no value unless there be independent corroboration. The corroboration must connect the accused with the commission of the offence and the tainted evidence of an approver is not sufficient corroboration. SURJAN SINGH *v.* EMPEROR *Lah.* **27**

———**s. 32**—*Recital in deed of gift respecting prior gift, admissibility of.*

A recital in a deed of gift by a widow that the gift had been already made by her deceased husband and that she is simply executing a formal document to give effect to that gift in consonance with the oral direction of the deceased is admissible in evidence as evidence in respect of gift by the deceased. APPASAMI PILLAI *v* RAMU TEVAR *Mad.* **340**

———**ss. 32 (5), (6), (7), 92, 116**—*Pedigrees—Conditions of admissibility—Evidentary value—Declarations* anti litem motam—*Admissibility of.*

Before a pedigree said to have been prepared by a deceased member of the family can be admitted in evidence under s. 32 (5), Evidence Act, it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence.

Declarations as to the existence of relationship by blood, in order to be admissible must be made *ante litem motam* which means not merely before the commencement of legal proceedings, but before even the existence of any actual controversy concerning the subject-matter of declaration.

A pedigree which had been subjected to investigation many years prior to the institution of the litigation in which it was questioned and which had been previously relied upon by competent authorities and which is supported by oral evidence can safely be accepted as correct. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

———**ss. 40 to 43**—*Complaint and suit for damages for defamation—Conflicting decisions—Judgment of one Court, whether admissible as evidence in the other.*

The petitioner charged the respondent with having defamed him and the latter was convicted. Thereupon the petitioner brought a suit for damages for defamation against the respondent but the Civil Court dismissed the suit. The High Court ordered a re-trial setting aside the conviction, and the question arose whether a copy of the judgment of the Civil Court was admissible in the criminal proceedings :

Held, that the matter was governed by ss. 40 to 43, Evidence Act, and the judgment was not admissible under any of those sections ; it was a judgment *in personam* and not *in rem* and was not conclusive proof, in the subsequent judicial proceedings of anything material. PANDMANABHANI RAMANAMMA GOLUSU APPALANARASAYYA *Mad.* **348**

———**s 91**. *See* EXECUTION SALE **49**

———**s 92**. *See* REGISTRATION ACT, 1908, s. 17 (2) (*xi*) **317**

———**s 92**—*Gift—Evidence to prove fictitious nature—Admissibility.*

Where a husband admits that he executed a deed of gift in favour of his wife but alleges that he had no intention of giving away the property and that in short he had no *animus contra hendi* when he executed the deed of gift, evidence to prove such a defence is admissible and does not violate the provisions of s. 92, Evidence Act. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

———**s 92, Proviso 4**—*Registered deed of partnership for fixed term—Oral evidence to prove*

Evidence Act—contd.

dissolution and payment of share before term—Admissibility.

When an oral agreement is made which in respect of the manner of payment rescinds or modifies a contract in writing and registered and any payment is made in accordance with that oral agreement, s. 92 of the Evidence Act, does not exclude evidence of that payment or of the oral agreement that explains it. Therefore, it is open to a partner to adduce oral evidence to prove that a partnership which has been formed for a fixed period under a registered deed had, in spite of the term, been dissolved within that period and that he paid the share of the other partners. NURUL HASAN *v.* IMAMBUX *Nag.* **874**

——— **s. 112**—*Presumption of legitimacy, nature of—Proof of access, effect of—'Access', meaning of.*

Under s. 112, Evidence Act, when a child is born during lawful wedlock there is a presumption to start with in favour of legitimacy; in other words, that the husband had intercourse with the wife at the time when the child must have been conceived. That presumption is a rebuttable one and may be rebutted by showing non-access; but once access of, or intercourse by, the husband is proved, no evidence will be allowed to show that the child is not the child of the husband.

The word 'access' in s. 112 means sexual intercourse not mere opportunity of access. JAGANNATHA *v.* CHINNASWAMI *Mad.* **36**

——— **ss. 114, illus, 133**—*Approver's evidence—Necessity of corroboration—Nature of corroboration required—Evidence of association, value of.*

Persons accused of an offence cannot be convicted upon the evidence of an approver unless the connection of each of the accused with the crime is proved by independent corroborative evidence.

Evidence of an isolated instance of association, by itself, is not of much corroborative value unless it is combined with other evidence of the same nature or of a nature showing an even more intimate connection between the accused.

There is much difference between association at a suspicious place which in itself points to two persons having met for some sinister purpose and a natural association which in itself raises no suspicions by itself. RANBIR SINGH *v.* EMPEROR *Lah.* **19**

——— **ss. 114, illus. (b), 133**—*Accomplice—Evidence—Necessity of corroboration—Nature of corroboration required.*

The effect of s. 133, Evidence Act, is that in very exceptional cases if the Court is satisfied that the presumption of untrustworthiness attaching to accomplices in general is rebutted by special circumstances, the Court can accept the uncorroborated testimony of the accomplice. But the established practice of all the Courts in England as well as in India is ordinarily to require corroboration of the evidence of an accomplice in regard to material particulars.

There is a general consensus of judicial opinion that the corroboration must be with regard to circumstances showing that the particular accused was connected with the crime. JAI SINGH *v.* EMPEROR *Oudh* **321**

——— **s. 114, illus. (e), (f)**—*Collector's books—Presumption of correctness.*

Entries in the books of the Collectorate may be presumed to be correct and such books must be examined to arrive at a finding as to whether there were arrears or not. RADHA GOBINDA DEB *v.* GIRIJA PRASANNA MOOKERJEE *Cal.* **129**

Evidence Act—concld.

——— **s. 116**—*Estoppel—Landlord and tenant.*

A tenant who has been let into possession cannot deny his landlord's title however defective it might be, so long as he has not openly restored possession by surrender to his landlord. Similarly a lessee is estopped during the subsistence of lease from questioning the title of his lessor. MOHAMMAD AZIM KHAN *v.* MOHD SAADAT ALI KHAN *Oudh* **642**

——— **s. 126**—*Communication by client to Pleader, when privileged.*

On general principles, and under s 126 of the Indian Evidence Act, there is no privilege to communications made before the creation of relationship of Pleader and client Further, where two persons have a dispute about a claim made by one of them upon the other, and both seek the help of a Pleader, and one of them makes a statement to the Pleader, the statement so made to the Pleader by one of the parties is certainly admissible.

Again, to be privileged under s. 126 of the Indian Evidence Act, a communication by a party to his Pleader must be of a confidential nature. KALIKUMAR PAL *v.* RAJKUMAR PAL *Cal* **476**

——— **s. 133**. *See* EVIDENCE ACT, 1872, s. 114, ILLUS. **19**

——— **s. 133**. *See* EVIDENCE ACT, 1872. s. 114, ILLUS (*b*) **321**

Execution—*Executing Court's power to question validity of decree—Award under Arbitration Act—Judgment and decree based on award—Legality—Execution of award—Application for execution of decree treated as one for execution of award—Decree in excess of jurisdiction*

Where an award is made under the Arbitration Act, the Court after satisfying itself as to its validity will order it to be filed and execution can be taken on it as though it were a decree but the Court can pronounce no judgment on it and make no decree. But if a judgment is pronounced and a decree is made, it is merely a superimposition, unnecessary and void. But the award being executable, an application for execution of decree may be treated as application for execution of award.

Where a decree presented for execution was made by a Court which apparently had no jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction and it is only within these narrow limits that the executing Court is authorised to question the validity of the decree.

A decree passed in excess of the limits prescribed may also be regarded as void on the ground of lack of inherent jurisdiction.

Once a cause is converted into a matter under the Arbitration Act, the inherent jurisdiction which the Court of general jurisdiction possessed over it, is curtailed, and the Court retains a limited jurisdiction only for the purposes and control over the proceedings of arbitration. It has no jurisdiction to treat the cause as a suit pending before it as one on which it can pass a judgment or make a decree. If it does so the decree passed is in excess of the limits and as such void RABINDRA NATH CHAKRAVARTI *v.* JNANENDRA MOHAN BHADURI *Cal.* **466**

——— *of deeds—Executant not understanding details—Validity of deed.*

In India as in England it is enough for the executant of a legal document to understand the

Execution—concld.

nature of the transaction leaving the details to his lawyer. It is not necessary that he should understand all the terms of the document. RAJKUMAR SEN *v.* RAM SUNDAR SHAH P. C. 102

——— *sale—Title of auction-purchaser—Absence of sale-certificate, effect of—Other evidence to prove title, admissibility of.*

The title of a purchaser at an auction-sale in execution of a decree is derived from the sale itself and not from the sale certificate. The sale certificate is merely evidence of title and not the title-deed, in the sense that the title is conveyed or created by it, and the purchaser can, therefore, establish his title by evidence independent of the sale certificate. TRIBENI PRASAD SINGH *v.* RAMASRAY PRASAD *Pat* 49

Executor—*Borrowing money as executor—Liability of estate—Creditor's right—Mere right of indemnity—English and Indian Law.*

Whatever differences there may be in the equity in favour of a creditor who has lent money to an executor according as it is applied for a purpose sanctioned by the will or a purpose not expressly sanctioned by it, the highest right that such a creditor may claim against the estate on the finding that it has been enriched or benefited by the money is a right to be subrogated to the right of the executor to be indemnified out of the estate to the necessary extent, and unless the right of the executor to the indemnity is established the creditor has none as against the estate where no charge has validly been created on the estate.

There is no difference between the English and Indian Law in this respect. A decree against the estate could not be passed in such cases under s 70, Contract Act. MANINDRA CHANDRA *v.* SUDIR KRISHNA BANERJEE *Cal.* 893

Explosives Act (IV of 1884)—Rules 3, 10—*"Throw downs" and Chinese crackers, whether "explosives".*

Even 'throw downs' and Chinese crackers are explosives within the meaning of rr. 3 and 10 under the Explosives Act. *In re*, P. SEENAPPA CHETTY *Mad* 781 (*a*)

Factories Act (XII of 1911), ss. 34, 41—*Failure to report accident—Liability of occupier—Joint trial of occupier and manager—Legality.*

Although s. 34, Factories Act, makes the manager liable for failure to report an accident, under s. 41 of the Act the occupier is also liable for such failure jointly and severally with the manager.

Under s. 41, Factories Act, the liability is fastened on the occupier irrespective of the actual offender for the breach of certain provisions. J. AGARWALA *v.* EMPEROR *Pat.* 289

——— **s. 41.** *See* FACTORIES ACT, 1911, S. 34 289

Family arrangement. *See* MUHAMMADAN LAW 97

Firm. *See* PROVINCIAL INSOLVENCY ACT, 1920, S. 44 (2) 815

Frontier Crimes Regulation (III of 1901), ss. 30, 48, 49 and 59—*Jurisdiction of High Court to revise orders of Sessions Judge and Magistrate on merits—Charge for adultery—Strict proof of adultery, necessity of.*

The provisions of ss. 48 and 49 of the Frontier Crimes Regulation apply only to orders passed by the Deputy Commissioner and the Commissioner acting under the express provisions of the Regulation. The High Court has, therefore, jurisdiction to revise the orders of the Sessions Judge or a Magistrate of the First Class in a case tried by them under s. 59 of the Regulation.

Frontier Crimes Regulation—concld.

In a charge of adultery under s. 30 of the Frontier Crimes Regulation, it is necessary to prove by direct evidence either the commission of adultery or such circumstances as raise an irresistible conclusion that adultery has been committed This cannot be done by merely alleging that the woman is of bad character and that another person has been visiting her father with whom she had been residing. SABHAI *v.* EMAEROR *Lah.* 707

——— **ss 48, 49 and 59.** *See* FRONTIER CRIMES REGULATION 1901, s 30 707

General Clauses Act (X of 1897), s. 26. *See* SALT ACT, 1882, s. 9 (*a*) 91

Gift—*Acceptance, presumption of.*

Where a gift is made by a mother to minor children living with her unless the contrary is proved the acceptance of the gift should be inferred and the mere circumstance that the mother retained the custody of the deed and kept the house in her name in the Municipal accounts and paid the taxes does not show that she did not intend the gift to be acted upon. ALAPATI VENKATRAMMAYYA *v.* ALAPATI NAGAMMA *Mad.* 343

——— *Construction.*

To test whether a gift is fictitious or otherwise the surrounding circumstances contemporaneous with the gift and subsequent conduct of parties concerned is the best guide MOHAMMAD AZIM KHAN *v.* MOHD. SAADAT ALI KHAN *Oudh* 642

——— *of jungle land, whether passes.*

Where according to a deed of gift, a jungle without the exception of any tree is gifted away, and there is no mention of the land upon which the jungle stood, what is gifted away is the timber of the jungle and not also the land upon which the jungle stood MOHAMMAD AZIM KHAN *v.* MOHD. SAADAT ALI KHAN *Oudh* 642

Government of India Act, 1915 (5 & 6 Geo. V, C. 61) *as amended by Government of India Act, 1916 (6 & 7 Geo. V. C. 37), s. 114—Bar Councils Act (XXXVIII of 1926) as amended by Act XIII of 1927, ss. 2 (h), 4, 8, 12—Advocate-General, meaning of—Acting Advocate-General—Pre-audience, right of.*

The acting Advocate-General is entitled to a right of pre-audience over all other Advocates in respect of all business whether for the Crown or of a private nature.

The expression 'Advocate-General' means the person for the time being legally entitled to exercise the powers of the Advocate-General. *In re* PRE-AUDIENCE OF THE ACTING ADVOCATE-GENERAL *Bom.* 793

Grant—*Construction of* sanad—*Grant in consideration of piety and learning—Personal grant—Act XI of 1852, Schedule A, r. 2*—Inam *Commissioner—Finality of decision—Summary Settlement Act (II of 1863)—"Lands held under a treaty", meaning of.*

Where there is no reference in the *sanad* that a grant is for religious and charitable purposes but is made in consideration of the piety and learning of the grantees who are *Brahmans*, the grant though it may be described by the word '*Dharmarth*', is not to the *devasthan* but is a personal one.

The decision of the *Inam* Commissioner by virtue of the provisions of r. 2, Schedule A of Act XI of 1852 is final as regards the land and interest concerned in the decision.

The expression "land held under a treaty" used in the Summary Settlement Act refers to cases in which the root of the title is a treaty. In order to hold that

Grant—concld.

land is held under a treaty it must be shown either that the original title was under a term of a treaty which remained in force or that the treaty of cession guaranteed title. DATTATRAYA PANDURANG GOSAVI *v* LAKSHMAN MAHADEV POHEKAR *Bom.* **161**

Guardians and Wards Act (VIII of 1890), s. 25 —*Suit for custody of ward—Maintainability—Act whether exhaustive.*

Though the Guardians and Wards Act, does not purport to be exhaustive of all questions that arise with respect to the custody of a minor yet in cases to which s 25 applies it is incumbent upon the guardian to proceed by way of application under the Guardians and Wards Act, and not by a regular suit. SHADEO *v.* MEHRAJI *Rang.* **831**

——— **ss. 34, 45**—Benami *lease by guardian—Summary order directing guardian to deposit lease money in Court, legality of.*

Where a guardian leased to his brother-in-law a plot of land belonging to the minor and the Court, holding that the lessee was merely a *benamidar* for the guardian, called upon the latter to deposit the lease money in Court:

Held, that the claim made against the guardian could be sustained only on the basis of a contract or a *quasi* contract as the amount was not recoverable from the guardian in his capacity as such, and the claim could not, therefore, be enforced in a sume mary manner but only by way of a suit. ARUR SINGH *v.* GUR BAKHSH SINGH *Lah.* **2**

——— **ss. 35, 36, 40, 41**—*Application for discharge of guardian—Power to go into accounts, and compel payment of amount found due—Proper procedure.*

On an application under the Guardians and Wards Act, for the discharge of a guardian the Court has no power to enquire into the correctness of the account submitted by the guardian and compel him to pay the amount found due by the Court. This can be done only by a suit under ss 35 and 36 of the Guardians and Wards Act. FAKIR MUHAMMAD *v.* BHARI *Lah.* **3**

——— **ss 40, 41.** *See* GUARDIANS AND WARDS ACT, 1890, ss. 35, 36 **3**

——— **s. 45** *See* GUARDIAN AND WARDS ACT, 1890, s. 34 **2**

Hindu Law—Adoption (*Bombay School*)—*Power to adopt—Death of son leaving widow—Mother's power to adopt with consent of son's widow.*

Under the Bombay School of Hindu Law where a person dies leaving his widow and a son, and the son dies thereafter leaving a widow, the mother has no power to adopt, even with the consent of the son's widow. SANGANGAUDA FAKIRGAUDA *v.* HANMANTGAUDA SANGANGAUDA *Bom.* **500**

——— **Alienation**—*Suit for declaration that certain transfers were fictitious—Partial consideration proved—Transfers not fictitious.*

Where, in a suit for declaration the relief claimed is that the deeds in question are colourable and fictitious, if any portion of the consideration in respect of them has been paid, the transaction cannot be considered to be fictitious and the plaintiffs cannot get the declaration claimed. UMA SHANKAR SINGH *v.* SUKHRAJ KUNWAR *Oudh* **247**

Hindu Law—contd.

——— **Debts**—*Criminal misappropriation by father—Son's liability—Pious obligation*—'Avyavaharika' *debt.*

Under the Hindu Law if a father's liability arises directly from a criminal act, *i. e*, an act for which the father may or may not have been successfully prosecuted, but which can be presumed or proved to be criminal on t e evidence on the record, the son would not be bound to pay the father's debt. BAI MANI *v* USAFALI BHUDAR *Bom* **173** (*b*)

——— *Debt incurred by father for contract business—Decree against father and sons -Whether can be executed against sons personally.*

Where the father of a Hindu family for himself and as the guardian of his minor sons executed a mortgage for a debt incurred in carrying on a contract business of the family and the mortgagee obtained a simple money decree against the father and the sons :

Held, that the decree could be executed personally against the sons in the absence of evidence to show that the debt was not a family debt and did not go to benefit the sons. DALIP NARAYAN SINGH *v.* RAGHUNANDAN PRASAD *Pat* **447** (*b*)

——— **Family arrangement**—*Widow's estate under family arrangement, nature of—Succession to widow's estate.*

In a family arrangement the compromise is based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is. The claim does not rest on contract only but upon a title acknowledged and defined by the contract.

The estate which a widow gets under a family arrangement is an absolute estate and forms part of *stridhan* and on her death devolves on her own her heirs and not on the heirs of her husband.

One *P* died separated from his brothers, the defendants in the present case, leaving behind certain self-acquired property, but the documents relating to it were in the name of the defendants After his death the property was divided between the widow of *P* and the defendants. On her death her daughter's daughters claimed the property which had fallen to the share of their grandmother. The defendants pleaded that the property devolved on them :

Held, that the partition between widow of *P* and the defendants was in the nature of a family arrangement and as such the widow' estate was absolute and devolved upon the plaintiffs. VATSALABAI VINAYAK NIMKAR *v.* VASUDEV VISHNU MUSALE *Bom.* **177**

——— **Joint family**—*Alienation—Mortgage for speculative litigation—Validity—Success in litigation, effect of—Equities—Conditional decree.*

Where money is raised by mortgage by a member of the family, even if he be the head of the family, for a speculative litigation which is to benefit the family only in the case of its success, it cannot be said that the mortgage was created for family necessity. Where the benefit to be acquired is to accrue to an individual member and not to the whole family the mortgage cannot bind the family estate.

Where, however, a grandfather mortgaged the family estate for a speculative litigation and succeeded, and the grandson sued to set aside the mortgage and the decree obtained thereupon :

Held, that it would be highly unjust to allow the

plaintiff to succeed unconditionally and to escape payment of the debt which went substantially to help his grandfather to succeed in the litigation, if, ultimately, the plaintiff succeeds to that property and a conditional decree that the mortgage-decree could not be executed until the plaintiff succeeds to the property recovered by the litigation, could be passed. PATESHWARI PRASAD PAL *v.* JAI KARAN *All.* **381**

——— **Joint family**—*Attachment before judgment of co-parcener's interest—Right of survivorship, if defeated.*

An attachment before judgment of a co-parcener's interest when not followed by a decree during the said co-parcener's life-time does not operate to defeat the right of survivorship MUTHAYYA CHETTIAR *v.* LAKSHMANAN CHETTIAR *Mad.* **778**

——— ——— *Gains of science—Member of joint family educated up to Entrance, earnings of—Self-acquired property.*

Gains made personally and without the aid of joint funds by a member of a joint family, who was maintained at the expense of the joint family and received no more than an ordinary education suitable to his position as a member of the family, are the self-acquired property of such member and not joint family property. Education up to the Entrance pass is a very ordinary education and a clerk who started his life on Rs. 15 a month cannot be said to be a member of a profession or occupation requiring special training. Any saving, therefore, from his pay cannot be described as gains of science. JAI DAYAL *v.* NARAIN DAS *Lah.* **270** (*b*)

——— ——— *Partition of some property—Status of members with regard to undivided property—Possession of one, if adverse to others.*

Where the co-parceners in a joint Hindu family make a partition and divide the joint property with the exception of a portion of it, they are, in absence of indication to the contrary, tenants-in-common with reference to the excepted property. The fact that the property was originally acquired by the members of the family as trespassers does not make any difference.

The possession of one tenant-in-common is not adverse to the other until ouster. BADRI MISIR *v.* SHANKAR MISIR *Oudh* **702**

——— ——— *Self-acquisitions—Burden of proof—Existence of ancestral property, effect of—Adoption—Bequest to adoptive mother assented to by natural father before adoption—Validity.*

It cannot be presumed from the mere fact that a Hindu father was possessed of some ancestral property that all his subsequent acquisitions are joint family property.

The natural father's assent cannot validate a bequest by the adoptive father in favour of the latter's daughter.

A bequest by the adoptive father in favour of the adoptive mother in a Will executed prior to adoption if assented to by the natural father before adoption, would be valid and binding on the adopted son if it is fair and reasonable. RAMIAH *v.* MAHALAKSHMAMMA *Mad* **205**

——— ——— ——— *Omission to implead minor members—Validity of sale.*

The omission to sue a minor member of a joint family if the interest of the family was properly looked after in the suit, will not in any way affect the sale held in execution of the decree passed in a suit against the family. TRIBENI PRASAD SINGH *v.* RAMASRAY PRASAD *Pat.* **49**

——— **Maintenance** — *Daughter-in-law—Father-in-law's liability—Liability of heirs—Liability of, person taking under Will—Rate of maintenance—Right to arrears.*

Under Hindu Law, a father-in-law who is not possessed of ancestral property is not legally bound to maintain his widowed daughter-in-law. He is however, under a moral obligation to do so, and this obligation becomes a legal and binding obligation on his heirs Persons in possession of the self-acquired property of a Hindu father after his death, whether they have taken such property by inheritance, survivorship or under a duly executed Will or deed of gift, are, therefore, under a legal obligation to maintain the widow of a son who predeceased his father.

A widow is not only entitled to bare maintenance but to maintenance suitable to her condition in life and the status of her family.

A widow who does not live in the house of her deceased husband does not thereby forfeit her claim to maintenance. LAXMIBAI *v.* SAMBHA *Nag.* **230**

——— **Partition**—*Evidence of separation—Circumstances—Cessor of commensality etc., value of—Presumption of completeness of partition.*

Under the Hindu Law though a declaration of intention to separate must be made in definite and unambiguous terms it does not follow that where there is no evidence of an express declaration of intention, separation cannot be proved. The question is really one of intention and all that the law requires is that the intention should be clearly and unequivocally expressed whether it be by explicit declaration or by conduct.

In the absence of an explicit declaration, the evidence of conduct as well as of the surrounding circumstances is material for the purpose of judging whether the member intended to separate or not.

Though certain circumstances when taken individually do not furnish conclusive evidence of separation, yet they may point to a different conclusion when taken collectively or with reference to the particular facts of any individual case.

Though cessor of commensality may not be conclusive yet it may properly be considered in determining the question whether there was a partition of the joint family or not.

When a partial partition is proved or admitted to have taken place, the presumption is that there has been an entire partition both with reference to rights and properties. PURNIMA DEBYA *v.* NAND LAL OJHA *Pat.* **577**

——— ——— *Evidence — Unequivocal deed—Separation of one member—Status of others—Presumption—Intention to continue united—Existence of minor sons, effect of.*

If a deed of partition is unequivocal in its language and the intention of the parties is clear from it, it is not necessary to prove acts in support of the deed.

A presumption of complete separation does not arise in all cases when there has been separation of one or more members. No definite agreement to continue to be a joint family on the part of the remaining members is necessary. An agreement may be inferred if the facts justify such inference.

Where an adult son separates from the family it is open to the father and the minor sons to remain joint and if the father's intention was that

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they should not separate that intention would be as effective to continue the joint family as an agreement, express or inferred, between the adults. TIKKILAL *v.* GULACHAND *Nag* 233

——— **Religious endowments** — *Dedication—Essentials—Delivery of possession to trustee, necessity of—Construction of deed—Absolute dedication or mere charge—Tests—Estoppel of reversioner.*

Where an endowment deed purported to be a deed of dedication of the settlor's properties to certain deities but there was failure to carry out the dedication into effect by delivery of the property by the settlor to the *mutawalli*, nor was there any change effected in the mode of expenditure of the properties dedicated, a large part being spent for the settlor and a very small one for the deities as before:

Held, that under the circumstances all that the settlor effected by the deed was the creation of a charge on the properties for the service and worship of deities therein mentioned, and not an out and out dedication.

Where the donor of a religious endowment constitutes himself the *mutawalli* there must be some unmistakable act to show that the possession was transferred to the deities and that the donor completely divested himself of the ownership of the property. The effective way of showing this transfer of possession is by altering the land register.

Where a *mutawalli* has been appointed to look after the temple properties, an acceptance by the temple *pujari* of a gift on behalf of the deities would not amount to an acceptance in law because the gift to the deities must be accepted on their behalf by the *mutawalli*.

Where a reversioner bought a portion of a village, the other portion of which was bought by the deceased for settling that portion on certain deities and both the purchases were effected by the same deed:

Held, that the purchase by the reversioner under the same deed did not raise any estoppel and it was open for him to challenge the settlor's dedication to the deities. BHEKDHARI SINGH *v.* SRI RAMCHANDERJI *Pat.* 290

——— **Succession** — Gotraja sapinda, *meaning of* — 'Gotra,' *meaning of.*

In order that a person may be male *agnate* or *gotraja-sapinda* of the propositus it must be proved, first, that he is of the same *gotra*, that is, of a common patriarchal stock and, secondly, that he is a *sapinda* of the deceased, that is, connected by blood through a common ancestor, the connection being traced through males.

In the absence of challenge on this point, it might well be that proof by a person that he was a *sapinda* of the propositus would be sufficient to raise a presumption that he was also *gotraja*, but, on his being challenged on this point, it is for him to satisfy the court that he complies with this condition also, before he can succeed in his claim to the succession.

The term "*agnate*" is not a term of art in the English legal system; in the English language, though not in frequent use, it is a known term, used to indicate relationship on the father's side or exclusively through males and it is a word expressive of relationship similar to "son" or brother."

The word '*gotra*' has only one meaning and denotes descent from common patriarchal stock. DULAHIN JADUNATH KUAR *v.* BISHESHAR BAKHSH SINGH P. C. 747

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——— **Widow**—*Alienation—Inadequacy of price, effect of.*

While it is correct to say that a transfer by a Hindu widow for legal necessity and for adequate price is binding on the reversioner it does not necessarily follow that a sale otherwise justified must under all circumstances be set aside if it can be shown that the price fetched was not adequate. Circumstances might make it absolutely necessary for the widow to sell her husband's property even for an inadequate price. Each case must depend on its own circumstances. If the necessity for the sale of the property was so great that the husband's property must be sold and if under circumstances then existing it was not possible for her to obtain the full value of the property which had to be sold and she could not get more than what is considered to be an inadequate price the sale would nevertheless be valid. NAUNITA KUNWAR *v.* MULLO *All.* 372

——— ——— *Alienation—Suit by reversioners—Limitation—Widow's duty to keep down interest on debts—Bona fide creditor, rights of—Interest—Reasonableness of rate.*

If a suit to challenge a mortgage by a widow is barred by limitation the reversioners cannot be allowed to do indirectly what they could not do directly by showing that the original mortgage to discharge which the later mortgage was executed was itself not binding on the estate.

A widow is not bound to discharge her husband's debts out of the income of his estate; but she is bound to keep down the interest on her husband's debts and is only entitled to enjoy the net income from her husband's property. But an exception is recognised in favour of the alienee. If there was actual pressure at the time of the alienation and the widow had then no funds available for the discharge of the debts or the alienee, after reasonable enquiry, *bona fide* believed that the alienation was necessary, he will be protected.

In order to determine of the reasonableness of a particular rate of interest the whole conditions and the terms of the lending must be considered together. THIRUVENGADAM PILLAI *v.* GNANASAMBANDAM PILLAI *Mad.* 43

——— ——— ——— *Decree against widow, when binding on reversioner—Tests—Frame of suit—Consent to payment of decree amount, whether amounts to acknowledgment that it is binding on estate.*

Where a decree is obtained against a limited owner such as a Hindu widow whether or not the debt was binding on the estate during the life-time of the limited owner, the decree-holder can proceed against her interest in the property. Therefore, consent by the reversioners to a stipulation reserving an amount for payment to the holder of a decree against a limited owner does not amount to an acknowledgment that the debt is binding not only upon the limited owner's interest but also upon the reversioners.

In order to construe a suit against a widow as a representative suit, some indication however slight, must be found to show that the creditor intended so to frame it and unless such indications are present and if the suit is in form only a simple money claim against the widow although in point of fact the debt may have been contracted for necessary purposes the reversionary interest could not be held to be bound by the decree against her. SETHURAMA *v.* VARADARAJA *Mad.* 773

Ignorance *of law as explanation for late objection.*
Although ignorance of law is no excuse it may explain why an objection was not raised at an early stage. SHEO TAHAL RAM *v.* BINAEK SHUKUL *All.* **353**

Illegal contract. *See* CONTRACT **875**

Income-tax *—Insurance against loss of profits, resulting from fire—Moneys received by assured, whether liable to be taxed—'Income,' 'profits,' meanings of.*
Moneys received by an assessee under use and occupancy policies insuring him against loss of profits resulting from cessation of business caused by fire are liable (under the British Colombia Taxation Act, 1924) to be brought into account by them for assessment to income-tax. Such moneys can fairly be regarded as 'income from the business.'
Moneys which are not strictly 'profits' of a business may yet be the 'income' of the tax-payer and the real question in cases of this nature is whether the insurance moneys constitute 'income', and not whether these moneys are 'profits' of the assessee's business. KING *v.* B. C FIR & CEDAR LUMBER CO. LTD. **P C. 863**

Income Tax Act (XI of 1922), ss. 2 (4), 4 (3), (vii), 6 (iv), 10, 12 *—Amounts paid to agents as compensation for cessation of agency—Whether assessable income—'Income', 'business', meanings of —Principles of liability.*
The word 'income' in the Income Tax Act connotes periodical monitory return 'coming in' with some sort of regularity or expected regularity from definite sources. The sources need not be continously productive but must be one whose object is the protection of a definite return excluding anything in the nature of a mere wind fall.
Though the words used in the definition of 'business' in s. 2 (4) of the Act are wide, underlying each of them there is the fundamental idea of the continuous exercise of an activity, and in order that an income may be assessable under the head of business in s. 6 of the Act, it is essential that the business must one *carried on by the assessee.* It must be profits earned by a process of production.
The expression 'receipts arising from business' in s. 4 (3) (*viii*) means receipts arising from the carrying on of business.
Where the assessees acted as distributing agents of certain oil companies and on the termination of the agency the assessees were paid a certain sum of money as compensation for cessation of the agency:
Held, that the amount so received by the assessees was not assessable income in as much as it was not the produce or the result of carrying on the business of agency but was received as a sort of *solatium* for its compulsory cessation. COMMISSIONER OF INCOME TAX, BENGAL *v.* SHAW, WALLACE & CO **P. C. 742**

——— ss. 2 (6), 4, 20, 48 *—Sterling Companies registered in United Kingdom but carrying on business in India——Dividends received outside British India—Liability to income-tax—Illegal levy of tax—Right to refund—Certificate of principal officer in United Kingdom, validity of.*
Dividends received outside British India from sterling companies registered and with their share register in the United Kingdom but, satisfying the definition of a company in s. 2 (6) of the Income Tax Act and assessed to income-tax in British India, are not to be taken into account as part of the total income of an assessee who resides outside British India for the purposes of income-tax assessment.

Income Tax Act—contd.

Where the assessee is a person liable to assessment to Indian income-tax in respect of part of his income, a refund of Indian income-tax is admissible in respect of the sums or dividends received by him from such companies.
Certificates under s. 20 of the Income Tax Act, signed by the principal officer in the United Kingdom of such companies can be regarded as valid certificates for the purpose of s. 48 (1) of the Income-Tax Act and refund granted on their production. COMMISSIONER OF INCOME TAX *v.* GOLDIE *Bom.* **170**

——— s. 3 *—Currimbhoy Ebrahim Baronetcy Act (IV of 1913)—Individual, what is—Trustees under latter Act—Liability for income-tax and super-tax.*
The assessee corporation were the trustees under a private Act No IV of 1913 which was passed by the Governor-General of India in Council entitled "an Act for settling certain properties belonging to Sir Currimbhoy Ebrahim, Baronet, so as to accompany and support the title and dignity of a Baronet and for other purposes connected therewith". The corporation was constituted with perpetual succession and common seal under the style and title of the trustees of the Sir Currimbhoy Ebrahim Baronetcy. The corporation consisted of the Baronet for the time being and three Government Officials named in the Act Certain properties were made to vest in the corporation who were to pay all taxes etc, to defray the expense of repairs and insurance, to set aside a sinking fund and a repair fund and to pay the surplus to the Baronet for the time being. The second Baronet died just before the end of the Financial year 1927, 1928 On 26th September, 1928, the corporation made a return for income-tax for the year 1928-29. The corporation were ordered to pay the income-tax which was paid. In March they were asked to pay super-tax which they refused to do. The question referred by the Commissioner of Income-tax was whether apart from s. 56, Income-Tax Act, the corporation were properly assessed to income-tax and super-tax for the year 1928-29:
Held, that the corporation constituted by the special Act was an individual within the orbit of s 3, Income-Tax Act and not an association of individuals.
Held, further, that the corporation was liable to be assessed both for Income-tax as well as super-tax. COMMISSIONER OF INCOME TAX, BOMBAY *v.* TRUSTEES OF SIR CURRIMBHOY EBRAHIM *Bom* **488**

——— ss. 4, 20, 48. *See* INCOME TAX ACT, 1922, s 2 (6) **170**

——— ss. 10 (2) (vi). *See* INCOME TAX ACT, 1922, s. 23 (4) **706**

——— s. 12 (2) *—Allowances—Salary of Receiver of property partly assessable and partly not—Portion of salary incurred in respect of assessable property, whether allowable as deduction*
Where a Receiver was appointed to manage the property of an estate consisting of assessable income in the shape of mining royalties and agricultural income which was not assessable to income-tax:
Held, that s. 12 (2) of the Income Tax Act did not require that the whole of the salary of the Receiver should be incurred solely for earning the income before any part of it could be deducted in calculating the assessable income and that, therefore, the portion of the Receiver's salary which was incurred for the making or earning of the royalty income could be deducted as expenditure under s. 12 (2). SACHINDRA

Income Tax Act—contd.

MOHAN GHOSH *v.* COMMISSIONER OF INCOME TAX
Pat. **63**

——— **ss. 23 (4), 10 (2) (vi)**—*Deductions—Depreciation of motor cars—Assessment to best judgment—Notice for assessment for subsequent year—Claim for depreciation of motor cars in use for more than five years—Admissibility—Failure to keep depreciation account, effect of.*

Where assessment for the years 1923-24 to 1927-28 was made to the best of the Income-tax Officer's judgment under s 23 (4), Income Tax Act, and the assessee on receiving notice of assessment for the year 1928-29, claimed depreciation in respect of motor cars which had been in use in 1922-23 and the claim was disallowed :

Held, that in view of the fact that the assessment for the years 1922-24 to 1927-28 was final and not subject to appeal and that for the purpose of allowing depreciation the life of motor cars is taken as five years under the Income-tax rules, the assessee was not entitled to claim depreciation on the cars which were in use from 1922-23, in a year subsequent to the said five years.

Held, further, that the fact that no depreciation account had been maintained as required by the rules did not give rise to any inference that no allowance for deductions had been made in the assessment for the years 1922-24 to 1927-28.

When an assessment is made to the best of the Income Tax Officer's judgment on a net income under s. 23 (4) of the Act all expenses incidental to the business must be assumed to have been considered in arriving at the net income assessed. GOVERNMENT MAIL MOTOR SERVICE, RAWALPINDI *v* COMMISSIONER OF INCOME TAX *Lah* **706**

——— **s. 34**—*Income Tax Rules, r. 25—Assessment of Life Insurance Companies—Rule 25, whether mandatory—Recourse to other modes of assessment, legality of—Chargeability and assessability—Difference.*

Rule 25 of the Income Tax Manual is of a mandatory character and provides the only manner in which the income, profits and gains of Life Assurance Companies can be determined. The assessing officer has no discretion to depart from its provisions and to have recourse to the other provisions of the Income Tax Act for the purpose of determining and assessing the income, profits and gains of a Life Assurance Company.

There is a clear distinction between chargeability and assessability. The former expression connotes liability to pay income-tax; the latter expression has reference primarily to the machinery, which ought to be utilized, and the procedure that must be followed in determining the amount which should be levied as income-tax.

Where, therefore, no machinery exists to make it possible for the Income Tax Authorities to assess the income, profits or gains of the company during a particular year the assessment for that year is not legal.

Section 34, Income Tax Act, pre-supposes that the income, profits or gains which can be assessed under it should have been chargeable during the preceding year and also must have escaped assessment. LAXMI INSURANCE CO. LTD., LAHORE *v.* COMMISSIONER OF INCOME TAX, PUNJAB, N. W. F. & DELHI PROVINCES *Lah.* **725**

——— **ss 34, 66**—*Income escaping assessment—Re-assessment—Jurisdiction of Income-tax Officer—Whole assessment cannot be revised.*

Income Tax Act—contd.

The words "assess or reassess such income, profits or gains", in s. 34, Income-Tax Act, must be taken to refer to the income, profits or gains chargeable to income-tax which have escaped assessment referred to in the prior part of the section. Accordingly in a proceeding under s. 34 the Income-tax Officer and after him the Assistant Commissioner are only dealing with the extra income which has not been assessed to income-tax. No jurisdiction is given to either of these officers by s. 34 to make a new assessment for the purposes of taxing the whole of that assessment under the Income-Tax Act.

Section 34 does not confer on the authorities a power to grant relief to the assessee on the ground that the previous assessment under s. 23 (4) was too high.

The question of the exercise of his discretion by the Commissioner is a matter solely for the Commissioner and not a matter for the High Court to consider in a reference. KASHI NATH BAGLA, *In the matter of* *All.* **575**

——— **ss 48, 67**—*Assessment of firm—Refusal of refund by Income-tax authorities—Suit in Civil Court—Maintainability—Death of partner before assessment—Claim for refund by legatee, competency of.*

A suit for refund of income-tax refused by the income-tax authorities is not barred by s 67, Income-Tax Act, which refers only to assessment.

The estate of a dead person is not liable to be assessed to income-tax and s. 48 (2) of the Act cannot apply to a person who died before the assessment on his own income was made.

Where a partner of a firm died in 1926 having bequeathed his share of the profits to his widow and the widow and the partners applied under s. 48, Income Tax Act, for a refund of tax assessed for the year 1927-1928 :

Held, that as the deceased partner or his estate was at no time entitled to a refund inasmuch as he was not a person who paid the assessment on the firm nor liable to pay that assessment or any part of it, and as he could not himself be an assessee for the year 1927-1928, his legatee could not claim as heir to or constructive owner of any refund. ZENAB BAI *v.* SECRETARY OF STATE FOR INDIA *Sind* **819**

——— **ss. 61, 66 (2)**—*Application for copy of judgment of Assistant Commissioner—Proper Court-fee—Court Fees Act (VII of 1870), Sch. II, Art 11 (a)—Application by person not expressly authorised—Validity.*

The words "judgments, decrees or orders passed by such Court, Board or Officer" in Sch. II, Art 1-A, Court Fees Act, are wide enough to cover an application to an Assistant Commissioner of income-tax who has power to make the order and a copy of whose order is necessary for the purpose of preferring an appeal to the Commissioner under the Income Tax Act and such an application, therefore, requires a Court-fee stamp of two annas.

An application for copy of the judgment in an Income-tax appeal is properly within the meaning of the words 'attendance before an Income Tax officer' in s. 61, Income Tax Act, and can be made only by the assessee or a person expressly authorised in writing in that behalf. Further, it does not follow that because an agent is duly authorised to conduct the business of the appeal before the Assistant Commissioner, he is *ipso facto* authorised to obtain copies of the Assistant Commissioner's judgment

Income Tax Act—concld.

BASANT LAL RAMJIDAS *v.* COMMISSIONER OF INCOME TAX, BIHAR & ORISSA *Pat* 302

———s. 66. *See* INCOME TAX ACT, 1922, s. 34 575

———s. 66 (2). *See* INCOME TAX ACT, 1922, s. 61 302

———s. 66 (2)—*Question of law—Exclusion of certain items from sales income—Point considered by Income Tax Authorities—Rate charged reasonable—Interference.*

The assessees claimed that certain sums covering postage, railway freight and packing charges amounting to Rs. 31,305 should have been left out of account as in respect of such sums no profits accrued to them. These items simply represented money paid out by them on behalf of their clients and afterwards recovered from the latter. This point was brought to the notice of the Assistant Commissioner of Income Tax and the Commissioner of Income Tax and was considered by them. From what these officers stated it appeared that the flat rates which were applied for purposes of calculation of profits were framed on the understanding that the items mentioned above were to be included in the total sales income, otherwise a higher rate would have been charged:

Held, that under the circumstances of the case no question of law arose. ASGHAR ALI-MOHAMMAD ALI *v.* COMMISSIONER OF INCOME TAX *Oudh* 331

———s. 66 (3)—*Refusal to state case on the ground that application is time-barred—High Court's power to order reference—Specific Relief Act (I of 1877), s. 45.*

The power of the High Court under s. 66 (3), Income Tax Act, to require the Commissioner to state a case is limited to a case of refusal on the ground of no question of law arising; the section cannot be construed as covering a refusal on some other grounds, such as that the application was barred by limitation.

[The serious inconvenience and failure of justice which is likely to arise in consequence of the powers under s 45, Specific Relief Act, not being conferred upon the Judicial Commissioner's Court of Sind pointed out]. FIRM OF KHEMCHAND RAMDAS *v.* COMMISSIONER OF INCOME TAX *Sind* 762

Inferior Proprietor—Rights over village waste and forest produce. *See* CENTRAL PROVINCES 628

Inherent powers. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, 1927, s. 78 769

Inherent powers of Court. *See* PARTITION ACT 1893, s. 2 203

Injunction, against proceedings in Native State. *See* PRESIDENCY TOWNS INSOLVENCY ACT, 1909, s. 17 141

———*—Equitable jurisdiction of High Court—Civil Procedure Code, whether exhaustive—Appeal from order refusing to set aside* ex parte *decree—Power to issue injunction restraining execution pending appeal—Civil Procedure Code (Act V of 1908), O. XXXIX, rr. 1, 2,*

The High Court has power to grant an injunction to restrain a person from executing an *ex parte* decree pending the disposal of an appeal preferred to the High Court from order refusing to set aside that *ex parte* decree.

The High Courts, over and above the powers which they enjoy under the Civil Procedure Code, possess an equitable jurisdiction derived from the old Supreme Court to issue an injunction in appropriate cases and there is nothing in the Civil Procedure Code, that deprives the High Courts of that power. N GOVINDARAJULU NAYUDU *v.* IMPERIAL BANK OF INDIA, VELLORE *Mad.* 346 (*b*)

Insolvency *See* CIVIL PROCEDURE CODE, 1908, O. XLI, R. 10 (2) 45

Insurance Policy, attachment of. *See* CIVIL PROCEDURE CODE, 1908, s 39 533

Interest—*Interest by way of damages, when awardable.*

Interest can be allowed only either under a contract, express or implied, between the parties or when the requirements of the Interest Act have been satisfied. Where these conditions are not fulfilled interest cannot be allowed by way of damages for the wrongful detention of money. SHAM SINGH *v.* NANAK *Lah.* 719

———Reasonableness. *See* HINDU LAW 43

Interpertation of Statutes—Ejusdem generis—*Limits of the rule.*

The doctrine of *ejusdem generis* is used only for the purpose of ascertaining the intention of the Legislature and if it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow a particular word, are nevertheless to be construed generally, effect must be given to the intention as gathered from a larger survey. FIRM RALA RAM-WALAITI RAM *v.* FIRM BANSI LAL-JAGGAN NATH *Lah.* 11

———*Headings of chapters.*

Headings in the body of an Act are of some help in clearing up obscurities when there is an ambiguity, but they cannot control the provisions of the sections when they are unequivocal and clear. DURGA THATHERA *v.* NARAIN THATHERA *All.* 274

———*Plain language.*

The proper method of construction of a Statute is to interpret its language as it stands uninfluenced by considerations of what the law may be elsewhere. VENKATACHALA GOUNDAN *v.* EMPEROR *Mad.* 33

———*Plain meaning.*

A section in an Act is *prima facie* to be interpreted according to the plain meaning of the words. PRAMATHA CHANDRA KAR *v.* BHAGWAN DAS MADAN LAL *Cal.* 529

———*Reference to repealed sections.*

It is not proper to attribute a meaning to a section based on a corresponding section in a repealed Act. KADIYALA VENKATA SUBAMMA *v.* KATREDDI RAMAYYA P. C. 11

——— Retrospective effect. *See* BENGAL TENANCY ACT, 1885, s 109 605

———*Retrospective effect—General principles—Law affecting right to sue, limitation etc., whether adjective law.*

Per *Sulaiman, Actg. C. J.*—If a new enactment lays down that a person may under certain conditions sue for certain specified reliefs, and he sues after the Act has come into force it would not, strictly speaking, be giving to the Act a retrospective effect if he avails himself of its provisions. The Act is in force when he is suing, even though his cause of action might have accrued before the Act was passed. It would be giving a retrospective effect if the Court applied that Act to a suit previously instituted.

A substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantive right as they are ordinarily matters of procedure only.

Interpretation of Statutes—concld.

When a question of limitation is raised it ought to be decided in accordance with the Law of Limitation in force at the time of the institution of the suit and not that in force at the time of the cause of action, unless there be any express provision to the contrary in the Act itself. RAM KARAN SINGH *v.* RAM DAS SINGH *All* **145**

———*Words and phrases—'Includes', meaning of.*

Where the interpretation clause of a Statute states that certain things are 'included' in a term, the term includes, unless the context otherwise requires, not only those things which the interpretation clause declares that it shall include, but such things as the term signifies according to its natural import. KING *v.* B. C. FIR & CEDAR LUMBER CO **P. C. 863**

Khandan, *meaning of.*

The word "*khandan*" denotes the descendants of one's paternal grand-father. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

Knowledge, *meaning of.*

For practical and legal purposes knowledge means the state of mind entertained by a person with regard to existing facts which he has himself observed, or the existence of which has been communicated to him by persons whose veracity he has no reason to doubt. EMPEROR *v.* ZAMIN *Oudh* **243**

Land Acquisition Act (I of 1894), s. 11—*Award —Duty of Collector to decide matter of apportionment —Separate awards in respect of same land—Legality —Land acquisition appeals—Privy Council—Interference on question of valuation.*

In appeals from land acquisition cases the Judicial Committee will not review the decree of an Indian Appellate Court merely upon questions of valuation of property, unless the judgment is vitiated by wrong application of principle or some important point in evidence has been overlooked or misapplied.

Under s. 11 of the Land Acquisition Act, it is the duty of the Collector to make an award in regard to three matters, *viz*, (1) the area of the land included in the award; (2) the total compensation to be allowed for that land, and (3) the apportionment of that compensation among all the persons interested in that land. Any one piece of land forming part of a whole in which more than one person has an interest for which he can claim compensation, ought not to be made the subject of more than one award. Each award should contain within its four corners the fixing of the value of the land with which it deals, and the apportionment of that value between the various persons interested in that land.

But under proper circumstances, if there are two awards in respect of the same piece of land, they may be read together and treated as one. PRAG NARAIN *v.* COLLECTOR OF AGRA **P. C 449**

———**s. 27 (2)**—*Costs of proceedings in higher Court—Discretion of Court.*

Section 27 (2) of the Land Acquisition Act, is limited to the proceedings in the Court of first instance, and does not apply to proceedings in higher Courts. Costs of such proceedings are in the discretion of those Courts. ASSISTANT COLLECTOR, SOUTH SALSETTE *v.* SAHPURJI CAWASJI *Bom* **173** (a)

Landlord and tenant—*Permanent tenancy—Execution of lease for fixed term after negotiation and intervention—Compromise of doubtful claim—Assertion of hostile title—Acquisition of permanent tenancy.*

A person in possession of land under a tenancy for a fixed term cannot by a mere assertion in a judicial proceeding during the period of tenancy and the lapse of twelve years without that assertion having been successfully challenged obtain a title as a permanent title.

The plaintiff landlord instituted a suit for the ejectment of his tenants on the expiration of the term of the lease *i. e.*, 25 years after its execution in 1897. The lease was the result of negotiations for 8 years and intervention of political authorities. The lease provided for enhanced rent and restriction on cultivation of lands, planting of trees and erection of buildings. The tenants gave up any right to continue as tenants after the expiry of the lease. In the suit the tenants objected to their ejectment on the ground that they were permanent tenants in spite of the lease:

Held, that the defendants were not permanent tenants and the lease was binding on the parties and their family members as a compromise of a doubtful claim. SHANKAR YESU KARGUTKAR *v.* H. H. KHEM SAWANT *Bom.* **801**

Landlord and tenant—contd

———*Permanent tenancy—Question of legal inference from proved facts—Weight of circumstances —Facts must be taken as a whole—Purpose of tenancy, prior transfers, etc.*

The question whether a tenancy is permanent is not to be treated as itself a mere question of fact though the actual findings of fact are binding upon the High Court in second appeal.

In considering whether the proper legal inference from the facts proved is that the tenancy was a permanent one, it is necessary to bear in mind two considerations. The first is that the legal inference of permanency is to be drawn from the ascertained facts taken as a whole. The second is that even although there be a considerable number of facts which point to the tenancy having a permanent character, the effect of these facts as evidence may be entirely destroyed by a single piece of negative evidence.

Upon the question whether a tenancy is permanent or not the law of India attaches a good deal of importance to the question whether the tenancy was for residential purposes.

Prior to the Transfer of Property Act a tenancy which was not permanent was not transferable, and the fact that the transfer was recognized by the landlord without any claim being made to require the transferee to make terms with him for a new tenancy points very firmly in favour of a permanent right.

A statement in the rent receipts that the rents are paid for certain specified months or for a certain number of months is neutral A tenant taking such a receipt cannot be held to have no higher right than a monthly tenant

[Their Lordships held on all the circumstances that the tenancy was a permanent one]. DEBENDRA NATH DHANG *v.* PASHUPATI NATH DEB *Cal* **889**

———*Suit for rent—Tenant denying possession under lease—Onus of proof—Possession, nature of —Tenant's partial possession—Decree for proportionate rent—Point of proportionate rent raised for first time before Privy Council—Practice.*

In a suit for rent where the tenant denies that he has ever got possession of the property leased, it is for the landlord to prove that he has discharged his obligation to put the tenant in possession before he can enforce the tenant to pay rent. But the onus would be primarily on the tenant where the

Landlord and tenant—concld.

tenant has already paid the rent under the lease or where the tenant claims that certain properties of which he had not got possession were within the properties let which the landlord denied.

To succeed in a suit for rent the landlord must not only show that the tenant is in possession of the subject of the lease, but that such possession was attributable to the lease, or might be so

Where it is proved that the tenant obtained possession of part of the properties under the lease the Court should give a decree for rent subject to an abatement in respect of properties of which the possession is not given.

[Their Lordships of the Privy Council allowed the point of proportionate decree for rent to be raised for the first time before their Lordships] JOGESH CHANDRA ROY *v* EMDAD MEAH P. C 398

———*Tenancy for one year—Position of tenant after one year—Notice to quit, necessity of.*

There is no presumption that a sub-tenancy for a single year continued after that year had expired, and the tenant, after the end of the year, is not entitled to any notice to quit. GULAB CHAND *v.* HARBHAGAT *Nag.* 884

Lease—*Duration—Lease for residential purposes, whether terminates on death of lessee.*

Where a lease is given for residential purposes, in the absence of an intention to the contrary, the leasehold interest must be regarded as heritable and the lease does not terminate on the death of the lessee. DIGAMBAR DAS *v.* BEPIN BEHARI *Cal.* 607

Legal Practitioner. *See* TRANSFER OF PROPERTY ACT, 1882, s. 130 833

———*Misconduct—Enquiry should not be started without grave consideration.*

It is right and proper that all judicial officers high or low should keep a vigilant eye on the conduct of legal practitioners, of whatever status, who are all ministers of the Court and should in proper cases institute inquiries under the Legal Practitioners Act or make complaints under the Bar Councils Act according to the status of the legal practitioner concerned, but legal practitioners are one and all of whatever status, entitled also to the protection of the Court, and inquiries should not be instituted or complaints made without having given very grave consideration to the reasonable probability of the case against the legal practitioner being well founded. Permanent and undeserved harm may be caused to the reputation of any legal practitioner against whom ill-considered proceedings are taken. SHANKAR LAL, *In the matter of* *All* 287

Legal Practitioners Act (XVIII of 1879), s. 36—*Tout—Resolution of Bar Association based on repute—Admissibility—Evidentiary value—Revision—Powers of High Court.*

If a resolution of a Bar Association declaring a person to be a tout is based on general repute the Court may attach less weight to it, but such a resolution is not legally inadmissible in evidence and can be taken into consideration by the Court.

The High Court, in the exercise of its powers of superintendence, can revise an order passed by a Subordinate Officer if the order is against natural justice. RAM PHAL *v.* EMPEROR *All.* 374

Legal representatives—*Nature of liability.*

One cannot be personally liable for the debts of a deceased person; the liability can be placed only on the estate of the deceased. BAI MANI *v.* USAFALI BHUDAR *Bom.* 173 (*b*)

Letters Patent (Bombay), cl. 39. *See* CIVIL PROCEDURE CODE, 1908, s. 109 183

Letters Patent (Cal), cls 24, 29—*Crown Side Rules Chap. XXXVII, r. 2—Offence committed outside British India—Complaint before High Court, competency of—Jurisdiction of Appellate Side—Jurisdiction of Original Side over Europeans*

The petitioners complained to the High Court against certain Police Officers of British India in respect of certain acts done by them in the French territory of Chandernagore The petitioners did not obtain the certificate of the Political Agent or Local Government or sanction under s. 197, Criminal Procedure Code:

Held, (*i*) that neither the Extradition Act nor the British Foreign Jurisdiction Act had any application to the case;

(*ii*) that neither cl. 24 nor cl. 29 of the Letters Patent, Calcutta, had any application to the case and the High Court in its appellate side had no jurisdiction to entertain the application;

(*iii*) that so far as the Indian subjects complained against were concerned, they could not be proceeded against without the certificate of the Political Agent, or the sanction of the Government;

(*iv*) that as regards the Europeans who were resident within the ordinary original jurisdiction, if any application lay at all, it must be made on the Original Side. SASHADHAR *v.* CHARLES TEGART *Cal.* 598

Life Insurance. *See* INCOME TAX ACT, 1922, s. 34 725

Limitation.

See HINDU LAW 43

See SURETY 629

Limitation Act (IX of 1908), s. 4—*Presidency Towns Insolvency Act (III of 1909), s. 46 (3)—Limitation expiring on holiday—Adjudication of debtor on re-opening day—Whether debt provable without filing suit.*

Where the period of limitation for a suit to recover a debt expires on a holiday and the judgment-debtor is adjudicated an insolvent on the next re-opening day, the debt can be proved in the insolvency. It is not necessary for the creditor to file a suit on the re-opening day for keeping the debt alive. FATIMA BI *v.* NAGOORKHAN *Mad.* 822

———**s. 5**—*Limitation for filing appeal—Allegation as to misreading of letter of Counsel's clerk—Non-production of letter—Delay, whether can be excused.*

Where the period of limitation for filing an appeal expired on the 9th December, 1931, but the appeal was filed on the 19th December, 1931, and s. 5 of the Limitation Act was called in aid on the ground that the appellant had made a mistake in reading the date in the letter sent to him by his Counsel's clerk and the letter itself was not produced:

Held, that under the circumstances of the case the appellant had not made out sufficient cause for the delay in filing the appeal. MOHAMMAD RAZA *v.* GANGA DEVI *Oudh* 838

———**ss. 6, 7**—*Court of Wards Act (IX of 1912), s 6 (a)—Disqualification under Court of Wards Act—Whether extends limitation—Suit by reversioner—Accrual of cause of action.*

The Limitation Act does not touch disqualification under s. 6 (*a*), Court of Wards Act; and a disqualified proprietor is not exempted from suing so long as the property remains in the hands of the Court of Wards. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* 642

———**s 19**—*'Acknowledgment', essentials of—Mere statement of existence of earlier mortgage*

deed, effect of—Civil Procedure Code (Act V of 1908), O. XXI, r. 66.

Where a second mortgagee who had obtained a decree on his mortgage stated in the verified statement accompanying an application for sale of the property under O. XXI, r. 66, Civil Procedure Code, that upon an examination of the Registration Office he found that there was a mortgage-deed of the property of which the sale proclamation was to issue which had been registered on a certain date (which was prior to the date of his mortgage):

Held, that this did not amount to an acknowledgment of any liability affixed to the property or personal under the earlier mortgage and did not give a fresh starting period for a suit on the earlier mortgage. NET RAM *v* ROSHAN I AL *All.* 624

——— **s. 19, Sch. I, Arts. 142, 144**—*Discontinuance of possession — Possession not resumed — Article applicable.*

A proprietor to whom the estate had been released and made over under the Chota Nagpur Encumbered Estates Act, made a gift of a portion of the estate to his wife in 1909 without the sanction of the Commissioner and delivered possession to her. In 1916 the wife filed a petition to the Commissioner referring to the gift and requesting that the Commissioner may be pleased to sanction the gift or order a fresh grant on the same terms to be executed. The donor died in 1924 and his grandson filed a suit for possession in 1924 against the widow and her transferees:

Held, (*i*) that the suit was governed by Art. 142 and not 144 of Sch. I, of the Limitation Act;

(*ii*) that the petition filed by the wife contained a clear acknowledgment of the title of her husband within the meaning of s. 19, Limitation Act;

(*iii*) that the petition did not declare any right in favour of the husband and was not compulsorily registrable under s. 17 (1), Registration Act. BHAGESHWARI CHARAN SINGH *v.* JAGARNATH KUARI P. C. 798

——— **Sch. I, Arts. 36, 48 and 49**—*Attachment of moveables—Removal by third person—Suit by attaching creditor—Limitation—Article applicable.*

A suit by an attaching creditor against a third person who has removed and misappropriated the attached moveables in collusion with the debtor is governed not by Art. 48 or Art. 49 of the Limitation Act but by Art. 36. Articles 48 and 49 are intended to apply only to cases where the plaintiff had a right to possession of the moveable property concerned. KRIPA RAM *v.* KUNWAR BAHADUR *All.* 809

——— **Arts. 44, 144**—*Suit for possession by minor on attaining majority against transferee from guardian—Limitation.*

A suit for possession by a minor on attaining majority against the transferee from the guardian where the latter had obtained permission from the District Judge to effect the transfer on the ground of fraud, or misrepresentation is governed by Art. 44 and not by Art. 144, Limitation Act. RAM CHARRITTER MISIR *v.* SURAJ TELI *All.* 71

——— **Arts. 48 and 49.** *See* LIMITATION ACT, 1908, SCH. I, ART. 36 809

——— **Arts. 62, 116**—*Suit to enforce covenant for indemnity in mortgage-deed—Article applicable—Cause of action.*

Where a mortgage-deed contained a provision that if in consequence of a dispute raised by a third person any loss is occasioned to the mortgagee the person and other property of the executant will be liable to make good the loss and a third person having obtained a declaratory decree that the property could not be sold in execution of the decree obtained upon the mortgage, the mortgagee instituted a suit for breach of the covenant of indemnity contained in the mortgage:

Held, that the suit was not governed by Art. 62 but by Art. 116 of the Limitation Act and the cause of action arose when it was declared that the plaintiff was not entitled to have the house sold in execution of his decree.

The fact that a consent decree had been passed on a mortgage-deed cannot have the effect of making a covenant for indemnity contained in the deed inoperative. ZIA UDDIN AHMAD KHAN *v* AKBAR ALI *All* 829

——— **Sch. I, Arts. 65, 83**—*Commission agent—Suit against principal to recover loss—Limitation—Article applicable—Cause of action—Art. 83, scope of—Cross-contracts—Cause of action, when arises.*

A suit by a commission agent to recover loss on the transactions entered into on behalf of his constituents is governed by Art. 83 of the Limitation Act. Article 65 applies only where there is an agreement between the parties to pay the loss immediately on its being ascertained, and in the absence of any specified time or specified contingency, that Article would not apply. Under Art. 83 time begins to run when plaintiff is actually indemnified.

The contract to indemnify within Art. 83 of the Limitation Act need not be by express stipulation, and may be either imposed by Statute or implied or inferred by virtue of the jural relations of the parties.

When a commission agent allocates the cross-contracts to himself it might be said that he is damnified on the day when the cross-contracts were entered into. If, on the other hand, he enters into cross-contracts with others, it cannot be said that the loss has necessarily occurred to the commission agent on the day on which such cross-contracts were entered into. HARAKCHAND *v.* SUMATILAL *Bom.* 481

——— **Arts. 97, 116**—*Suit for damages for breach of covenant of title—Limitation—Starting point—Date of sale or date of dispossession.*

Under Art. 116 of Sch. I of the Limitation Act, in the case of a suit for damages for breach of covenant of title contained in a registered deed, where the vendee has been put in possession of the property by the vendor and the sale is void *ab initio* as against the rightful owner, limitation begins to run not from the date of sale but from the time the vendee is dispossessed by the rightful owner.

Per *Jackson, J. C.*—The expression "covenant for title" does not, as is too often assumed, mean merely covenant for right to convey but includes covenant for quiet enjoyment. KASHIRAO *v.* ZABU *Nag.* 225

——— **Art. 120**—*Suit to set aside alienation—Cause of action when arises.*

The cause of action in a suit to set aside an alienation arises when the alienation is made and not when the alienation becomes known to the plaintiffs. DATTATRAYA PANDURANG GASAVI *v.* LAKSHMAN MAHADEO PAHEKAR *Bom.* 161

——— **Art. 123** — *Applicability — Suit against executor, administrator or person legally charged with duty of distributing estate.*

Article 123, Limitation Act, only applies to a suit brought against an executor or administrator or some

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person legally charged with the duty of distributing the estate. GHULAM MOHAMMAD *v.* GHULAM HUSAIN P.C 454

——— **Sch. I, Art 138.** *See* CIVIL PROCEDURE CODE, 1908, s. 47, O. XXI, R. 15 49

——— ——— **Arts. 142, 144.** *See* LIMITATION ACT, 1903, s. 19 798

——— ——— **Arts. 142, 144,** *application of—Suit for possession by partition by transferee from daughter of her share in her father's estate—Dispossession not alleged—Limitation.*

Article 142, Limitation Act, is restricted to suits which are in terms and substance based on plaintiff's prior possession which he has lost by dispossession or discontinuance of possession A suit for possession by partition by a transferee from a daughter entitled to her share in her father's property where it is not alleged that she was ever dispossessed is not within the ambit of Art. 142 but is governed by Art. 144, Limitation Act. ZAHIDA BEGAM *v* MUMTAZ ALI KHAN *Oudh* 256

——— ——— **Arts. 144, 148** —*Co-owners—Redemption by one co-owner—Suit by others—Article applicable—Adverse possession—Starting point of limitation.*

A co-owner who redeems a mortgage becomes a charge-holder and not a mortgagee and a suit by the other co-owners against him for possession is governed by Art. 144 and not by Art. 148 of the Limitation Act. The possession of the redeeming co-owner does not become adverse to the other co-owners from the date of redemption but becomes adverse only when he does any unequivocal overt act showing his intention to hold adversely to the other co-owners. GANDA RAM *v.* MUNSHI RAM *Lah.* 264

——— ——— **Art 164.** *See* CIVIL PROCEDURE CODE, 1908, O. V, R 20 609

——— ——— **Art. 168.** *See* CIVIL PROCEDURE CODE, 1908, O. XLI, R. 10 (2) 45

Lis Pendens, doctrine. *See* RES JUDICATA 306

Madras District Municipalities Act (V of 1920), s. 45 (1) (c)—*Claim to appear on electoral roll on ground of assessment to tax—Revising authority, enquiry into propriety of assessment*—Certiorari, *writ of—Another remedy open, effect of.*

If a person claims that he has been assessed and that his name should appear on the electoral roll, then it is for the Revising Authority to enquire into that claim, and, if satisfied that the claimant has been assessed, to put his name on the roll. On the other hand, if an objection is made that a person whose name is included in the roll is not an assessee then all that the Revising Authority can enquire into is the fact whether he has been assessed The question whether the assessee has been illegally or improperly assessed is a matter which does not lie within the scope of the Revising Authority's enquiry.

Where a person has another remedy open to him he can not come to the High Court by way of *certiorari. In re* SOMASUNDARA MUDALIAR *Mad.* 319

——— **s. 80**—*Profession tax, levying of—Notification specifying rate, necessity of.*

A Municipality has no jurisdiction to levy profession tax under s 80, District Municipalities Act unless a notification specifying the rate at which the tax will be levied has been published before levying it MUNICIPAL COUNCIL, CONJEEVARAM *v* KACHI MUNUSAMI MUDALIAR *Mad.* 346 (*a*)

Madras District Municipalities Act—concld.

——— **s. 92**—*Benefit society—Assessment to company's tax—Contributions of members, whether capital—'Income', 'capital' 'paid-up capital,' meanings of.*

Where an association formed for the purpose of gathering recruits for estates and contributed to by its members who paid a subscription on a fixed scale and a capitation fee for each recruiter and each recruit, was assessed to company's tax under s. 92, of the Madras District Municipalities Act:

Held, that there was a distinct difference between 'income' and 'capital', that the contributions of the members of the association were income and not capital and as the association had no 'paid-up capital' within the meaning of s. 92 of the Madras District Municipalities Act, it could not be assessed to company's tax under that section MUNICIPAL COUNCIL OF VIZAGAPATAM *v.* TEA DISTRICTS LABOUR ASSOCIATION *Mad.* 201

Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21, *scope of—Madras Proprietary Estates Village Service Act (II of 1894), ss. 10, 11, scope of*—Karnam—*Appointment by proprietor—Revenue Officer cancelling such appointment and making new one—Suit for declaration that order of Revenue Officer is* ultra vires, *competency of—Civil Courts, jurisdiction of.*

Section 21 of the Madras Hereditary Village Offices Act takes away the jurisdiction of the Civil Court only in cases in which the jurisdiction is conferred on the Revenue Courts by s. 13 of the Act. Where the case of the plaintiff is that he has been validly appointed as *karnam* by the proprietor, that he is holding the office and discharging its duties and that the appointment of the defendant by the Revenue Divisional Officer in cancellation of his own appointment is null and void, the suit is cognisable by the Civil Court.

Whether the plaintiff is the next heir in order of succession or not, if he is in possession of the office and is discharging its duties, there is sufficient legal character within the meaning of s. 42, Specific Relief Act, to sustain an action for declaration that he was validly appointed *Karnam* and that cancellation of his appointment by the Revenue Officer concerned is null and void.

Section 11 (2) Madras Proprietary Estates Village Service Act confers powers on the Divisional Officer to appoint another individual to the office in cases where a proprietor who has the right to appoint omits to do so within the statutory period or if the person again appointed by the proprietor is also disqualified under s. 10 (1). Where action is taken by the Revenue Officer under s. 11 (1) the right of appointment is conferred on the Revenue Divisional Officer only in respect of cases where the nominee of the proprietor is disqualified under s. 10 (1) but does not extend to cases where the nominee is not in fact the nearer heir to the last holder of the office, that is, the cases where the prorprietor's appointment contravenes the provisions of s. 10 (2). Where the plaintiff does not suffer from any of the heads of disqualifications referred to in s. 10 (1) the Divisional Revenue Officer has no jurisdiction to set aside the order of the proprietor.

Where the Divisional Officer makes an appointment after taking action under s. 11 sub-s. (1), the sub-section should be understood as confining the right of appeal to cases where the appointment is disallowed by the Revenue Divisional Officer on the

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ground that the proprietor has contravened the provisions of s. 10 (1). This sub-section does not bar a suit by an aggrieved party from the order of the Divisional Officer's order. VENKATARAGHAVAIH *v.* CHENCHU SUBBAIAH *Mad.* **38**

Madras Hindu Religious Endowments Act (II of 1927), s. 78—Ex parte *order for delivery—Objection by aggrieved party—Power of Court to reconsider its order—Inherent powers.*

Where an order is passed *ex parte* by the Court under s. 78 of the Madras Hindu Religious Endowments Act, 1927, directing delivery of some trust property and it is objected to by a person who is prejudicially affected thereby, the Court can reconsider the *ex parte* order, inasmuch as such an order carries with it an implication that it will be subject to any objections to which the act of delivery may give rise.

In a proceeding under s. 78 of the said Act the Court acts not merely administratively but judicially, and on cause being shown, may refuse to enforce the Board's order. GURUVAMMAL *v.* ARUMUGA PADAYACHI *Mad* **769**

Madras Irrigation Cess Act (VII of 1865), s. 1—*'Belongs', meaning of—Riparian owner taking water from Government stream—Liability to pay cess—Rights of riparian owners.*

A riparian owner is not liable to pay water-cess to Government for using water of a stream belonging to the Government, land on one side of which belongs to him, as he takes it in respect of a natural, or of an easement, right.

A river 'belongs' to the Government within the meaning s. 1, of the Madras Irrigation Cess Act, 1865, when the *solum* of the stream belongs to the Government, which happens when the Government is the proprietor of lands abutting on the river on both sides or when the river is tidal and navigable.

A riparian owner is a person who owns land abutting on a stream and who as such has a certain right to take water from the stream. His right to the use of the stream does not depend upon the ownership of the soil of the stream and he can take water first of all for domestic use and then for other uses connected with the land of which irrigation of the lands which form the property is one The right is a natural right and not in the strict sense of the term an easement, though in many cases it has been called an easement. In particular it is not capable of being lost *non utendo* and the maxim *tantum prescriptum quantum possessum* has no application. SECRETARY OF STATE *v.* SANNIDHIRAJU **P C 413**

Madras Local Boards Act (XIV of 1920 as amended by Act XI of 1930), ss. 166 (1), 207, 223—*Plying motor bus for hire without licence—Complaint—Three months' period, computation of.*

If a person does an act for which a licence is required, and fails to obtain a licence, he may be prosecuted within three months of the expiry of the period for which the licence, if granted, would have been current. The period of three months referred to in s. 223, Madras Local Boards Act, is not, therefore, to be reckoned from the commencement of the offence where the offence is a continuing one as in the case of plying without licence a motor car. PRESIDENT, DISTRICT BOARD TANJORE *v.* ADAM GHANNI ROWTHER *Mad.* **781** (*b*)

Madras Proprietary Estates Village Service Act (II of 1894), ss. 10, 11, *See* MADRAS HEREDITARY VILLAGE OFFICES ACT, 1895, s. 13 **38**

Malabar Law *See* CONTRACT ACT, 1872, s. 202 **776**

——— *Alienation—Family karar—Alienation by karnavan in excess of powers—Amount utilised for benefit of family—Alienee's right to refund of consideration—Contract Act (IX of 1872), ss. 64 65—Principal of restitution.*

The *karanavan* of a Nambudiri *illom* executed a *kanom* in respect of the *illom* properties It was found that the amount was borrowed to meet the expenses of the marriage expenses of a female member of the *illom* and that the sum was in fact utilised in connection with such expenses. A suit was instituted by a junior member to set aside the *kanom* on the ground that there was a *karar* to which the *karanavan* (who was then a junior member) was a party under which no debts could be incurred except with the consent of all the adult members of the *illom* for the time being:

Held, that, granting that the transaction as a *kanom* was not binding on the *illom*, as the money had been utilised for the benefit of the *illom* and every member of the *illom* including the plaintiff had the benefit of that money, the *kanom* could be set aside only on the condition that the *illom* or its *karanavan* for the time being should pay the *kanomdar* the amount borrowed from him with interest

The principle on which ss. 64 and 65, Contract Act, rest is not confined to cases expressly included in either of the sections. MUNDAKATH MATHU *v.* CHALORA ILLATH VISHNU NAMBUDRIPAD *Mad.* **350**

Malicious prosecution—*Essentials of action—Matters to be proved—Discharge, effect of—Burden of proof of innocence—Malice, necessity of—Measure of damages—Costs of defence—Danger to liberty—Witnesses, liability of.*

In a suit for damages for malicious prosecution the discharge of the accused cannot by itself be considered as evidence of the groundlessness of the prosecution, but when the accused is discharged and he brings a suit for damages no obligation is imposed on him to prove affirmatively that he was innocent.

Malice is a necessary ingredient in a suit for damages for malicious prosecution.

Witnesses cannot be sued for damages in respect of evidence given by them in a judicial proceeding.

In a suit for damages for malicious prosecution the plaintiff is entitled to legitimate expenses incurred in defending himself in the criminal Court.

The Court in a suit for damages for malicious prosecution can take into consideration not only the injury to the reputation of the plaintiff but also the danger to liberty. FAKIR MUHAMMAD *v.* FAKIR MUHAMMAD NANJI *Sind* **757**

———*'Prosecution'—Dismissal of complaint without issuing process—Suit for damages, whether lies—Defamation—Absolute privilege—Criminal complaint.*

A suit for damages for malicious prosecution will not lie where no process has been issued by the Magistrate for the attendance of the person accused.

In India damage to a man's fame is not sufficient for an action for malicious prosecution.

A criminal complaint is absolutely privileged so far as the Civil Court is concerned and no suit for damages lies for defamation on account of statements of a defamatory character contained in a complaint made to a Magistrate. ALI MOHAMED *v.* ZAKAR ALI *All.* **369**

Medical examination. *See* CIVIL PROCEDURE CODE, 1908, s. 104 367

Mesne Profits.

See COURT FEES ACT, 1870, SCH. I, ART. 1 77

See VENDOR AND PURCHASER 108

Minor—*Guardian investing moneys in his own firm —Insolvency of firm—Liability of guardian's estate.*

Where the guardian of the property of a minor deposited the minor's money in his own firm and omitted to give proper accounts and subsequently, after the death of the guardian, the firm was adjudicated insolvent owing to the speculation of other persons:

Held, that as the omission of the guardian to invest the minor's property in trustee securities as directed by s. 20, Trusts Act, 1882, and the omission to file proper accounts was the main cause of the loss caused to the minor, both the guardian and his surety were liable for the loss sustained by the minor. RADHAKISHEN *v.* SECRETARY OF STATE *Sind* 517

Mortgage. *See* REGULATION ACT, 1806 69

———*Interest—Presumptions as to rate—No provision as to rate of interest—Entire sum payable on default—Reasonable rate.*

If a mortgage-deed contains stipulations regarding the payment of interest till the date fixed for payment, a presumption arises that the parties intended that interest should be paid after the date and where no inference regarding the rates can be drawn the presumption is that it was intended to pay interest at a reasonable rate

A mortgage-deed in which prospective interest had been added as *sawai* and which provided for payment in instalments contained a clause that if instalments were defaulted interest at 2 per cent. per mensem compound was to be paid till satisfaction There was, however, a further clause that, if two instalments were defaulted, the whole amount should become due. The deed made no provision for interest on the whole sum if it became due:

Held, (*i*) that as there was no precise definition of the rate of interest prior to default, it was not possible to draw an inference that the parties intended that after the whole amount became due, interest should be paid at the rate which can be deduced from the arrangement regarding addition of *sawai* and payment by instalment;

(*ii*) that as the terms of the deed did not indicate what rate of interest should be paid after the entire amount became due the plaintiff was only entitled to a reasonable rate of interest. PARASHRAM *v.* KRISHNA *Nag.* 887

———*Merger—Intention to keep alive—Express undertaking by purchaser to discharge subsequent mortgage, effect of.*

Where a transferee of immoveable property, having a prior lien upon the property, purchases the property with a distinct stipulation with his vendor to discharge with the purchase-money left in deposit with him his own lien and that of another mortgagee of date subsequent to his own and the transferee satisfies his own encumbrance but fails to discharge the other incumbrance he cannot be allowed in equity to use his paid up mortgage or charge as a shield against the latter BALBHADDAR *v.* SHEO MANGAL *All.* 824

———*Mortgage-deed providing for payment of interest to mortgagee from pocket of mortgagor till redemption from prior mortgagee—Interest, whether charge on property—Mortgagee entitled to mutation costs—Costs of possession, whether included.*

Where a mortgage-deed provides that till redemption is made from the prior mortgagee and until the subsequent mortgagee does not take possession the mortgagor shall pay interest to him from his own pocket six monthly, the liability of the mortgagor to pay interest is personal and no charge on the mortgaged property is created so long as the property is not redeemed from the prior mortgagee and consequently possession is not delivered to the subsequent mortgagee. The charge becomes operative from the date when the mortgagor redeems the mortgaged property from the hands of the prior mortgagee but does not deliver possession of the same to the mortgagor. In other words the charge accrues from the time when the subsequent mortgagee becomes entitled to enter into possession.

When according to the mortgage-deed the mortgagee is entitled to the costs of the mutation proceedings, such costs must be decreed to include the costs of obtaining possession by aid of the Court previous to the mutation of names. HASHMAT ALI *v.* GOBARDHAN DASS *Oudh* 332

———*Mortgagee bound to pay particular sum as revenue—Enhancement of revenue—Liability of mortgagee.*

Where according to the terms of the mortgage-deed the mortgagee is to pay the mortgagor "at the rate of Rs 6 being the proportionate" Government Revenue for the land and the assessment is enhanced subsequently, the burden of enhancement, in the absence of a contract to the contrary, falls on the mortgagee inasmuch as the bond defines clearly what the Rs 6 signifies. CHANGAT CHATHU NAMBIAR *v.* CHANGAT ODAYOTH KUNHIRAMAN NAMBIAR *Mad* 337 (*b*)

———*Possession—Failure to deliver possession—Right to damages—Limitation.*

Where a mortgagor is guilty of the breach of the covenant to deliver possession, the mortgagee is entitled to fall back on the claim for interest whether it is described as interest or described as damages for breach of the covenant to deliver possession. It cannot be said that it is the business of the mortgagee to get into possession and if he does not get possession he is not entitled to interest or damages.

In such a case claim for damages remains unbarred so long as the claim for the principal is also unbarred. SUBRAMANIA AIYAR *v.* PANCHANADA ODAYAR *Mad.* 785

———*Release—Mortgagor mortgaging two houses—Suit for sale on basis of mortgage—Exemption of one house by statement, whether release—Mortgagee's right to claim entire money from one house—Transfer of Property Act (IV of 1882), s 82.*

One *C* after mortgaging two houses, house No. 1 and house No. 2, in favour of the plaintiff sold house No. 1 to defendant No. 2. Later on the mortgagee sued for sale of both houses on the foot of the mortgage. After written statements had been filed the mortgagee's Counsel made a statement admitting that the house No 2 did not belong to the mortgagor in the mortgage in suit and that it belonged to one *K* predecessor-in-interest of defendant No 3 who had mortgaged it to defendant No. 4 and that it might be excluded from claim. In consequence of this statement Counsel for defendant No 4 remitted costs:

Held, that the action of the mortgagee did not amount to a release and he could ask that his entire claim under the mortgage be satisfied out of house No. 1.

Mortgage—concld.

Held, further, that the owner of house No. 1 could file a suit for contribution directed against house No 2 under s. 82, Transfer of Property Act. BAL KISHAN *v.* BUNDIA *All.* **567**

——— *Usufructuary mortgage — Mortgagee deprived of possession before expiry of period—Right to interest till date of redemption—Interest, whether chargeable on property.*

Where a usufructuary mortgagee who is entitled under the deed of mortgage to enjoy the mortgaged property in lieu of interest for a period is deprived of his possession without payment of the principal, he is entitled to interest even subsequent to the period fixed for redemption and the same can be made a charge on the mortgaged property. GURUSAMI THEVAN *v* GANAPATHI CHETTI *Mad.* **783**

Muhammadan Law— Divorce—*Words implying divorce—Express words for effecting divorce—* Talak, *what is.*

The words 'I give up all relations and would have no connection of any sort" addressed by a Muhammadan husband to his wife are not express within the meaning of the Hanafi Muhammadan Law to effect a divorce nor are they understood in that law as implying divorce. Among Indian Muhammadans they are frequently used for the purpose of dissociating oneself from the company or the presence of the addressee, of relieving such a person from the obligation of rendering service to the user and also for the purpose of withdrawing restraints from the movements of addressee. The express words for effecting divorce are well known to be *talak* and its grammatical variations. These words are terms of art and the technical meaning which they have acquired by usage is freedom from the bondage of marriage and not from any other bondage. Once they are used they must be given effect to according to their technical import and evidence as to any intention to the contrary is not permissible according to the Hanafi Muhammadan Law. WAJID ALI KHAN *v.* JAFAR HUSAIN KHAN *Oudh* **209**

———**Dower.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 130 **833**

——— *Payments as presents to wife, whether discharge of dower.*

Payments made by a Muhammadan husband to his wife during his lifetime as presents cannot be regarded as payments made towards satisfaction of dower debt. The maxim *'debitor non præsumitur donare"* has no application between husband and wife. MOHAMMAD SADIQ *v* FAKER JAHAN **P. C. 385**

——— *Widow's right to retain property until dower debt is satisfied—Husband's creditor's right to proceed against such property.*

Under Muhammadan Law a widow's right to retain her husband's property as a creditor for her dower until her debt is satisfied is a personal right and not an interest in the property. Therefore, a creditor who has got a decree against her and other heirs of her husband in respect of his debts is entitled to have the property attached and sold in execution of his decree subject to her right of retention until her dower debt has been satisfied out of the income of the property or otherwise. KALEKHAN *v.* HOORA *Nag.* **239**

———**Gift**—*Delivery of possession—Necessity of.*

In order to constitute a valid gift under Muhammadan Law it is essential to prove the taking possession of the subject-matter of the gift by the donee and that the donor had a *bona fide* intention of divesting himself *in præsenti* of his proprietary title in the property gifted. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

Muhammadan Law—contd.

———**Gift**—*Husband's gift to wife or by father to son—Delivery of possession, necessity of.*

In the case of a gift by a husband to his wife Muhammadan Law does not require actual vacation by the husband and actual taking of separate possession by the wife of the property gifted. A declaration made by the husband followed by the handing over of the deed are amply sufficient to establish a transfer of possession.

In the case of a gift by a Muhammadan father to his infant child no transfer of possession is required; it is only necessary to establish a *bona fide* intention to give. MOHAMMAD SADIQ *v.* FAKR JAHAN **P. C. 385**

———**Guardianship**—*Mother—Right to refer to arbitration dispute relating to immovable property of minor children—Family arrangement.*

Under the Muhammadan Law the mother as the *de facto* guardian of her minor children is not competent to enter on their behalf into an agreement to refer to arbitration disputes relating to the distribution of their father's estate so as to make the award binding upon them as to their share in such immovable property. She is equally incompetent to agree to the disposal of her infant children's share in any part of the immovable property of their father by adopting an award made on a reference made by her and by calling the transaction a family arrangement. MOHAMMAD EJAZ HUSAIN *v.* MOHAMMAD IFTIKHAR HUSAIN **P. C. 97**

———**Inheritance**—*Surrender by heirs in exchange for annuities—Interest in whole estate, if enures for benefit of other heirs.*

Where the widow and daughters of a deceased Muhammadan have surrendered their rights to a certain property in exchange for certain annuities charged upon the whole property, their interests in the whole property enure for the benefit of the other heirs irrespective of their rights *inter se*, and the whole property, subject to the annuities and the debts, become divisible between the remaining heirs. GHULAM MOHAMMAD *v.* GHULAM HUSAIN **P. C. 454**

——— **Succession**—*Custom governing ancestral estate— Presumption regarding self-acquisitions— Rebuttal.*

In the case of a Muhammadan family if a custom governs the succession to the ancestral estate the presumption is that it attaches also to the personal acquisitions of the last owner left by him on his death and it is for the person who asserts that these properties follow a line of devolution different from that of the *taluqa* to establish it. But where a family custom in respect of succession to *taluqdari* estate is of recent origin and instances of succession to personal acquisitions by Muhammadan Law are established, such presumption is sufficiently rebutted. MOHAMMAD SADIQ *v* FAKR JAHAN **P. C. 385**

——— **Wakf**, *essentials of—Constructions of grant —Valid objects—Some of objects invalid, effect of* —Sajjadanashin—*Ground for removal*—Sajjadanashin *and* mutawalli, *distinction between—Court's powers to separate offices of* mutawalli *and* sajjadanashin.

In determining whether or not a particular grant is a *wakf* it is not of much importance to see in whose name the grant is made. The crucial question is always for what purpose the grant is made.

In order to interpret a document and to determine whether or not the property granted to an individual by name is *wakf* it is necessary to refer to the customary use of the income of the property.

The term '*wakf*' literally means detention or stoppage and the legal meaning of it according to the Hanafi School of Muhammadan Law is the extinction of the proprietor's ownership in the thing dedicated and its detention in the implied ownership of God in such a manner that the profits may revert to and be applied for the benefit of mankind.

The requirement of a valid *wakf* is a substantial dedication of the usufruct of the property to charitable, religious or good purposes within the meaning of Muhammadan Law, no particular form is necessary for creating a *wakf*. A *wakf* may be construed from Royal grants of property made in favour of individual persons as long as it is for a perpetual religious charitable or good purposes. The dedicator need not use the word *wakf* at all or may not formally transfer the property to the ownership of God and the appropriation of property to pious and charitable purposes would suffice to constitute a *wakf*. A grant to an individual heritable by his descendants may be a *wakf*. If there is a substantial dedication to a valid object it will not cease to be a *wakf* because some objects are mentioned which are not legal objects of *wakf*. The *wakf* will be valid and the whole income will be devoted to for the valid purposes. The expenses over the drum-beaters, casual visitors and maintenance of the *sajjadanashin* of a *khankah* and his heirs are objects of a valid trust. The essentials of a valid *wakf* are: (1) an appropriator must destine the ultimate application of the income to the objects not liable to become extinct; (2) the appropriation must be at once complete; (3) there must be no stipulation in the *wakf* for sale of property and expenditure of the price on the appropriator's necessities; (4) perpetuity must be a necessary condition.

A present to a dead man cannot by any stretch of imagination be construed to mean a personal grant to the successor of the saint.

A *khankah* is a monastery or religious institution where *darveshes* and seekers of truth congregate for religious instructions and devotional exercises. It is generally founded by a *darvesh* or a *sufi* professing esoteric belief, whose teachings and personal sanctity have attracted disciples whom he initiates into his doctrine. A *khankah* is usually under the governance of a *sajjadanashin* who not only acts as *mutawalli* or manager of the institution and of the adjoining mosques, but also as the spiritual preceptor of the adherents. The founder is generally the first *sajjadanashin* and after his death the spiritual line (*sil silla*) is extended by succession of *sajjadanashins*. Generally members of his family chosen by him or according to the directions given by him in his lifetime or selected by the *faqirs* and *murids* are formally installed.

An assignment of income does not always mean an assignment of corpus All depends upon the terms of the grant and its construction.

Though the partition of the endowment itself is illegal, distribution of profits arising from it is legal.

The usage can be taken into consideration in deciding whether there is a trust.

A trust in the sense of an obligation attached to the ownership of property is known to and recognised by Muhammadan Law.

The distinction between an English trust for charitable and religious purposes and a *wakf* under Muhammadan Law is more historical than legal. Different systems of law have different explanations as to the legal ownership of a property dedicated for public, religious or charitable purposes. English law recognises two estates one legal and another equitable. Imam Abu Haneefa holds the ownership continuing in the appropriator, his two disciples hold the ownership to be in God, *Shias* in the beneficiaries and the Hindus in the idol. But whatever may be the difference in the conception of the legal ownership of the property there is no difference whatsoever that the beneficiaries have a right in the property which the Courts will enforce The distinction of legal and equitable estate is of no consequence. The same Courts exercise both jurisdictions. The difference in the law of trust and *wakf* as to the transferability or otherwise of the property is also due to this difference in the conception of ownership of the property. As under English law the legal ownership is vested in a human being he can transfer it subject to the obligations placed upon it. Under the Muhammadan Law while the ownership is vested in God the *mutawalli* is His manager; he cannot transfer the corpus of the property. A *wakf* in the terms of English Law is a trust and the legal ownership is vested in God and the equitable ownership in the *cesti que* trust, and as nobody can transfer the property vested in God the *wakfs* are not transferable.

A person who himself comes in possession of properties as trustee cannot take up the position that they are his private properties.

A *sajjadanashin* can be removed where a proper case is made out against him for such removal. Cases of mismanagement or in capacity will not ordinarily be sufficient to remove a *sajjadanashin* as distinct from the managership of the property. It must be shown that the man is not only incompetent to manage the property but that he is of such a low morality that his continuance as the superior head of the sacred shrines and institutions is repugnant and undesirable.

Even if the office of the *sajjadanashin* and that of the manager have been held by one and the same person since the creation of the trust, if the Court finds that the present incumbent is unfit to continue as manager though quite worthy to be *sajjadanashin* it is not bound to follow either the terms of the grant, if any, or the usage which has been in force so far.

Courts will not apply the principle governing the case of a *mutawalli* to a *sajjadanashin*. By him the spiritual line of the founder is continued. People become his disciple mostly not so much on account of his personal qualifications but on account of the fact that by becoming his disciple they will connect themselves in a spiritual link with the founder saint.

A *sajjadanashin* is not a *mutawalli* and his powers of expenditure are wide and as long as he keeps up the institution in a fairly decent condition he is not accountable to anybody. SHAH MUHAMMAD KAZIM *v.* ABISAGHIR *Pat.* **417**

——— **Wakf**—Mutawalli—*Appointment by congregation—Validity.*

Under the Muhammadan Law, in the case of an institution confined to a particular locality such as the grave-yard in a *mohalla* the congregations of that locality can appoint a *mutawalli*. DILAWAR HUSAIN *v.* SUBHAN KHAN *Oudh* **241**

——— *Objects—Salary and pension of*

servants—Waqf silent as regards amount payable—Subsequent declaration of amount by waqif—Validity—Power of mutawalli *to reduce amount fixed.*

Under the Muhammadan Law a provision for the salary and pension of servants is a valid object of *waqf*.

If a provision is expressly made in the deed of *waqf* it is not open to the *waqif* to revoke it or to derogate from it, but if he has deliberately deferred making provision on a particular subject to a future date and does make such provision, such provision should be considered to be part and parcel of the deed itself.

A *mutawalli* has no right to interfere with the amount fixed by the *waqif* where the pay or pension of servants is made a valid object of the *wakf*. ABDUL WAHAB *v.* SUGHRA BEGUM *All.* **619**

——— **Will** *in favour of one heir—Minority of other heirs—Consent by guardian, sufficiency of.*

A will made by a Muhammadan in favour of one of his heirs is invalid unless consented to by the other heirs after the testator's death. If the other heirs happen to be minors at the time of the testator's death, consent must be given by them after attaining majority. No validity attaches to a consent given by their guardian during minority, in which case they are free to dispute the validity of the will and to claim their shares according to Muhammadan Law. GHULAM MOHAMMAD *v* GHULAM HUSAIN **P.C 454**

Municipal Corporation—*Taxation—Gas mains laid in streets, whether immoveable property—Liability to be taxed as such—'Immoveable property', 'Buildings', meanings of.*

The term 'buildings' covers constructions such as gas mains laid under public streets, and gas mains so laid must be regarded as immoveable property by their nature in the territory in which they are physically situate and are therefore taxable as immoveable property in the Municipality in which they are laid. MONTREAL LIGHT HEAT & POWER CONSOLIDATED *v.* CITY OF OUTREMONT **P.C. 858**

Mussalman Wakf Act (XLII of 1923), ss. 3, 5, 10—*Failure to submit statement of accounts—Conviction—Denial of* wakf*—Effect of—Jurisdiction of District Judge to impose penalty.*

Mussalman Wakf Act of 1923 is applicable to all instruments other than those to which the Musalman Wakf Validating Act of 1913 applies.

Under the Act of 1923 all that is needed to bring home the offence under s. 10 read with s. 3 is to establish by evidence that the offender is a *mutawalli* in respect of property which is *wakf* within the meaning of Act XLII of 1923, though the *mutawalli* is bound to file a statement only if he has already furnished particulars under s. 3 If the *mutawali* has complied with the provisions of s 3 no question as to whether he denies the *wakf* or admits it can arise because by his conduct in furnishing particulars of the *wakf* property he may be deemed to have admitted the *wakf* and he can be convicted for failure to file statement under s. 5 of the Mussalman Wakf Validating Act of 1923.

The District Judge is the proper authority to impose the penalty provided for by s. 10. It is not necessary to proceed against the *mutawalli* in a regular Criminal Court. NASARULLAH *v.* WAJID ALI *All.* **813**

Mutation—*Effect.*

Mutation does not confer title either under the Oudh Estates Act or under the general law. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

——— *Compromise by mother on behalf of minor without leave of Court—Legality of compromise—Civil Procedure Code (Act V of 1908), O. XXXII, r. 7, application of, to proceedings under Land Revenue Act.*

The provisions of the Code of Civil Procedure do not apply *en bloc* to proceedings in Courts constituted under the Land Revenue Act. Therefore, where a minor is represented in mutation proceedings by his mother who *bona fide* enters into a compromise with the other party without the leave of the Court as required by O XXXII, r. 7 of the Code the compromise is not bad merely for want of such leave. SITAL PRASAD SINGH *v.* SARJU SINGH *Oudh* **254**

Negligence—*Contributory negligence—Apportionment of liability.*

Where the defendant's negligence is the primary and substantial cause of the damage sustained by the plaintiff, he will be responsible for the whole damage, though it may have been increased by the wrongful conduct of a third person or though there may have been negligence on the part of such third person which jointly with the defendant's negligence so caused the damage. The same rule applies where the negligence is that of a person for whom the defendant is liable. RADHA KISHEN *v.* SECRETARY OF STATE *Sind* **517**

——— *Contributory negligence—Level crossing—Gates left open—Collision of car and engine—Liability.*

Where the defendant's negligence is such as invites, as it were, the plaintiff to be less circumspect, the defendant cannot put the blame on the plaintiff, if he happened to be less circumspect than he would otherwise have been

While the plaintiff who was travelling in his motor-car at a speed of about 7 miles an hour arrived near a level crossing, the gates of which were open, a Railway-engine came and collided against the plaintiffs' car and broke it:

Held, in a suit for damages that the plaintiff was not guilty of contributory negligence and was entitled to recover damages. CHAUBEY DAYA SHANKAR *v.* BOMBAY BARODA & CENTRAL INDIA RAILWAY CO. *All.* **380**

——— *Pleadings—New case in appeal—Permissibility.*

In a suit based on negligence the plaintiff is not entitled to throw over the case of negligence which he has alleged and spoken to in evidence and ask the Court of appeal to find negligence established on a quite different *species facti*. RAYMOND LINCOLN *v.* MRS. ALICE POUPINEL DE VALENCE **P.C. 451**

Negotiable Instruments Act (XXVI of 1881), ss. 4, 9, 13—*Debentures issued by Improvement Trust—Forged endorsements—Surrender of old and issue of new debentures—Novation of contract—Holder in due course—Title to new debentures*

One *F* was entrusted by the plaintiffs-appellants with certain debentures for the purpose of collecting on their behalf the interest as it fell due *F* by means of forged endorsements in his own favour pledged those securities with the Alliance Bank of Simla endorsing them over to that Bank to secure his own indebtedness Subsequently the Alliance Bank surrendered these securities to the Improvement Trustees who issued fresh debentures in their place and described the transaction as a renewal of the old debentures. Later on the Alliance Bank under instructions

Negotiable Instruments Act—concld.

from *F* endorsed over the new debentures in favour of the Mercantile Bank, the respondents to whom *F* had transferred his loan account. The plaintiffs-appellants brought a suit for delivery and transfer to them of those instruments by the Mercantile Bank:

Held, (1) that the debentures were promissory notes and were, therefore, negotiable instruments;

(2) that as there was no irregularity in the transfer the appellants were apparently in the position of holders in due course;

(3) that the new debentures issued by the Improvement Trustees were in form and in substance new and independent obligations in substitution for those under the surrendered instruments;

(4) that the appellants did not acquire any title to these new debentures;

(5) that the appellants had no right of action against the Mercantile Bank as the latter were holders in due course of the new debentures. JULIO MASCARENHAS *v.* MERCHATILE BANK OF INDIA LTD. **P. C. 126**

———**s. 79.** *See* USURIOUS LOANS ACT, 1918, s. 2 (3) **78 (1)**

———**s. 131**—*Negligence of collecting Bank, test of.*

Whether or not a collecting Bank is guilty of negligence under s. 131, Negotiable Instruments Act, is a question the determination of which depends upon the particular circumstances of each case. The test of negligence is whether the transaction of paying in any given cheque is so out of the ordinary course that it ought to arouse doubts in the Bankers mind and cause them to make enquiry. J. G. ROBINSON *v.* CENTRAL BANK OF INDIA LTD. *Rang.* **825**

Oaths Act (X of 1873), ss. 8, 9, 10—*Party, meaning of—Authorised agent, whether party—Statement by party to be bound—Effect on other parties*—Mukhtar's *power to bind.*

The word 'party' in s. 9, Oaths Act, includes a duly authorised agent.

Where the terms of a *mukhtarnama* are very wide and give the *mukhtar* authority to make a compromise, confess judgment or make a reference to arbitration, such extensive powers must be deemed sufficiently wide to include authority to take action under ss. 8, 9 and 10 of the Oaths Act.

Statement by a party in pursuance of an agreement made under the Oaths Act, is ordinarily binding only as against the parties who had offered to be so bound, but where the rights and liabilities of certain parties are inseparable and some of them agree to be bound, the agreement is binding on all of them. JASODA *v.* GOPAL *Oudh* **246**

Onus of Proof. *See* LANDLORD AND TENANT **398**

Opium Act (I of 1878), s. 9 (e)—*'Importing' and 'exporting', meanings of — Sending opium from Native State addressed to accused's nominee in British India—Refusal of addressee to accept—Offence, nature of—Place of commission of offence —Opium smuggling—Heavy fines, necessity of.*

The offence of importing opium is an offence constituted by bringing it into the territory in question. It does not matter where it was before, provided it was outside the province. If the goods once come across the border of the territory in question, if they come for and on account of the accused with his consent, the offence of importing is complete. It is not necessary to show that the accused did anything outside the territory.

A, who was a resident of Assam, sent from Cooch Behar a parcel (which was subsequently found to contain opium) addressed to *B* in Assam which *B* was to receive on his behalf. The Post Master getting suspicious requested *B* to take open delivery and on his refusal duly opened the parcel and it was found to contain opium:

Held, (*i*) that *A* was guilty of importing opium in Assam under s. 9, Opium Act, and the offence was entirely committed in Assam

(*ii*) that the offence of possession was not made out as *B* had refused to take possession of the parcel

(*iii*) that the offence was not committed in Cooch Behar at all and s. 188 of the Criminal Procedure Code had, therefore, no application to the case.

The trial Magistrate dealing with cases of opium smuggling should impose heavy penalties in cases where traffic is clearly brought home to the accused. SUPERINTENDENT & REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v* LUDUR CHANDRA DAS *Cal.* **137**

Oudh Estates Act (I of 1869), ss. 3, 22, 29, 31—*Will—Construction—Power to widow to adopt in succession—Life-estate and power to adopt—Widow's power to disclaim—Effect of disclaimer—Adoption of daughters or sister's son—Succession to non-*taluqdari *property, rules governing—Adoption —Ceremonies—Applicability of Hindu Law—Life-estate, whether condition for exercising power to adopt—Effect of adoption—Divesting of estate—Will—Power to make disposition contrary to law.*

A Muhammadan *talukdar* made a will which directed that if no one of his four wives had any issue, then the first wife was to adopt a son within two years of the death of the testator, that the boy to be adopted was to be a Sunni lad under ten years and was not to belong to a particular family; that if the first wife failed to adopt a son within the prescribed period then the second wife was within the space of two years to adopt subject to the "above conditions." If the second wife also failed to adopt then the third was empowered to adopt. If she too failed then the fourth was given power to adopt on the same conditions:

Held, that, on a proper construction of the will, if the first wife died after the death of the testator without making an adoption, then the second wife was at once to come into possession and become entitled to make an adoption within two years of her coming into possession subject to the condition that the boy was a Sunni lad under ten years of age and did not belong to the particular family.

Where a Muhammadan *talukdar* creates under his will a life-estate in favour of his widow with power to adopt, the widow is fully justified in law in refusing the life-estate as well as the power to adopt, and where she so disclaims her right, her estate is lost and the estate of another legatee entitled to succeed under the will is accelerated.

A childless widow of a Muhammadan *talukdar* can make an adoption of her daughter's son or sister's son under the provisions of s. 29, Oudh Estates Act, provided she has no natural son born to her from her husband and provided she has not already adopted a son. The expression "for the purposes of this Act" cannot very well be restricted to mean "only for the purposes of intestacy."

Section 22 of the Oudh Estates Act applies only to an "estate" as defined in the Act; and non-*talukdari* property is not an "estate" within the meaning of the definition given in s. 3. The rule of succession to non-*talukdari* property is governed by s 23 of the Act that is, by ordinary law, modified by custom, if any, proved in the case. Regarding non-*talukdari* prop-

erty the presumption that it is governed by the rule of single heir succession in the case of List No. 2 estate is rebuttable; but there is no presumption that the rule of male lineal primogeniture would govern such non-*talukdari* property in the case of List No 2 estate.

Under s. 29, Oudh Estates Act, the widow of a Muhammadan *talukdar* is allowed to make an adoption only in those cases in which it is permissible for a Hindu to do so. The Oudh Estates Act (1 of 1869) is a purely secular enactment and has nothing to do with the peculiar notions of Hindus and Muhammadans on the subject of adoption. It merely lays down that in those cases in which a Hindu widow could adopt, a Muhammadan widow of a *talukdar* could also do so. It does not touch the question of the qualifications of the boy to be adopted. A childless Hindu widow may, with the authority of her husband, make an adoption and the same power is given to the widow of a Muhammadan *talukdar* by Act I of 1869. A Hindu widow who has a son born to her by her husband cannot legally adopt and similarly a Muhammadan widow if she has a son by her husband could also not adopt under Act I of 1869. Adoption like marriage in Hindu Law, is in the nature of a religious sacrament but no religious ceremony is necessary under Muhammadan Law for the purpose of making an adoption which is unknown to Islamic Law. The only condition of Hindu Law which is imposed upon a widow of a Muhammadan *tatukdar* by Act I of 1869 is that the latter must be a childless widow and authorized by her husband to make an adoption during her widowhood.

Section 29, Oudh Estates Act, confers the power of adoption upon every widow of a Muhammadan *talukdar* and it nowhere lays down that it is necessary for the widow to be in possession for life of the estate of her husband before she can make a valid adoption under the Oudh Estates Act. This does not make the possession of a life-estate by a Hindu widow or a Muhammadan widow the *sine qua non* or a prerequisite condition before she can validly exercise the authority conferred upon her by her deceased husband.

Ordinarily a life-estate vests in the widow of a Hindu or Muhammadan *talukdar* who dies intestate, but where a childless *talukdar* has executed a valid will giving his widow authority to adopt and making his adopted son the absolute owner of the estate the absolute estate vests in the adopted son from the moment he is adopted but enjoyment of it may be postponed or deferred till the termination of the life-estate of the widow.

A testator who is a Muhammadan *talukdar* can confer on any widow of his the power to adopt without conferring on her also a life-estate; and if the testator by his will lays down that on the adoption being effected the adopted son should come into immediate possession of the estate then the life-estate, if any, of the adopted mother would be cut off at once

If the testator is authorized by law to make a testamentary disposition of his property he can exercise that right and legally make a will contrary to the devolution of the estate on intestacy laid down in Act I of 1869, provided his will does not offend against the rule of perpetuity incorporated in that Act. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

———**ss. 8, 10, 32 A**—*Entry of name in lists, effect of—Incorporation of acquired property to property under Act—Will—Non-compliance with provisions of Act, effect of.*

By s. 10 of the Oudh Estates Act the entry of the name of a person in the lists is conclusive evidence that he is a *talukdar* to whom the provisions of the Act apply The effect of the inclusion of his name in the second list is a statutory declaration that the particular estate by family custom devolves upon a single heir.

Apart from the provisions of s. 32-A, Oudh Estates Act, no incorporation of other property to property held under the Act is possible whether by purchase or accretion.

A Will by the *taluqdar* which does not comply with requirements of Oudh Estates Act is not valid in law. MOHAMMAD SADIQ ALI KHAN *v.* FAKR JAHAN BEGAM **P. C. 385**

———**s. 22 (10)**—'Male agnate', *meaning of—Test of determination.*

The meaning of '*male agnate*' in s. 22 (10), Oudh Estates Act, cannot be determined without recourse to the ordinary law which would govern the succession a part from the statute. DULAHIN JADUNATH KUAR *v.* BISHESHAR BAKHSH SINGH **P. C. 747**

———**ss. 22, 29, 31.** *See* OUDH ESTATES ACT, 1869, s. 3 **642**

———**s. 29**—*Muhammadan* Talukdar—*Widow's power to adopt—Adoption after re-marriage—Validity.*

The widow of a Muhammadan *taluqdar* of Oudh has under the terms of s. 29 of the Oudh Estate Act (which confers on her the power to adopt) no power to adopt a son after re-marriage and an adoption made by her after her re-marriage is therefore, invalid. ABDUL HAMID KHAN *v.* SAADAT ALI KHAN **P. C. 745**

Oudh Rent Act (XXII of 1886), ss. 4 (1), 52—*Policy of Act—Relinquishment by tenant without surrender of possession—Ejectment of tenant, suit for.*

A relinquishment in writing without surrender of possession on the part of a tenant does not constitute a sufficient right in the landlord to recover possession of the plots in question by means of a suit in ejectment.

The policy of the Oudh Rent Act is to keep the relationship of landlord and tenant subsisting in spite of either or both of them and it can be terminated only in the manner provided by the Act.

The combined effect of ss. 4 (1) and 52, Oudh Rent Act, is that an effectual ejectment of a tenant can only take place when the procedure with reference thereto as prescribed by the Act has been adopted and this will be so in spite of any agreement between the landlord and the tenant. AMAR NATH SINGH *v.* HAR PRASAD SINGH *Oudh* **333**

Panchnama—Evidentiary value. *See* BOMBAY PREVENTION OF GAMBLING ACT, 1887, s. 40 (*a*) **868**

Pardanashins—*Applicability of rule.*

The rule giving protection to *pardanashins* is not strictly applicable to cases where the *pardanashin* is not a contracting party and the case is one of fraud not undue influence. PURNIMA DEBYA *v.* NAND LAL OJHA *Pat.* **577**

Partition.

See CO-TENANTS **594**

See COURT FEES ACT, 1870, SCH. II, ART. 17 (*vi*) **600**

———*Previous possession to be respected.*

It is a general rule of law that partition should be

made with due regard to the possession of the parties. JAI DAYAL *v.* NARAIN DAS *Lah.* **270** (*b*)

Partition Act (IV of 1893), ss. 2, 3, 4, 6, *scope of—Operation of s. 4, conditions for—Inherent powers of Court in partition cases.*

There is a broad distinction between ss. 2, 3 and 6 of the Partition Act forming a group on the one hand and s. 4 on the other. Section 4 applies to the case of a dwelling house a share of which has been transferred to a stranger and three conditions must be fulfilled before s. 4 comes into operation (1): the suit must relate to a dwelling house of an undivided family, (2) some share in it must have been transferred to the stranger and (3) the stranger transferee must have sued for partition. In the case of the other sections, one of the parties to the dispute may or may not be a stranger. Even if the subject of the dispute is a dwelling house unless there be a stranger transferee s. 4 does not apply.

What s. 3 contemplates is a request by a party for the sale of the whole property. The section favours the smaller share-holder at the expense of the larger and the fact of a person owning a large share is a disability under the section since such a person is precluded from offering to buy the interest of the party owning the smaller share. This is the reason why the Courts have wherever possible striven to avoid this result.

If a sale is directed under s. 2 and s. 3 does not apply, the sale is nevertheless one governed by the Partition Act and s. 6 relates to such a sale.

Independent of Partition Act, a Court has inherent power to refuse to divide a property by metes and bounds and to adopt such other means as may appear equitable for effecting a just partition. SUBBAMMA *v.* VEERAYYA *Mad* **203**

Partnership.

See CIVIL PROCEDURE CODE, 1908, O. I, R. 3 **497**
See EVIDENCE ACT, 1872, s. 92 **874**
See PENAL CODE, 1860, s. 405 **493**

———*Absence of partnership deed—Loss in business—Measure of individual liability—Co-partner joining sub-co-partner—Sub-co-partner's liability—Common Law.*

Under the Common Law of England where there is no partnership deed between the co-partners the loss in the business has to be borne by them in proportion to their contribution of capital. Where a co-partner takes with him a sub-co-partner not in any particular share but whose contribution towards capital is to be a particular sum, if such co-partner contributes further capital towards partnership, the liability of the sub-co-partner in the loss of the business is not thereby increased but will be in proportion to his contribution. GIUSEPPE BIANCO *v.* GIOVANNI VINCENZO **P.C. 396**

Patni Regulation (VIII of 1819), s. 14—*Auction of patni rights—Auction-purchaser paying rent to zemindar—Patni sale set aside on suit by patnidar—Subsequent suit for refund of rent by auction-purchaser, maintainability of—Expression of opinion by previous Court, effect of.*

A *patnidar* on 3rd June, 1922, brought a suit both against the *zemindar* and the auction-purchaser for setting aside a sale effected under the Patni Regulation on 15th May, 1922. On 9th June symbolical possession was obtained by the auction-purchaser. In December, 1922, and in April and May, 1923, he paid certain sums of rent to the *zemindar*. The suit of the *patnidar* succeeded and the sale was set aside by the

first Court. At the time the first Court set aside the sale it provided that the *patnidar* should recover possession and it directed the *zemindar* to pay the plaintiff's costs and also to refund the purchase-money to the auction-purchaser with interest, to return him certain security and to bear his costs in the suit. The auction-purchaser as well as the *zemindar* filed appeals. The auction-purchaser's appeal proceeded on the ground that he should have been refunded the rent which he had paid to the *zemindar*. The Appellate Court dismissed the appeal but in doing so remarked in its judgment that s. 14 of the Regulation would not be a bar to another suit for the recovery of the rent paid. Thereupon the present suit was brought by the auction-purchaser both against the *zemindar* and the defaulting *patnidar* for the refund of the money paid by him as rent:

Held, that the suit against the *zemindar* was barred. The proper remedy of the auction-purchaser was under s. 14 of the Patni Regulation. It was not intended by the Regulation that the matter should be dealt with piecemeal. The intention was, at all events so far as the claim against the *zemindar* was concerned, the whole matter should be enquired into and the auction-purchaser should be put in such a position as to suffer no loss.

Held, also, that s. 14, Patni Regulation, does not exclude suits against any party except the *zemindar*, *e. g.*, against *patnidar*.

Held, further, that the mere expression by the Appellate Court in the former suit that another suit would lie, could not bind the parties.

Held, still further, that payment of rent by the auction-purchaser to the *zemindar* could not be regarded as payment under a mistake of fact and could not, therefore, sustain a suit for money paid without consideration. ABDUL HAMID *v.* BIJOY CHAND *Cal.* **472**

Penal Code (Act XLV of 1860), s. 34—*Joint assault—Inference of common intention.*

Where several men assault another at one and the same time, each of them seeing that the others are assaulting also, the assault may be regarded as a common one though the impulse to assault may have arisen independently. EMPEROR *v.* EBRAHIM *Rang.* **836**

———**ss. 46, 117.** *See* SALT ACT, 1882, s. 9 (*a*) **91**

———**s. 52.** *See* CRIMINAL PROCEDURE CODE, 1898, s. 103 **60**

———**s. 64.** *See* CALCUTTA MUNICIPAL ACT, 1923 s. 391 **465**

———**ss. 99, 352.** *See* CRIMINAL PROCEDURE CODE, 1898, s. 103 **60**

———**s. 124-A.** *See* CRIMINAL PROCEDURE CODE, 1898, SCH. II **187**

———**s. 182**—*Giving false information to Police about missing of animal, whether an offence.*

Where the accused reported to the Police that his buffalo was missing, and the Police directed a case in the matter and it was subsequently established that he had sold the animal to a person against whom the accused wanted to get up a case:

Held, that the report, not being the report of a cognizable or non-cognizable offence, did not in itself call for any action on the part of the Police Officer to whom it was made, and hence fell short of fulfilling the conditions necessary to justify a conviction under s. 182 of the Penal Code. MOSAFIR SINGH *v.* EMPEROR *Pat.* **447** (*a*)

———**ss. 193, 467.** *See* CRIMINAL PROCEDURE CODE, 1898, s. 195 (1) (*b*) **779**

———s. 211—*'Institution of criminal proceeding', what amounts to—Making false charge of cognizable offence, effect of.*

The making of a false charge to the Police of a cognizable offence is the institution of criminal proceedings within the meaning of s. 211, Penal Code. Where the accused made a report of an alleged offence under s. 304, Penal Code, and thereby caused the Police to make an investigation:

Held, that the accused must be deemed to have instituted a criminal proceeding within the meaning of s. 211, Penal Code. EMPEROR *v.* JOHRI *All.* **277**

———s. 300, Exception 1—*Murder—'Grave and sudden provocation'—Mere vulgar abuse—Provocation not grave and sudden—Sentence.*

Mere vulgar abuse is not such a grave and sudden provocation as is contemplated by Exception 1 to s. 300 of the Penal Code. But provocation though not grave and sudden may be a sufficient reason for not imposing the capital sentence.

Vulgar abuse may amount to provocation even though the party abused is a mere *kamin*. ABDULLAH *v.* EMPEROR *Lah.* **715**

——— s 300, Excep. 1, s. 304—*Grave and sudden provocation—Tests—Social morality, how far a guiding factor.*

The question of provocation is a physychological question and one cannot apply considerations of social morality to such a question.

Where a man sees a woman in the arms of another, and loses control over himself, the circumstance that she was his mistress and not wife does not make any real difference for the purposes of s 304, Penal Code PATHARAJU *v.* EMPEROR *Mad.* **314** (*a*)

———ss. 302, 149. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 237, 238 **721**

——— ss 302 and 201. *See* CRIMINAL TRIAL **376**

———ss. 304-II, 325—*Offence under provocation—Resultant death—Nature of offence.*

Where the deceased had beaten the accused with a shoe and being overpowered by others, the accused lost self-control and picked up some sort of wooden substance which was lying near by and introduced it into the rectum of the deceased who died in consequence:

Held, that the offence was one under s. 304-II and one not under s. 325, Penal Code. BHOLA NATH *v.* EMPEROR *Lah.* **729** (*b*)

———ss. 326 and 302. *See* CRIMINAL TRIAL **272**

———s. 335—*Offence under provocation—Sentence of fine only—Insufficiency of.*

An offence under s. 335, Penal Code, though committed under some provocation, should not be treated leniently and a sentence of fine only will not be sufficient to meet the ends of justice. EMPEROR *v.* GHULAM NABI *Lah.* **734**

——— s. 338. *See* CRIMINAL PROCEDURE CODE, 1898, s. 516-A **724**

———ss. 366, 368—*Offence under s. 368—Knowledge of accused, importance of.*

For a conviction under s. 368, Penal Code, the accused must be proved to have had knowledge of the fact of kidnapping or abduction. EMPEROR *v.* ZAMIN *Oudh* **243**

———s. 368—*Charge to Jury—Essentials.*

A verdict of the Jury finding a person guilty under s. 368, Penal Code, must be considered erroneous within the meaning of s. 243 (2), Criminal Procedure Code, where the Judge did not adequately bring out the difference between knowledge and existence of grounds for belief or suspicion in his charge to the Jury or, at any rate, the Jury did not understand the importance of the difference between the two things. EMPEROR *v.* ZAMIN *Oudh* **243**

——— ss 401, 457—*Separate sentences under—Legality of.*

Though technically the offence of being member of a gang associated for the purpose of committing burglaries is different from that of actually taking part in them, yet where the main evidence to establish membership consists of the fact that the accused took part or received some of the proceeds of the burglaries it is not equitable to give separate sentences under ss. 401 and 457, Penal Code. SURJAN SINGH *v.* EMPEROR *Lah.* **27**

———s. 405—*Criminal breach of trust—Partner, liability of—Dishonest intent—Burden of proof—Duty of Court in partnership cases.*

The words of s. 405, Penal Code, are quite enough to cover the case of a partner and if one partner is given authority by the other partners to collect moneys or property of the firm, he is entrusted with dominion over that property and if he dishonestly misappropriates it, then he comes within the section.

The burden of proving dishonest intention under s. 105, Penal Code, on the part of the accused is on the prosecution. In other words, the prosecution must prove facts from which the only possible inference which can reasonably be drawn is that there was a dishonest intent.

In case of charges of criminal breach of trust against partners, the Court ought to be very careful. In many cases it is impossible to say what the share of the accused may be, whether he is indebted to the firm or whether the firm is indebted to him and if the firm is indebted to him there may be no dishonest intent in his withdrawing money from the firm. If there is any doubt upon the matter, the accused must always have the benefit of the doubt. JAGANNATH *v.* EMPEROR *Bom.* **493**

———ss. 409, 477A. *See* CRIMINAL PROCEDURE CODE, 1898, s. 231 **136** (*b*)

———s. 430—*Essentials of the offence—Intention to save one's own land—Effect of.*

Where the accused cut a *bandh* belonging to the complainant and containing water which the complainant required for the irrigation of his fields and let out some of the water:

Held, that the act of the accused would amount to an offence under s. 430, Penal Code, even though there was evidence to show that if the dam had not been cut, the crops of the accused would have been destroyed.

To fall within s. 430, Penal Code, the act need not be an act of wanton waste. RAGHUNATH *v.* EMPEROR *Pat.* **592**

———s. 447. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 413, 415 **248**

———s. 463. *See* CRIMINAL PROCEDURE CODE, 1898, ss. 436, 437 **780**

———s. 477-A. *See* CRIMINAL PROCEDURE CODE, 1898, s 195 (1) (*c*) **766**

Petition to Government—*Recitals in admissibility of.*

A genuine petition of appeal produced from the Government Secretariat, even though it may not bear the signature or thumb-mark of the party, is admis-

Petition to Government--concld.

sible in evidence, but a statement made in it by the appellant in his own interest about his alleged relationship with a certain person cannot be admitted as relevant and admissible in evidence unless such statement has been brought home to the appellant as his own. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* 642

Pleader—Authority to refer. *See* CIVIL PROCEDURE CODE, 1908, O. III, R 4 712

Pleader and client—*Statement of Pleader, value of —Contradiction by client, effect of*—'Moqadma', *meaning of.*

When a Pleader, who is authorized by his *vakalatnama* to appear for a party, does appear and makes a statement of fact on behalf of that party, the mere allegation of that party to the contrary is not material sufficient to contradict his Pleader.

The word "*moqadma*" is a general term meaning "case" and applies not only to an original suit but to an appeal. SHEO NATH SINGH *v.* BANSIDHAR *All.* 622

Pleadings.

See CONTEMPT OF COURT 901

See NEGLIGENCE 451

Poll *See* COMPANY 193

Post Office Act (VI of 1898), s. 6—'Default' meaning of. *See* CIVIL PROCEDURE CODE, 1908, s 100 569

Practice—*Dismissal of suit on preliminary issue, propriety of.*

As a general rule a Subordinate Judge ought not to dismiss an action on a preliminary issue, but ought to try the preliminary issue and then try out the other issues as well. It is only in exceptional cases when the preliminary point seems clear and the record is a very heavy one and the trial of other issues would take a long time that it would be desirable to dismiss the action on a preliminary issue. BHAGVAN GOKULJI *v.* BALKU BABAJI *Bom.* 497

——New point in appeal. *See* SURETY 629

——*New points in appeal—Question of law—Point of non-registration of admitted document, whether can be raised for the first time in appeal—Conduct of parties, effect of.*

When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the courts below. The course ought not in any case to be followed unless the court is satisfied that the evidence upon which they are asked to decide, establishes beyond doubt that the facts if fully investigated would have supported the new plea. OFFICIAL LIQUIDATOR OF M. E. MOOLA SONS LTD. *v.* MRS. PERSINEE R. BURJORJEE P. C. 737

——*Precedents, value of.*

Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT AZI KHAN *Oudh* 642

Practice--concld.

——*Privy Council—Concurrent findings*

Concurrent findings will not be disturbed unless it is shown that there has been a miscarriage of justice, or the violation of some principle of law or procedure. This does not necessarily imply that their Lordships make the findings their own, for almost *ex hypothesi*, they have not considered them in detail: but only that where matters of fact have been fairly tried by two local Courts, which are often in a better position to conclude upon them than the Board, and the same conclusion has been reached by both, it is not in the public interest that the facts should again be examined in the ultimate Court of Appeal. SATGUR PRASAD *v.* HAR NARAIN DAS P. C. 108

——*Privy Council — Concurrent findings of fact—Costs—Interference.*

It is not the practice of the Privy Council to re-open concurrent findings of fact of the Court below.

It is very rarely that the Privy Council interferes in a matter merely of costs. MOHAMMAD SADIQ *v.* FAKR JAHAN P. C. 385

——*Privy Council—Concurrent findings of fact —Interference.*

The usual practice with the Privy Council is not to disturb concurrent findings of fact of the Courts below. U PO LEIN *v* MA HNIN HLAING P. C. 393

Pre-emption *See* VENDOR AND PURCHASER 879

——*Building sites in Benares City—Proof of custom as to buildings—Evidentiary value.*

The burden of proving the existence of a custom of pre-emption with regard to building sites is on the party who alleges the existence of such a custom and he cannot succeed by merely establishing that there is a custom of pre-emption with regard to houses. But ordinarily the same principle of exclusion of strangers would apply to building sites as applies to houses and if a custom of pre-emption with regard to houses is proved slight evidence ought to be sufficient for establishing that the same custom applies to building sites. GAURI SHANKER PRASAD *v.* SITA RAM *All.* 616

——*Vendee acquiring share during pendency of suit for pre-emption—Claim for pre-emption, whether defeated—Crucial date—Agra Pre-emption Act (XI of 1922), s. 19.*

Under the law as it stood before the passing of the Agra Pre-emption Act of 1922, the vendee's acquisition by gift of a share in the village, pending a co-sharer's suit for pre-emption would defeat that co-sharer's claim for pre-emption. The decisive date as regards the right of the co-sharer to pre-empt is the date of the decree. HANS NATH *v.* RAGHO PRASAD SINGH P. C. 402

Presidency Towns Insolvency Act (III of 1909), ss. 17, 30, 90—*Property in Foreign State—Whether vests in Official Assignee—Adjudication in British India—Injunction against proceedings in Native State—Power to grant—Annulment of adjudication—Power of Insolvency Court, whether terminates.*

An adjudication order does not operate to vest the insolvent's immoveable property situated in a Foreign State in the Official Assignee or when there has been a composition scheme approved of by the Court, in the trustees of the composition under the order approving the scheme.

But, the language of s. 90 (1), Presidency Towns Insolvency Act, is wide enough to confer on the Court the power of granting an injunction

Presidency Towns Insolvency Act—concld.

restraining proceedings in a Foreign Court by creditors of an insolvent who is so adjudicated in a British Court and the more so when the parties sought to be restrained carry on business within the Court's urisdiction even if they do not reside there and have ssets within its jurisdiction which can be attached in the case of any breach of the injunction. There is also nothing in principle which prevents the Court from restraining such proceedings.

The jurisdiction of the Insolvency Court is not exhausted owing to the annulment of the adjudication. The Court has jurisdiction to give effect to the scheme it has approved. SUMERMULL SURANA, *In re* *Cal.* **141**

——— **s. 46 (3).** *See* LIMITATION ACT, 1908, s. 4 **822**

Presumption—*Religion and status of child.*

A child born in India must under ordinary circumstances be presumed to have his father's religion and his corresponding civil and social status. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* **642**

Prevention of Cruelty to Animals Act (XI of 1890), s. 6—*Offence by servant—Liability of owner—'Permits,' 'employs,' meanings of—Criminal Procedure Code (Act V of 1898), s. 190 (c)—Charge against servant—Power to issue process against master also.*

The word "permits" in s. 6, Prevention of Cruelty to Animals Act does not involve any conscious act on the part of the person who is held to be liable under the section. The fact that the accused was absent and ignorant of the use of the animal by his servant, is, therefore, no defence to a charge under s. 6.

Where an animal is the property of the accused and is employed in the work of the accused it is nonetheless employed by the accused by reason of the fact that the accused employs a driver to drive the animal.

Where a complaint is made against a bullock-driver it is open to the Court to take cognizance of the offence against the owner of the animal also under s. 190 (c), Criminal Procedure Code. BINDESHWAR PRASAD *v.* EMPEROR *Pat.* **59**

Principal and surety—*Deed of guarantee—Construction—Debt secured by mortgage—Surety, whether liable only for deficiency after realising mortgage securities—Right to securities.*

The material clauses in a deed of guarantee ran as follows—(*i*) "In consideration of your having at our request agreed to obtain a loan of Rs. 40,00,000 bearing interest at six per cent. per annum from the Imperial Bank of India for the sole benefit of John Carapiet Galstaun for the purpose of satisfying certain decrees and paying certain pressing debts such sum of Rs. 40,00,000 to bear interest at the rate aforesaid and the re-payment thereof to be secured by a mortgage to be executed by the said John Carapiet Galstaun in your favour of the properties .... We hereby guarantee to you the payment by the said John Carapiet Galstaun of the said sum of Rs. 40,00,000 to the limit of our aggregate and individual liability hereinafter prescribed;

(*ii*) this guarantee shall be a continuing guarantee, but our aggregate liability thereunder shall not under any circumstances exceed the sum of Rs. 18,00,000 and the liability of each of us individually in respect of the said sum shall not exceed the sum of Rs. 6,00,000;

Principal and surety—concld.

(*iii*) within the aforesaid limit of liability this guarantee shall extend to and be applicable to the whole debt that shall ultimately be due to you from the said John Carapiet Galstaun in respect of such advance as aforesaid and not merely to so much thereof as shall be co-extensive with our aforesaid maximum liability hereunder.

The High Court held that upon its true construction the guarantee only provided for a guarantee of the balance which should remain owing after the creditor had exhausted his remedies under the mortgage against the principal debtor. On appeal:

Held, (*i*) that the guarantee covered the whole debt of 40 lakhs to the limit of the aggregate and individual liability of the guarantors and not merely the deficiency remaining after realising the mortgage securities;

(*ii*) that cl. (*iii*) was a clause commonly employed in the case of a limited guarantee to enable the creditor at any rate up to a point to retain as against the guarantor dividends received in the bankruptcy of the principal debtor and it did not cut down but re-inforced the obligation imposed by cl. (*i*);

(*iii*) that this construction of the guarantee was not in any way affected by the practice of the Courts in India under O. XXXIV, Civil Procedure Code, in relation to suits to enforce a mortgage.

Their Lordships further disapproved of the view that the sureties would not be entitled to the benefit of the securities until the whole of the 40 lakhs had been discharged. ALFRED ERNEST *v.* CARE LAZARUS **P. C. 407**

Private Prosecutor. *See* CRIMINAL PROCEDURE CODE, 1898, s. 423 **474**

Privy Council—Interference on question of valuation. *See* LAND ACQUISITION ACT, 1894, s. 11 **449**

Probate and Administration Act (V of 1881), ss. 4, 12, 59, 90—*Title of executor, whether vests before grant of probate—Sale by executor before getting probate, validity of.*

Under the Probate and Administration Act, 1881, the estate of a testator vests in the executor and the executor has the power to dispose of the estate from the date of the testator's death, even though probate has not been obtained.

Under the English Law the title of an executor is derived from the Will and not from the probate though it is probate alone which authenticates his right, and the Indian Legislature has not departed from this principle in the Probate and Administration Act, 1881.

Section 12, Probate and Administration Act, does not imply that before probate the executor has no title but is only intended to simplify the proof of his title as dating from the testator's death by authenticating the Will against all the world. KADIYALA VENKATA SUBAMMA *v.* KATREDDI RAMAYYA **P. C. 111**

——— **s. 62.**—*Succession Act (XXXIX of 1925), s. 276—Oral Will—Application for probate, maintainability of—Fact that substance of oral Will was taken down at the time, effect of.*

An application for the grant of probate of an oral Will can be entertained under the Probate and Administration Act (V of 1881).

The fact that the substance of the oral Will was taken down at the time the Will was made would not make any difference in the eye of the law. That fact would only be a strong piece of evidence to

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prove the contents of the oral Will. PITAM LAL *v.* KALLA RAM *All.* 284

Probate proceedings—*Application by legatee—Death of party—Right to continue, whether survives to donees of legacy—Civil Procedure Code (Act V of 1908), s. 2 (11)—'Legal representative', meaning of.*

A person applied for probate under a will. The widow of the testator produced a codicil under which she was a legatee and claimed probate. The District Judge granted probate of the will holding that the codicil was not genuine. The widow appealed and during the pendency of the appeal she made a gift of the legacy to *A* and then died. *A* applied for being substituted in place of the widow:

Held, that as the right to the legacy had vested in *A*, he was a 'legal representative' of the widow within the definition in s. 2, Civil Procedure Code, and was entitled to be substituted as party under O XXII, Civil Procedure Code.

The right to obtain a probate does not ordinarily survive but in an appeal in a case where the judgment appealed against may operate as one *in rem* different considerations will arise. CHANDRAMANI *v.* BIPIN BEHARI *Cal.* 543

Provincial Insolvency Act (V of 1920), ss. 4, 53—Benami *transfer by insolvent—Jurisdiction of Insolvency Court to consider nature of transaction, whether controlled by s. 53.*

In the case of *benami* transactions the limitation of two years imposed by s. 53, Provincial Insolvency Act, does not apply, and an Insolvency Court can decide the question whether a transfer by an insolvent is *benami* under s 4 of the Act even if the transaction took place more than two years before the presentation of the petition in insolvency.

Section 4 of the Act is controlled by s. 53 only in respect of real transfers made by the insolvent. BISESWAR CHAUDHURI *v.* KANHAI SINGH *Pat.* 299

——**ss. 4, 68**—*Attachment by court through Receiver—Claim not preferred within 21 days—Power of court to enquire—'Act of Receiver', what constitutes.*

Where on an application made by a creditor, the Insolvency Court ordered the Official Receiver to take possession of certain property alleged to belong to the insolvent and the Official Receiver in pursuance of the said order attached this property:

Held, that the attachment was not act or decision of the Receiver, within the meaning of s. 68, Provincial Insolvency Act, and a claim put forward by a stranger to the said property could be enquired into even though it was made more than 21 days after the date of the attachment. NATHU RAM *v.* MADAN GOPAL *All.* 791

——**s. 7**—*Application for adjudication—Death of debtor—Proceeding, whether abates.*

In proceedings for adjudication of a person as insolvent he may be rightly declared such in spite of the fact that he died before the application for his being declared as insolvent was decided. The application may be allowed to proceed bringing on the record his legal representatives for realization and distribution of his property. GIRDHARI LAL *v.* JUGAL KISHORE *Lah.* 733

——**ss. 20, 56 (1)**—*Civil Procedure Code (Act V of 1908), s. 47—Receiver, whether representative of debtor—Objection by Receiver to execution against debtor's property, whether falls within s. 47—Second appeal, maintainability of*—Ad interim *Receiver, powers of.*

The question whether a Receiver in insolvency is or is not a representative of the debtor for the purposes of s. 47, Civil Procedure Code, depends upon the purpose and nature of the application made by the Receiver For some purposes he would be entitled as representing the judgment-debtor to litigate matters under s. 47 of the Code; but where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belongs to the Receiver the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the Receiver for the benefit of the creditors, then, for that purpose, the Receiver is not a representative of the judgment-debtor, but a third party making a claim, and no second appeal lies from an order made on such an application.

An *interim* Receiver cannot represent the debtor and make an application under s. 47, Civil Procedure Code. MOHITOSH DUTTA *v* SATISH CHANDRA *Cal.* 593

——**s. 27 (2)**—*Application for discharge—Extension of time—Creditors' right to apply.*

Section 27 (2) of the Provincial Insolvency Act, authorises a Court to extend the time for an application for discharging an adjudicated insolvent even if an application for extension of time is made after the period specified for making the application for discharge has expired.

It was not the intention of the framers of the Provincial Insolvency Act, that the debtor should derive advantage from his failure to apply for discharge. Therefore, an application to extend time for discharge made by a creditor should be granted if the annulment of the adjudication is calculated to prejudice the creditor. LADURAM *v.* SAKHARAM *Nag* 873

——**ss. 44 (2), 79**—*Adjudication of firm—Discharge of partners—Subsequent arrest of partner for private debts, legality of—Adjudication, effect of—Failure of Court to frame rules—Procedure.*

It is not only incumbent on the creditors of a firm which has been adjudicated as insolvent but also on the creditors of each individual partner to prove their claims in the insolvency proceedings, and a partner whose property has vested in the Official Receiver for the benefit of his creditors should not be allowed to be harassed again by one of such creditors merely and solely because the order of adjudication was not passed in an application directed against him but against a firm in which he was a partner or because, for the sake of convenience the court passed an order against the firm and did not pass a specific order against each individual partner in such firm

The failure of the Court to frame rules as required by s. 79, Provincial Insolvency Act, cannot override the provision of the law which exempts an insolvent from liability for his debts prior to the date of his insolvency on his obtaining a discharge. In the absence of such rules the provisions of the Civil Procedure Code, apply to insolvency proceedings in view of s 5 of the Provincial Insolvency Act. HEERJI JIVRAJ *v.* FIRM OF VALABRAM MULJI *Sind* 815

——**s. 52**—*Application to immovable property—'Receiver' includes* ad interim *Receiver—Application for stay of sale of insolvent's property in execution of decree—Duty of Court to stay sale—Sale effected—Official Receiver's rights.*

Section 52, Provincial Insolvency Act, as now amend-

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ed contemplates the presentation of an application not as it used to be after adjudication but at an earlier stage that is to say after an insolvency petition has been admitted. At that stage the only Receiver that can be in existence for the purpose of applying is an *interim* Receiver.

Section 52 applies to all kinds of property under attachment by a Court.

Where an insolvent's property is attached in execution of a decree before he applies for insolvency, and on his insolvency application being admitted the *ad interim* Receiver applies for stay of sale, the executing Court should stay the sale and direct the delivery of possession to the Receiver. If the sale takes place in spite of Receiver application for its stay, he is not bound to recognise the title of the auction-purchaser. SIVASAMI ODAYAR *v.* SUBRAMANIA AIYAR *Mad.* **338**

——— **s. 53**. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 4 **299**

——— **s. 54**—*Fraudulent preference—Essentials—Consent decree against insolvent more than three months prior to petition for adjudication—Execution proceedings within three months—Proceedings, whether voidable.*

The conditions precedent to the applicability of s. 54, Provincial Insolvency Act are that the act complained of which is to be deemed fraudulent and void against the Receiver should have been done by the insolvent with a view to give preference to a creditor over others and that such act should have been done within three months of the presentation of the petition.

Where more than three months before presentation of the petition for insolvency, a consent decree has been passed in favour of one creditor, the proceedings taken in execution of that decree cannot be impugned as fraudulent under s. 54, even if the proceedings had been instituted within three months of the presentation of the petition. The execution proceedings taken against the insolvents or the *ex parte* orders for payment passed against them cannot afford fresh starting point for computing the period of limitation of three months under this section. DR. CHAINRAI *v* DOLARAM *Sind* **522**

——— **s 55**—*Fraudulent transfer—Avoidance—Exclusive jurisdiction of Insolvency Court—Referring parties to Civil Court, illegality of.*

Under the Provincial Insolvency Act, the insolvency Court is the only Court which has jurisdiction to go into the questions raised under s. 53 of the Act and decide the same and the parties should not be referred to the civil Court for determination of such questions

Where a Receiver reports to the effect that a transfer is fraudulent and prays that the transfer might be annulled under s. 53, the Court should treat the report as an application under s. 53 and go into the matter for itself after taking evidence. HRIDAYKRISHNA *v.* OSMANALI *Cal.* **143**

——— **s 56 (1)**. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 20 **593**

——— **s. 68**. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 4 **791**

——— **s 68**—*Civil Procedure Code (Act V of 1908), O. XXI—Sale by Official Receiver—O. XXI, applicability of—Objection by insolvent—Limitation.*

The rules laid down in the Civil Procedure Code, regulating sales under that Code are not applicable to sales by Official Receivers in insolvency proceedings. Sale by the Official Receiver is not, therefore, irregular merely because it was held at his office and not at the spot.

Though an insolvent who is aggrieved by an act of the Receiver is entitled to move the Court under s. 68, Provincial Insolvency Act, he must take action within the period prescribed by the proviso to that section. SHAKAR KHAN *v* SANMUKH SINGH *Lah.* **267**

——— **s. 75 (1), (3)**—*Order refusing to restore appeal dismissed, for default, whether appealable—Power to grant leave after expiry of limitation.*

An appeal lies under the proviso to s. 75 (1), Provincial Insolvency Act, from an order of the District Court refusing to restore an appeal dismissed for default. At any rate, even if such an order be regarded as one passed otherwise than on appeal the appellant can appeal with the leave of the High Court or of the District Court, under s. 75 (3).

Leave to appeal may be granted even after the expiry of limitation and even if there is no prayer for it in the memorandum of appeal. GANGA RAM *v.* OFFICIAL RECEIVER, DELHI *Lah.* **268**

——— **s. 79**. *See* PROVINCIAL INSOLVENCY ACT, 1920, s. 44 (2) **815**

Provincial Small Cause Courts Act (IX of 1887), s. 17—*Application for setting aside* ex parte *decree accompanied by security—Court not directing particular kind of security but issuing notice to other party—Application valid.*

Where a person against whom an *ex parte* decree has been passed by a Court of Small Causes, without formally applying for the court's direction as to the nature of security to be furnished applies to such court for setting aside the *ex parte* decree and furnishes security with it and the court directs a notice to issue to the other party the court must be taken to have directed the applicant to furnish security of the kind actually furnished by him.

The provisions of s. 17, Provincial Small Cause Courts Act, are not merely directory but imperative and mandatory. RAM BHAROSE *v.* GANGA SINGH *All.* **609**

——— **s. 17**—*Application to set aside* ex parte *decree—Amount to be deposited—'Amount due under the decree', meaning of.*

The words "the amount due under the decree" in s. 17, Provincial Small Cause Courts Act, mean the amount due under the decree at the date it was given and not the amount due under the decree at the date when the application for restoration was presented. KALLU MAL *v* BIKRAMAJIT SINGH *All.* **839** (*a*)

——— **s. 35**—*Civil Procedure Code (Act V of 1908), s. 24—Transfer of Munsif having Small Cause powers—Successor without small cause powers—Order by District Judge for trial of Small Cause by successor as regular suit—Decree, whether appealable—Existence of Subordinate Court with Small Cause powers in same local area, effect of—Civil Procedure Code, s 24, scope and effect of.*

While a small cause suit was pending before a Munsif who had small cause powers he was transferred and succeeded by a gentleman who was not invested with the powers of a Judge, Small Cause Court, at the date. The Additional District Judge thereupon made the following order: "The Small Cause Court cases pending in the Court of the Munsif of Basti will be tried by the present incumbent of the office as regular suits, as he has not got the Small Cause Court powers The attention

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of the said learned Munsif be drawn to s. 35, Small Cause Courts Act, and these cases should be dealt with as provided by the Small Cause Courts Act." In pursuance of this order or direction, the successor took cognizance of the case and tried it as a regular suit. He decreed the claim of the plaintiffs, and the defendant filed an appeal which was rejected on the ground that no appeal lay.

Held, (*i*) that the order of the Additional District Judge was not an order of transfer within the meaning of s. 24, Civil Procedure Code, but was merely drawing the attention of the Munsif to the fact that there was a provision in the Small Cause Courts Act in s. 35 to the effect that the successor of the Judge, Small Cause Court, should try the suit;

(*ii*) that the Munsif had no jurisdiction to try the case under s. 35 and his decree was appealable.

Held, further, when an officer who has no Small Cause Court jurisdiction hears a case which was pending before his predecessor-in-office who had Small Cause Court jurisdiction, and makes a decree, the decree is appealable.

Per *Sulaiman, Actg, C. J.*—Section 24 contemplates the transfer of a case from one existing Court to another existing Court If, therefore, a Court of Small Causes has ceased to exist or the officer invested with Small Cause Court powers has been transferred from the district and there is no other officer possessing such powers, there would be no Court from which the District Court can under s. 24, transfer the case to an ordinary Civil Court. The contingency where no Court or officer invested with Small Cause Court powers exists is provided for in s. 35, Provincial Small Cause Courts Act.

Section 35, Provincial Small Cause Courts Act, is subject to the provisions of the Civil Procedure Code, and would not be applicable where there is any special provision in the Code. *Prima facie* s. 35 deals with a case where either a Court of Small Causes or a Court invested with such jurisdiction has ceased to have such jurisdiction and under this section if the Court of Small Causes has ceased to exist or the officer invested with such powers has been transferred, then the proceedings would be bad in the new Court which would have jurisdiction to try the suit if it were filed on that date afresh. Accordingly if there is in the district any other Court or officer invested with power to try the Small Cause Court suits in that area, it is that Court or officer who would have jurisdiction to take cognizance of the suit and continue the proceeding. In such a case the successor of the officer recently transferred who himself does not possess the powers of a Small Cause Court, would not be entitled under s 35, to take it up *suo motu* and can only act if the case were transferred to him under s 24. On the other hand if no such Court or officer remains in the district then the suit if filed would have to be filed in the ordinary civil Court and the proceeding accordingly would be cognizable by such Court.

Where a Munsif has been transferred and there is in the district a Subordinate Judge invested with the powers of a Small Cause Court for the area within the jurisdiction of the Munsif under s. 35, Provincial Small Cause Courts Act, it would be such a Subordinate Judge who would have authority to entertain the proceeding. A new Munsif who comes to take the place of the Munsif transferred

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but who does not possess the Small Cause Court powers would have no jurisdiction himself to transfer the case from the Small Cause Court side of his predecessor to his own regular side. The case would go automatically to the Subordinate Judge who is invested with Small Cause Court powers. If there is such a Subordinate Judge, it would be open to the District Judge to transfer the case from the Court of the Subordinate Judge with Small Cause Court powers to that of the new Munsif without such powers. If there is no such Subordinate Judge with Small Cause Court powers the Munsif will under s. 35, Provincial Small Cause Courts Act, have to try it on the original side, and the District Judge would have no power at all to act under s. 24 so as to transfer the case to the new Munsif and make him a Court of Small Causes. He can, of course, transfer the case from the Munsif's file to any other Court, but the suit would cease to be a Small Cause Court suit. An appeal in such cases would lie to the District Judge. BHAGWATI PANDE *v.* BADRI PANDE *All.* **357**

Rectification of deeds—*Prayer for rectification and partition in same suit, legality of.*

It is open to the plaintiff in a suit for partition to pray for rectification of a deed relating to the properties sought to be partitioned. He need not institute a separate suit for rectification. KOTUMAL MOHAN DAS *v* DUR MAHOMED *Sind* **525**

Registration. *See* DEEDS **525**

Registration Act (XVI of 1908), s. 17 (1) (b)—*'Declare,' meaning of — Document acknowledging a right—Registration, necessity of.*

The word 'declare' in s. 17, Registration Act, implies a declaration of will, not a mere statement of fact. A document which merely acknowledges as a fact that a right is vested in a particular person does not require registration.

In the case of an acknowledgment contained in a communication addressed to a third party registration is not practicable nor required. BAGESHWARI CHARAN SINGH *v* JAGARNATH KUARI **P. C. 798**

——— **s. 17 (1) (b)**—*'Declare', meaning of—Document acknowledging existence of previous mortgage—Registration, necessity of.*

The word 'declare' in s. 17 (1) (*b*), Registration Act, indicates something more than a mere statement of existing facts and implies a declaration of will to cause a change of legal relationship in respect of the property concerned. Therefore, a document which merely acknowledges that a previous mortgage exists unredeemed cannot be said to declare a charge on the land mortgaged and as such is not compulsorily registrable. RADHA KISHAN SINGH *v.* HUKAM CHAND *Lah* **14**

——— **s. 17 (2**—*Compromise decree—Compromise embodied in decree—Compromise creating lease—Registration, whether compulsory.*

All decrees and orders are not excluded from compulsory registration but only those are excluded which partake the character of the documents mentioned in cls (*b*) and (*c*) of sub-s. (1) and if a consent decree operates to create a lease its registration is compulsory. SACHINDRA MOHAN *v.* RAMJASH *Pat* **54**

——— **s. 17 (2) (xi)**—*Endorsement of payment on mortgage-deed—Necessity of registration—Return of mortgage-deed—Discharge of mortgage by payment of smaller sum, proof of—Evidence Act (I of 1872), s 92.*

The discharge of a mortgage-debt by payment and receipt of a smaller amount than was due can be proved as a fact if it is separable from any oral agreement to vary the terms of the mortgage contract and can be proved without evidence of such an agreement.

Where an endorsement does not on its face purport to extinguish the mortgage it does not require compulsory registration The return of the mortgage-deed by the mortgagee is not conclusive in such cases nor even of itself any indication that the mortgage is extinguished. SUPPAN CHETTY *v.* YEGNANARAYANA AYYAR *Mad* **317**

——— **s. 49**—*Unregistered agreement—Admissibility in suit for damages for breach of contract.*

There is nothing in s. 49 of the Registration Act when properly construed to compel the court to take notice of the non-registration of an admitted document unless at any rate such document must, if treated as effective, be the foundation of a judgment affecting immoveable property comprised in such document.

[As the parties were not agreed on the facts and there were indications of a course of conduct on the part of the appellant which was sufficient to preclude him from raising the new point their Lordships refused to allow the appellant to raise the point of non-registration for the first time before the Board.]

Where the claim is a personal one for damages of an admitted contract, the Court of Appeal is not bound to take notice of the fact of the non-registration of the deed of agreement as the proceedings do not in any way affect any immoveable property. OFFICIAL LIQUIDATOR OF M. E. MOOLA SONS LTD *v.* MRS PERRINER R BURJORJEE **P. C. 737**

——— **s 77**—*Vendor and purchaser—Refusal to register document—Infructuous suit under s. 77—Fresh suit for specific performance and possession—Maintainability — S. 77, whether exclusive remedy—Agreement to transfer immoveable property—Right to specific performance.*

In the case of an agreement for transfer of immoveable property a suit under s. 77, Registration Act, is not the exclusive relief open to the purchaser and the mere failure of a suit under s. 77 or its infructuous termination cannot operate as a bar to a suit for the specific performance of the contract by executing a new and a fresh document and for recovery of actual possession.

The original cause of action to enforce specific performance is independent and separate from the cause of action arising from the refusal of the purchaser to register the document.

The relief of specific performance is discretionary but the ordinary presumption is that a contract for transfer of immoveable property cannot be compensated for by damages. BALKISHAN DAS *v.* BACHAN PANDEY *All.* **561**

Regulation XVIII of 1806—*Mortgage by conditional sale—Foreclosure proceedings—Expiry of year of grace—Conditional vendee's title, nature of—Mortgage by mortgagor after expiry of year of grace—Rights conveyed by mortgagor—Mortgagor ejected—Reversion of ex-proprietary rights to* zamindar—*Adverse possession by mortgagee.*

On the expiration of the year of grace, provided anything remains unpaid under the mortgage and the proceedings under the Regulation were regular, the title of the conditional vendee becomes that of an absolute vendee and the sale becomes an absolute sale on that date. No subsequent proceedings to obtain possession are necessary to establish the title of the vendee.

Where the title of the conditional vendee has become absolute and the mortgagor is in possession he becomes an exproprietary tenant and a mortgage by him of the land effects a mortgage of the rights of an exproprietary tenant.

When an exproprietary tenant is ejected his rights do not escheat to the Crown but revert to the *zemindar* and the latter can redeem a mortgage by the former of rights as exproprietary tenant.

Possession, for however long a period, by a mortgagee can give him no title other than the title which he has acquired by the mortgage. BASDEO RAI *v.* JAIMANGAL RAI *All.* **69**

Religious trusts—*Suit relating to* wakf—*Power of Court to pass just and proper orders.*

Where the suit relates to *wakf* property the Court has jurisdiction to pass such order as may be just and proper in all the circumstances of the case and is not bound to the granting of the relief of ejectment asked for by the plaintiff *mutawalli*. DILAWAR HUSAIN *v.* SUBHAN KHAN *Oudh* **241**

Remand. *See* APPELLATE COURT **632**

Res judicata *See* C. P. LAND REVENUE ACT, 1881, s. 69 **884**

——— *See* CUSTOMARY LAW (PUNJAB) **265**

——— *Execution proceedings.*

Section 11, Civil Procedure Code, does not in terms apply to execution proceedings as they are not proceedings in a separate suit. The principle underlying that section has no doubt been applied to execution proceedings, but the principle of constructive *res judicata* has not been applied unless the point was expressly raised and decided or must be deemed to have been decided by necessary implication. SHEO TAHAL RAM *v.* BINAIK SHUKUL *All.* **353**

——— *Execution proceedings—Sale by judgment-debtor during execution proceedings—Decision in execution as to validity of attachment etc, whether binding on purchaser—Purchaser claiming title under judgment-debtor*—Lis pendens, *doctrine of.*

Orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and cannot be called in question by the parties or their representatives. When once the said orders become final, that effect cannot be sought to be avoided by making allegations that the previous decisions were wrong on the merits because full facts were not placed before the Court or that all available evidence was not let in on the former occasion.

When proceedings by way of attachment of immoveable property in execution of a money decree have been taken by the executing Court in an execution application filed by the decree-holder, any question that might be raised whether the proceedings taken by the Court did amount to a valid attachment or not is one that falls to be decided by the Court in the execution department; any stranger purchasing the property from the judgment-debtor in those circumstances would only take the property subject to the Court's decision as to the effect of the proceedings actually taken before his purchase. Such purchaser would be bound by the Court's decision of the question in the execution department as a person claiming title under the judgment-debtor.

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The principle of *lis pendens* would also apply to such sale. It is not open to a party to a proceeding to nullify the effect of the proceedings already properly taken with reference to that property by transferring the same to strangers. It does not really matter whether the actual decision of the Court as to the effect of past proceedings is given only after the purchase by the stranger, if the adjudication is really with reference to matters that happened before such purchase and regarding the effect of the legal proceedings that were taken prior to the same. To safeguard the purchasers' rights the purchasers should in such circumstances get themselves impleaded as parties. VENKATACHALAPATHI RAO *v.* VENKATAPPAYYA *Mad.* **306**

Revenue Record—*Entry contrary to express agreement—Evidentiary value*

Where an entry in the village papers to the effect that certain persons are under-proprietors is contrary to the express terms of a compromise between the parties is no value whatsoever, the presumption of its corectness is destroyed by the terms of the compromise. BISHESHWAR PANDE *v.* BHAWANI DIN SINGH *Oudh* **703**

Revision. *See* CALCUTTA HIGH COURT (O. S.) RULES, CHAP. XLVI, rr. 32, 71 to 73 **539**

——— Powers of High Court. *See* LEGAL PRACTITIONERS ACT, 1879, s. 36 **374**

Riparian Owners. *See* MADRAS IRRIGATION CESS ACT, 1865, s. 1 **413**

Riwaj-i-am. *See* CUSTOMARY LAW (PUNJAB) **545**

Sale—*Part of consideration dependent on result of litigation—Validity of sale*

The mere fact that a part of the consideration for a sale of property is dependent on the result of a suit relating to that property does not make the transaction bad as opposed to public policy. TRIBENI PRASAD SINGH *v* RAMASRAY PRASAD *Pat* **49**

Salt Act (XII of 1882), s. 9 (a)—*Penal Code (Act XLV of 1860), ss 46, 117—General Clauses Act (X of 1897), s 26—Abetment of offence under Salt Act—Conviction under s. 117, Penal Code—Legality—Offences under Special Acts and general law—Punishment.*

A person guilty of abetment of an offence under s. 9 (*a*) of the Salt Act may be convicted and sentenced under s. 117 of the Penal Code where it is proved that the act amounted to an abetment of the commission of an offence by the public generally or by any number or class of persons exceeding ten.

Where there is nothing in the special Act to exclude the operation of the general criminal law, it cannot be inferred that there was an intention on the part of the Legislature to exclude it.

Under the General Clauses Act, s. 26, where an act in punishable under a general Statute, the offender could be proceeded with under either or both but could not be punished twice for the same act or omission which constitutes the offence. JOTI PRASAD *v.* EMPEROR *All.* **91**

Security *for costs, object of*

Where the appeal has been heard and decided on the merits the object of asking for security disappears. DATTATRAYA PANDURANG GOSAVI *v.* LAKSHMAN MAHADEV PAHEKAR *Bom* **161**

Sikh Gurdwaras Act (VIII of 1925), ss. 2 (9), 7—*Udasis, whether Sikhs—Sikh Gurdwara—Proof of dedication by Sikhs, necessity of.*

Where it is not proved that an institution was established by Sikhs for the purpose of public worship it cannot be declared a Sikh Gurdwara in a petition under s. 7, Sikh Gurdwaras Act.

Udasis are not Sikhs within the meaning of that term as defined in the Sikh Gurdwaras Act. SHIROMANI GURDWARA PARBANDHAK COMMITTEE *v.* NAND KAUR *Lah.* **31.**

——— **s. 16 (2), (3)**—*Nature of institution—Burden of proof*—Udasi, *institution—Worship of* samadh—*Inference from circumstances*—Udasis, *whether 'Sikhs'*

An institution was founded in the time of Moguls by one Guria, and ever since its foundation all the *mahants* were *Udasis*, succession going from *guru* to *chela*, subject to confirmation by *Udasi Bhek*. The principal object of worship was the *samadh* of Guria, which existed on the date of dispute:

Held, (1) that the onus of proving that Guria was a Sikh and that the institution had been established for use by Sikhs for the purpose of public worship and that it had been used for such worship by Sikhs, and fell within s. 16 (2) (3), Punjab Sikh Gurdwaras Act, was on those claiming it to be a Sikh Gurdwara;

(2) that the institution must be regarded as having been founded by *Udasis* and must be treated as an *Udasi* Gurdwara; and

(3) the mere fact that *Adi Grantha* was also kept in the institution and on occasions opened with due ceremony and passages from it read was not sufficient proof of the purely Sikh nature of the worship carried on at the Gurdwara or Dera.

The *Udasis* are not Sikhs within the meaning of the term 'Sikh' as used in the Sikh Gurdwaras Act. SHIROMANI GURDWARA PARBANDHAK COMMITTEE *v* GULAB DAS *Lah.* **257**

——— **s. 18 (g)**—*Person in possession of property proved to be office-holder—Presumption regarding nature of property.*

Where it is proved that a person is an office-holder, the burden of proof is on him or on those who claim through him to show that the property in dispute was his personal property and did not belong to the Gurdwara SHIV DEVI *v.* SHIROMANI GURDWARA PARBANDHAK COMMITTEE *Lah.* **718**

Specific performance *See* REGISTRATION ACT, 1908, s. 77 **561**

——— *Readiness and willingness of plaintiff to perform his part, necessity of—Making unfounded claims, effect of.*

In a suit for specific performance the plaintiff has to allege and if the fact is traversed, to prove, a continuous readiness and willingness from the date of the contract to the time of the hearing, to perform the contract on his part.

Where the plaintiff sued for specific performance alleging that a *khancha* was included in the property which the defendants had agreed to sell and claiming damages in case the *khancha* could not be included and it was found that the defendants had not promised to sell the *khancha*:

Held, as the plaintiff was not ready and willing to perform his part of a contract as it really was but insisted on having the *khancha* included in the sale, he had debarred himself from obtaining specific performance NARINJAN *v.* MUHAMMAD YUNUS *Lah* **557**

Specific Relief Act (I of 1877), ss. 14, 15, 16—*Co sharer agreeing to lease entire property believing other co-sharer had given consent—Other co sharer refusing to join—Suit for specific performance—Maintainability—Construction of contract.*

Where a co-sharer professed to grant a lease of the entire estate in a property of which he held a share only, in the belief that the lessee had

already obtained the consent of the other co-sharer :

Held, that it could not be deemed that there was a concluded contract, whereby the co-sharer undertook a binding obligation on behalf of himself and the other co-sharer to obtain the lease of the property and no suit for specific performance to execute a *kabuliyat* and give possession can lie against the entire body of the proprietors.

Held, further, that even assuming that there was a concluded contract, specific performance of the agreement in part could not be decreed under s. 15, Specific Relief Act, as the plaintiff had not relinquished all claim to further performance and all right to compensation either for the deficiency or for the loss or damage sustained by him through the default of the defendants. PROMATHA NATH *v.* GOSTHA BEHARI P. C. 405

——— s. 31. *See* CIVIL PROCEDURE CODE, 1908, s. 152 850

——— s. 42. *See* TRADE UNION 84

——— s. 45. *See* INCOME TAX ACT, 1922, s. 66 (3) 762

Succession Act (XXXIX of 1925), ss. 214, 381, application of, to Crown *See* ESCHEAT 565

——— s. 276. *See* PROBATE AND ADMINISTRATION ACT, 1881, s. 62 284

——— s. 283 (1) (c)—*Probate—Application for revocation—Person disclaiming interest in estate—* Locus standi.

A person disclaiming interest in the estate is not entitled to citation and has no *locus standi* in the probate Court.

Where an application for revocation of a probate was made on the ground that the deceased had no estate and that the properties which the testator purported to make over by Will were properties which he held not in his personal but in his official capacity:

Held, that the petitioners had no *locus standi* to maintain the application. RAM DAS *v.* PREM DAS *Pat.* 296

Summary Settlement Act (II of 1863). *See* GRANT 161

Surety—*Stay of execution of mortgage-decree—Bond by surety—Construction—Suit to enforce bond—Limitation—Cause of action, whether arises from date of appellate decree or sale of property in execution—Practice—New point in appeal.*

During the pendency of an appeal from a decree for sale to enforce a mortgage the Appellate Court ordered stay of execution of the decree for a period of one year on the appellant furnishing security for Rs. 1,12,000 and, if the appeal was not decided within one year, for a further period of one year for a similar sum of Rs. 1,12,000. In pursuance of this order a person stood surety and executed a bond which provided as follows: "I of my own free will stand security to the extent of rupees seventy-seven thousand out of rupees one lac and twelve thousand as therein ordered and covenant that if the decree of the first Court be confirmed or varied by the Appellate Court within one year from the 1st April, 1919, the said defendants shall duly act in accordance with the decree of the said Appellate Court and they shall pay the sum of rupees seventy-seven thousand or whatever may be payable under the said High Court order not exceeding rupees seventy-seven thousand, but if they should fail to pay the sum of rupees seventy-seven thousand, then any amount so payable as aforesaid shall be realised from my person and my

legal representatives shall be personally liable to pay the same. If the judgment-debtors fail to furnish security to the extent of rupees one lakh and twelve thousand on the 1st April, 1920, in case the appeals be not decided within that date then the decree-holders according to the order of the High Court shall be able to execute their decree with interest and shall be able to realise rupees seventy-seven thousand from me and my representatives the money secured by this bond." The appeal was heard on the 19th July 1921 and dismissed. On 26th January 1925 the property was sold and there was a deficit of Rs. 93,000. The decree was confirmed on appeal on 16th December 1925 and on the 25th January 1927 the decree-holders made an application to enforce the bond against the surety. The High Court held that the sum of Rs 77,000 had become payable on the 1st April 1920 and that the claim was time barred:

Held, (1) that the security bond did not put upon the giver of the bond an obligation to make an immediate payment in cash but only gave the decree-holders a realisable security up to Rs. 77,000 for the balance of the sum, if any, remaining unpaid after the mortgaged property had been realised;

(2) that until the property was sold the liability of the surety could not be enforced, and the application made in January 1927 was within time inasmuch as under the Limitation Act it must either be within three years if the application was properly an application in the suit, or within six years if the application should have been made by independent suit:

Held, further, that it was not open to the defendants to take the plea that the application should have been made by an independent suit, having regard to the fact that the point had never been taken before, and that if it was allowed to be taken in appeal and succeeded the appellants would be barred by lapse of time, although their original application was in time.

A security bond must be construed in the light of the order directing the security to be given. RAGHUNANDAN PRASAD SINGH *v.* KIRTYANAND SINGH P. C. 629

Trade Union—*Not registered under Companies Act—Whether unlawful—Suit for declaration of illegality—Maintainability—Combination among traders resulting in injury to others—Whether actionable—Companies Act (VII of 1913), s. 4 (2)—Specific Relief Act (I of 1877), s 42.*

A trade association is not unlawful merely because it has not been registered in conformity with the provisions of s 4 (2), Companies Act.

A suit for a declaration that an association is not a corporate unit inasmuch as it has not been registered in accordance with the provisions of the Companies Act is not maintainable

Though a combination of two or more persons for the purpose of injuring a man in his trade is unlawful, and if it results in damage to him, is actionable, if the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie although damage to another ensues, provided the purpose is not effected by illegal means. BHOLA NATH-SHANKARDAS *v* LACHMI NARAIN *All.* 84

Transfer of Property Act (IV of 1882), s. 6 (1)— *Transfer—Relinquishment by tenant of agricultural holding, whether transfer—Validity.*

A transfer by way of relinquishment by a tenant

is prohibited by s. 6 (*i*), Transfer of Property Act.

The interest of a tenant in the land is no more and no less than a possessory interest and if the possession is not delivered it is difficult to characterise such a transfer as a transfer of that interest. AMAR NATH SINGH *v.* HAR PRASAD SINGH *Oudh* **333**

——— **s. 10.** *See* TRANSFER OF PROPERTY ACT, 1882, s. 54 **509**

——— **ss 51, 52,** *application of—'Active prosecution', meaning of*—Lis *in mortgage suit, what is—Mortgage security, extent and continuance of.*

The 'active prosecution' within the meaning of s. 52, Transfer of Property Act, must be deemed to continue so long as the suit is pending in appeal since the proceedings in the Appellate Court are merely a continuation of those in the suit.

In a mortgage suit the *lis* continues even after the final decree and subsists during the pendency of proceedings in execution.

The mere fact that a judgment has been obtained on a mortgage does not extinguish the debt and the mortgage continues as a lien till it is satisfied or the judgment is barred by the statute of limitation.

Section 51, Transfer of Property Act, cannot be taken advantage of by a person to whom s. 52 of the Act applies. MOTI CHAND *v.* BRITISH INDIA CORPORATION LTD. CAWNPORE *All.* **78** (*b*)

——— **s. 53**—*'Transfer defeating or delaying creditor', meaning of—Transfer in favour of one creditor to prejudice of others, legality of.*

In cases where no question of insolvency is involved a debtor may pay one creditor in full and may leave others unpaid. The transfer which defeats or delay creditors is not an instrument which prefers one creditor to another but an instrument which removes property from the creditors to the benefit of the debtor.

A transfer by a debtor in favour of one of the creditors for adequate consideration in satisfaction of genuine debts and without reservation of any benefit to the debtor is not hit by the provisions of s. 53, Transfer of Property Act. UTTAMRAO *v.* GANGARAM *Rang.* **237**

——— **ss 54, 10**—*Agreement of sale prior to Transfer of Property Act—Creation of equitable interest in property—Rule of perpetuities—Restraint or alienation.*

Agreements for the sale of land entered into prior to the passing of Transfer of Property Act, were governed by English Law and created an equitable interest in land and, therefore, were subject to the rule of perpetuities.

Where an absolute transfer of property is effected and by a subsequent agreement executed on the same day the trasferee is restrained from parting with or disposing of that property to any person other than the transferor, the condition amounts to absolute restriction on the right of transfer and is void. ALLIBHAI MAHOMED AKUJI *v.* DADA ALLI ISAP *Bom.* **509**

——— **s. 55 (2)**—*Sale—Covenant for title—Provision that vendee may sue for refund of price—Whether excludes suit for damages on partial dispossession.*

Where a sale-deed provided that if the vendee was dispossessed of the whole or any portion of the property sold on account of defect in the vendor's title the vendee shall have a right to recover his consideration money along with damages from the property transferred or from other property of the vendor, and the vendee being dispossessed of a portion by a stranger, instituted a suit for recovery of a proportionate part of the price paid:

Held, that the covenant in the sale-deed that the vendee might recover the entire consideration amount was only an enabling provision intended for the benefit of the vendee and did not exclude the implied warranty of title contemplated by s. 55 (2), Transfer of Property Act, and the suit for a proportionate part of the price alone was maintainable. NANHI *v.* KETKI *All.* **73**

——— **s. 55 (4) (b)**—*Lien of purchaser of immoveable property—Purchase at auction sale—Purchase for value and without notice—Effect on lien.*

It is a well established principle of equity that a purchaser of an immoveable property has a lien on the property purchased and the fact that the purchase was made at an auction-sale and not by a private contract does not kill the equitable lien. The lien will however be ineffectual as against a transferee for value and without notice. SHEO DULARE *v.* JAGANNATH *Oudh* **222**

——— **ss. 76 (h), 77**—*Mortgagee in possession—Liability to account for profits—Contract to the contrary, effect of—S. 77, applicability of.*

Where the mortgage is governed by the Transfer of Property Act, the mortgagee cannot contract himself out of the provisions of s. 76 (*h*) of the Act unless he can bring himself strictly within the exception provided by s. 77.

Section 77 cannot apply unless there is a contract between the mortgagee and the mortgagor that the receipts from the mortgaged property shall, so long as the mortgagee is in possession of the property, be taken in lieu of interest on the principal money or in lieu of such interest and defined portion of the principal. MOHAMMAD ISHAQ KHAN *v.* KUP NARAIN SINGH *All.* **363**

——— **s. 82.** *See* MORTGAGE **567**

——— **s. 82**—*Several properties securing a mortgage—Valuation for contribution purposes—Determination of—'Incumbrance,' meaning of.*

To arrive at the value for contribution purposes of each of several properties on which a particular mortgage is secured, the amount of all prior incumbrances upon such properties must be ascertained and deducted. Where properties A, B and C are all made security for one mortgage, if property A is subject to a prior encumbrance jointly with properties X, Y and Z, the rateable share to be attributed to A under the prior incumbrance must necessarily be assessed in order to ascertain its value for the purposes of the mortgage. It is not correct to say that all that would be necessary in such a case would be to see what was the total amount of prior incumbrance to which A was liable, irrespective of the question whether that liability was to be shared by X, Y and Z.

"Incumbrance' is a term of wider connotation than "mortgage." FAQ'R CHAND *v* AZIZ AHMAD KHAN **P. C. 751**

——— **s 91 (f)**—*Civil Procedure Code (Act V of 1908, O. XXXIV, r. 1—Attaching creditor—Right to redeem—Sale under attachment, whether extinguishes such right.*

Where property subject to a mortgage is attached by one who holds a simple money-decree against the mortgagor and the property is sold in pursuance of this decree during the pendency of a suit by the mortgagee to enforce the mortgage to which the attaching decree-holder is not made a party, the purchaser under the mortgage-decree is not entitled to recover possession from the purchaser under the

Transfer of Property Act—contd.

simple money-decree unconditionally but only subject to the latter's right to redeem the mortgage.

The attaching creditor's right to redeem is not extinguished when a sale in pursuance of the attachment takes place. FATIMA BEGAM *v.* BANSIDHAR *All.* **840**

———s. 101—*Merger—Prior mortgagee purchasing property—Keeping alive of mortgage—Presumption.*

Where a man who pays off a prior mortgage has a right to extinguish it and a right to keep it alive, in the absence of express evidence of intention, he should be assumed to have acted according to his interest. Thus, where a prior mortgagee purchases the property in the absence of any intention to the contrary he must be assumed to have kept alive the mortgage in his favour as a shield against the subsequent mortgagee. ABDUL MAJID SAHIB *v.* ARUNACHALA MUDALIAR *Mad.* **305**

———s. 106, *applicability of, to tenancies before 1882.*

Section 106 of the Transfer of Property Act is not applicable to tenancies created before 1882. DEBENDRA NATH DHANG *v.* PASHUPATI NATH DEB *Cal.* **889**

———ss. 106, 108 (b), 116—*Lease for term—Subsequent lease to enure after expiry of term—Suit by subsequent lessee for ejectment of prior lessee—Maintainability—Necessity of notice.*

Section 106, Transfer of Property Act, is not applicable to the case of a lessee for a fixed term when the term has expired.

Sections 106 and 116, Transfer of Property Act, regulate the rights of the lessor and the lessee *inter se* and do not apply to a suit brought by a subsequent lessee against the lessor and the prior lessee.

A subsequent lessee is entitled to enforce his right to obtain possession by instituting a suit against the lessor and the prior lessee in possession whose term has expired. It is not necessary that an ejectment suit should be brought by the lessor himself against the prior lessee. BISHEN SARUP *v.* ABDUL SAMAD *All.* **273**

———ss. 130, 135, 136—*Muhammadan Law—Dower—Assignment of right of dower to legal practitioner—Validity—Right to dower, whether actionable claim—Actionable claim, meaning of.*

A widow's right under the Muhammadan Law to recover her unpaid dower is an actionable claim as defined in s. 2 of the Transfer of Property Act and an assignment of such right to a legal practitioner is void under s. 136 of the said Act. Such a transfer cannot be treated as the transfer of the widow's right to possession inasmuch as the widow cannot transfer her right to possession alone without validly transferring her right to receive the dower debt.

[The nature of a widow's right to dower under the Muhammadan Law discussed.]

Under the Transfer of Property Act as amended in 1900 a debt which otherwise amounts to an actionable claim does not cease to be such merely because the cause of action in respect thereof has not arisen, or the time for its payment has not arrived. AMIR HUSAIN *v.* MOHAMMAD NAZIR HASAN *All* **833**

Transfer of Property Act (IV of 1882 as amended by Act XXVII of 1926), s. 3—*Attestation—Person who cannot sign and person signing on behalf of executant, whether competent to attest—Sub-Registrar, when attestor.*

Under the Transfer of Property Act as amended by Act XXVII of 1926 a person who cannot sign his name is not qualified to attest a document. As the amendment is retrospective in effect the rule applies even to documents executed before 1926 and it is not open to the Court to refuse to act upon it merely because illiterate persons were formerly accepted as capable of attesting.

A person who signs on behalf of the executant of a document cannot also sign as an attestor of it.

The Sub-Registrar who has signed the document cannot be accepted as an attestor in the absence of evidence to show that he signed in the presence of the executant. ALAPATI VENKATRAMAYYA *v.* ALAPATI NAGAMMA *Mad.* **343**

Trust—*Trusteeship conferred on certain persons and his heirs—Trust not accepted by trustee—Effect on heirs—Trustee taking attitude adverse to trust, effect of.*

Even where a trusteeship is conferred upon a person his sons and grandsons, the estate does not descend on sons and grandsons of such a person where he has not accepted the trust in his life.

Where the heirs of a trustee take up an attitude adverse to the trust and support the adverse claim of the opposed party, they cannot be deemed to have accepted the trust. APPASAMI PILLAI *v.* RAMUTEVAR *Mad.* **340**

Trusts Act (II of 1882), s. 88. *See* VENDOR AND PURCHASER **108**

Udasis, whether Sikhs. *See* SIKH GURDWARAS ACT, 1925, s. 16 (2) **257**

Undue Influence—*Burden of proof—Shifting of burden—Third party's right to set up the plea.*

A document executed under undue influence is not void but only voidable and the onus is in the first instance on the person who raises that plea. Before the onus can shift on the other party to prove that the contract was not induced by undue influence he has to prove not only that the other party was in a position to dominate his will, but that the transaction appeared on the face of it or on the evidence adduced unconscionable.

Plea of undue influence can be raised only by executant of document or his representative in estate, but not by a third party claiming adversely to such executant. KOTUMAL MOHAN DAS *v.* DUR MAHOMED *Sind* **525**

U. P. Court of Wards Act (III of 1899), s 48. *See* CIVIL PROCEDURE CODE, 1908, s. 470 **642**

U. P. Court of Wards Act (IV of 1912), s. 6 (a). *See* LIMITATION ACT, 1908, ss. 6, 7 **642**

U. P. Excise Act (IV of 1910), ss. 60 (a), 60-A—*'Permits', significance of—Person liable for use of house for offence under the Act—Large quantity of cocaine found in courtyard—Accused found near by—Inference.*

The words of s. 60-A of the U. P. Excise Act imply a single person in a controlling position over the premises which is indicated by the use of the word 'permits' later on in the section.

It is only the person who has the use of the house in such a way as to be in a position to prevent, if he so likes, the illicit sale of cocaine in that building who is liable for permitting the building under his use and control to be used for the commission of an offence under the Excise Act.

Where a large quantity of cocaine in a number of tin boxes placed in a row is found in a courtyard close to a house and the accused are found to be near the place from where the cocaine is recovered and they do not explain how they came to be there and how the cocaine happened to be found placed in a row

U. P. Excise Act—concld.

the conclusion is inevitable that either the accused came there to purchase the cocaine or they were there to sell the cocaine which was found in front of them. WILAYAT HUSAIN *v.* EMPEROR *Oudh* **218**

U. P. Municipalities Act (II of 1916), s 298 (1) —*List I, Group H, cl. (e)—Promoting or maintaining health, safety and convenience of inhabitants—Bye-law prohibiting residence of prostitutes in particular area, legality of.*

The prohibition against public prostitutes from residing in a particular street or area given may be for the purpose of promoting or maintaining the health, safety and convenience of the inhabitants of the municipality within the meaning of s. 298 (1) of the U. P. Municipalities Act and a bye-law to that effect therefore can be validily made under that section. But such a bye-law must not be discriminating in its effects. The prohibition must be aimed against the residence of public prostitutes in general and not the residence of any individual prostitute or class of prostitutes. CHANCHAL *v.* EMPEROR *All.* **787**

Usurious Loans Act (X of 1918), s 2 (3)—*Negotiable Instruments Act (XXVI of 1881), s. 79—Negotiable instrument—Usurious rate of interest—Power of Court to reduce rate.*

Section 79, Negotiable Instruments Act, does not exclude the jurisdiction of the Court to reduce the rate of interest specified in a negotiable instrument, in the exercise of the powers conferred upon it by s. 2 (3), Usurious Loans Act. SHEOBANS RAI *v* SHAH MADHO LAL *All.* **78** (1)

———**s. 3.** *See* CONTRACT ACT, 1872, s. 74 **556**

Vendor and Purchaser. *See* REGISTRATION ACT, 1908, s. 77 **561**

———*Pre-emption—Covenant of title by vendor in favour of vendee—Pre-emptor coming into shoes of vendee—Defect in title—Pre-emptor's suit for damages as against vendor, whether competent.*

A pre-emptor is entitled to enforce a covenant running with the title against the vendor. Therefore, the vendor is as much liable to the pre-emptor as to his vendee for breach of warranty of title and a suit for damages for defect of title is competent by a pre-emptor against the vendor. ABDUL *v.* KISAN *Nag.* **879**

———*Sale void for undue influence and fraud—Vendor's right to mesne profits from date of sale—Vendee's possession, whether wrongful—Contract Act (IX of 1872), s. 65—Trusts Act (II of 1882), s 88—Principles of equity.*

Where a person occupying a fiduciary position obtains a conveyance of immoveable property by undue influence and fraud if there is no proof of undue delay on the part of the vendor in bringing a suit to set aside the deed and there is no difficulty of putting the parties back in the position which they occupied, the vendor should have an account of the rents and profits of the properties from the date on which possession was obtained by the vendee, the latter being entitled to credit in the account for all payments made by him to the vendor. Interest should also be allowed at the usual rate on both sides of the account.

In such a case though before the institution of the suit the defendant could have made a valid transfer to an innocent purchaser, it by no means follows from this that as between him and the person he had defrauded his possession was not wrongful. To admit of such an assertion would be to allow him

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to take advantage of his own wrong, which no Court of equity will permit

The words 'when a contract becomes void' in s. 65, Contract Act, are sufficient to cover the case of a voidable contract which has been avoided and the said section will apply to such a case.

Regarding the transaction as one that has passed out of the realm of contract, it would be covered by s. 88, Trusts Act.

Apart from either of these statutory provisions the vendor is entitled to claim mesne profits in such cases upon general principles of equity. SATDUR PRASAD *v.* HAR NARAIN DAS **P. C. 108**

Will—*Construction—Charitable trust—Gifts in alternative—Previous gifts invalid but residuary gift valid—Effect—Persons entitled to manage or apply to Court to enforce trust—Death of trustees—Power of sole surviving trustee to appoint by Will.*

Generally speaking, if a trust is of a charitable or public nature, the Advocate-General or the Collector is the only person who can apply to the Court to enforce the trust. In the case of a private trust it is the beneficiary interested who can apply. Where a Will provides for the funeral of the testator or the disposal of his body in the performance of which no person has any direct interest, no one can insist on these provisions being carried out. Even the nearest relative of the testator has in that capacity no *locus standi* to apply to the Court to enforce the provisions of the Will in which no one is directly interested.

Where a Will provides that if one of the trustees dies, the others may appoint any one in his place and no such appointments are made with the result that only one trustee is left behind, it is not open to such trustee to appoint new trustees by his Will either in his own place or in place of others for the simple reason that by the time the Will operates he ceases to be a trustee.

Where there are no trustees left, the heirs of the testator are the proper persons to manage the trust.

A testator provided in his Will that the residue of his property should be spent in distributing brass vessels or in giving dinner to *Brahmans* in Shukaltirth or in providing water wells wherever there be scarcity of water and the surplus, if any should be utilised in the *Sadavarta* of Shukaltirth. The objection directed against the Will was that the first two objects not being charitable the Will failed entirely:

Held, that the ultimate gift to *Sadavarta* of Shukaltirth was by itself a good residuary gift, and even if any of the previous gifts failed, the result was that the property in respect of which the gift failed fell into the residue and passed to the *Sadavarta*. KALIDAS *v* RUKSHAMANI *Bom.* **168**

———*Power—Effect of disclaimer—Construction—Principles.*

That construction of the will should be adopted, which be speaks a reasonable and probable intention, rejecting that which would indicate an intention unreasonable, capricious and inconsistent with the testator's view as evidenced by his conduct and by the dispositions of his will which are not open to controversy.

A person to whom any power whether coupled with an interest or not, is given may by deed disclaim the power, and after disclaimer shall not be capable of exercising or joining in the exercise of the power,

Will—concld.

On such disclaimer, the power may be exercised by the other person or persons or the survivor or survivors of the other person to whom the power is given unless the contrary is expressed in the instrument creating the power. MOHAMMAD AZIM KHAN *v.* MOHAMMAD SAADAT ALI KHAN *Oudh* 642

WORDS AND PHRASES:—

Buildings, meaning of. *See* MUNICIPAL CORPORATION 858

Business. *See* INCOME TAX ACT, 1922, ss. 2, (4), 4 (3), (*vii*) 6 (*iv*) 10, 12 742

Capital. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 92 201

Declare, meaning of. *See* REGISTRATION ACT, 1908, s. 17 (1) (*b*) 798

Immoveable Property. *See* MUNICIPAL CORPORATION 858

WORDS And PHRASES:—

Income. *See* INCOME TAX ACT, 1922, ss. 2, (4) 4 (3), (*vii*) 6 (*iv*), 10, 12 742

——— *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 92 201

Incumbrance, meaning of. *See* TRANSFER OF PROPERTY ACT, 1882, s. 82 751

Legal representative, meaning of. *See* PROBATE AND PROCEEDINGS 543

Moqadma. *See* PLEADER AND CLIENT 622

Paid up capital. *See* MADRAS DISTRICT MUNICIPALITIES ACT, 1920, s. 92 201

Permits, employs. *See* PREVENTION OF CRUELTY TO ANIMALS ACT, 1890, s. 6 59

Public and community, meaning of. *See* CRIMINAL PROCEDURE CODE, 1898, s. 133 621